THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 90

Professional Privilege For Confidential Communications

REPORT

MAY 1993

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The Commission would like to acknowledge its indebtedness to Mr W G Briscoe LLB (Hons) (Tasmania) MA (California), Senior Research Officer at the Commission until his resignation in December 1992, for his invaluable work on this report.

To: **HON CHERYL EDWARDES MLA**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on Professional Privilege for Confidential Communications.

M D PENDLETON, *Chairman*
17 May 1993

SUMMARY OF RECOMMENDATIONS

1. The Commission recommends the enactment of a judicial discretion allowing courts to excuse witnesses from answering questions or producing documents to judicial proceedings, in the following terms:

(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question (including a question as to the identity of a source of information) or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the answer or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:

(b) The nature of the confidence and of the special relationship between the confidant and the witness:

(c) The likely effect of the disclosure on the confidant, any other person or the community, taking account of the ethical, moral or religious dictates of those professions or vocations which unequivocally demand non-disclosure, even in the face of the Court's order to disclose:

(d) Any means available to the Court to limit the adverse consequences of a required disclosure of confidential information or confidential sources of information and any alternative means of proving relevant facts.

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section "Court" includes

(a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and

(b) Any other person acting judicially.

Paragraphs 8.38-8.55

2. The Commission recommends that no privilege to refuse to reveal information to judicial proceedings in relation to confidential communications within any particular professional relationship should be created.

Paragraphs 4.96, 5.43, 6.42, 7.42

PARTICULAR FEATURES OF THE STATUTORY DISCRETION

Particular features of the Commission's recommended statutory discretion are that it

(1) extends to cover questions as to the identity of a source of information;

Paragraph 8.53

(2) includes, as circumstances to be taken into account by the court -

(a) any means available to limit the adverse consequences of a required disclosure of confidential information or confidential sources of information and any alternative means of proving relevant facts;

Paragraphs 2.18, 8.45

(b) the likely effect of the disclosure on the confidant, any other person or the community, taking account of the ethical, moral or religious dictates of those professions or vocations which unequivaocally demand non-disclosure, even in the face of the court's order to disclose;

Paragraphs 8.50-8.52

(3) is limited to proceedings before "courts", defined to include any tribunal or authority constitued by or under any Act and having power to compel the attendance of witnesses, and any other person acting judicially.

Paragraphs 8.54-8.56

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ALRC *Evidence* Report	Australian Law Reform Commission *Evidence* (Report No 38, 1987)
ALRC Interim *Evidence Report*	Australian Law Reform Commission Interim Report on Evidence (Report No 26, 1985)
Byrne & Heydon	D Byrne & J D Heydon *Cross on Evidence: Australian Edition (1991)*
DP	Law Reform Commission of Western Australia, Discussion Paper on *Professional Privilege for Confidential Communications* (Project No 90, 1991)
McNicol	S B McNicol *Law of Privilege* (1992)

The pronouns and adjectives "he", "him" and "his", as used in this report, are not intended to convey the masculine gender alone, but include also the feminine equivalents "she", "her" and "hers".

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The previous Western Australian Attorney General asked the Law Reform Commission:

> "to recommend what changes, if any, should be made to the law of professional privilege as regards the obligation to disclose confidential communications or records in judicial proceedings and, in particular, whether clause 109 of the draft Evidence Bill in Appendix A to the 38th Report of the Australian Law Reform Commission,[1] or any variation thereto, should be adopted in Western Australia."[2]

1.2 For purposes of the terms of reference, "privilege" refers to the legal right of a person to insist on withholding from a judicial body information which might assist that body to ascertain facts relevant to an issue on which it is adjudicating.[3] Such a right, when exercised,

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1 Cl 109 is set out in para 8.9 below. This clause has not been adopted in any Australian jurisdiction to date.

2 The reference was given to the Commission on 19 December 1989. The Commission is only able to recommend changes to Western Australian law. In the Western Australian case which gave rise to the reference, *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989 (committal proceedings); *DPP v Luders* (unreported) District Court of Western Australia, 7-8 August 1990, No 177 of 1990 (see paras 4.17-4.26 below), the Perth Court of Petty Sessions and the District Court were exercising federal jurisdiction because the charge concerned the *Crimes Act 1914* (Cth). Although Western Australian law may apply to federal proceedings in Western Australia, that position can be altered by the Commonwealth Parliament. The following examples were given in the DP para 1.29:

(1) If the State Parliament enacts a privilege for journalists, but the Commonwealth does not, then as a result of s 80 of the *Judiciary Act 1903* (Cth) the State privilege would apply in federal proceedings in Western Australia, unless inconsistent with Commonwealth law.

(2) If the Commonwealth Parliament did not want the State statutory privilege to apply, then it could legislate to retain the common law position or some variant thereof.

(3) If both the Commonwealth and the State adopt privileges, then the Commonwealth privilege would apply, not the State privilege.

Therefore, a statutory discretion (as recommended in Ch 8) created by State legislation will not necessarily protect confidential information required by judicial proceedings exercising federal jurisdiction. For example, the (Cth) Evidence Bill 1991 proposed to introduce a privilege relating to clerics and penitents. There is no such privilege under Western Australian statute or common law. If the Commonwealth provision is enacted and a case arises where a priest is required during judicial proceedings to reveal information obtained during confession, whether or not the priest can claim that the information is privileged will depend on whether the proceedings are State or federal in nature. If the former, there will be no privilege, but if the latter, the privilege under the federal statute will apply unless the case falls within one of its exceptions. Similarly, if a clerics' privilege were created under Western Australian law, that privilege might not apply in a case heard in Western Australia under federal jurisdiction because of inconsistency between the Commonwealth and State privileges.

3 See generally Byrne & Heydon para 25005.

is an exemption from the normal legal obligation to provide information and documents which are required for the determination of litigation.

2. BACKGROUND TO THE REFERENCE

1.3 The reference was given to the Commission after a case in Perth concerning a newspaper journalist who refused to disclose to the Perth Court of Petty Sessions and the District Court the source of information emanating from the Australian Tax Office which he had used in newspaper articles.[4] It is clear from the terms of reference given to the Commission and a media statement issued by the previous Attorney General a few days earlier[5] that the review was to cover not only the relationship between journalists and their informants but all professional relationships where confidential communications are a relevant basis of the relationship, for example the relationships of doctor-patient and cleric-penitent.

3. DISCUSSION PAPER

1.4 In December 1991 the Commission issued a Discussion Paper which examined issues raised by the terms of reference and the law and proposals for reform in other Australian and overseas jurisdictions, and discussed the primary options for reform.

1.5 A questionnaire was distributed with the Discussion Paper. Responses and comments were invited from a wide variety of professional and other organisations and individuals.

1.6 Concurrently, the work of the Commission in this area was publicised in newspaper articles and radio talks as well as at seminars and meetings with interested people.

1.7 Formal responses to the Discussion Paper were received from the persons and organisations listed in Appendix I. The Commission is most grateful to all who responded for the time and effort they have taken in giving their views to the Commission.

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4 *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989 (committal proceedings); *DPP v Luders* (unreported) District Court of Western Australia, 7-8 August 1990, No 177 of 1990. Both courts were exercising federal jurisdiction because the charges were under the *Crimes Act 1914* (Cth). The case is discussed in detail at paras 4.17-4.26 below.

5 Media statement issued by the Attorney General 13 December 1989.

1.8 In the light of the Commission's research, the comments received on the Discussion Paper and of the consultations referred to above, the Commission submits this report.

4. ISSUES

(a) Evidence required by the court

1.9 People are generally[6] obliged to disclose relevant information as evidence in a variety of contexts in which the common law or statute law imposes an obligation under sanction.[7] In the context of the adversarial system,[8] to do justice in judicial proceedings, whether civil or criminal, relevant information must be available as evidence to judicial bodies. It would be detrimental to the public interest in the proper administration of justice to interfere with this without very good reasons.

1.10 If limitations are put on the admissibility of relevant evidence, or people were generally allowed to decide for themselves whether or not certain information in their possession or knowledge should be available during judicial proceedings, the risk of wrong and unjust decisions increases. Without evidence that only the witness could provide, the outcome of a case may be affected. For example, proving the guilt or innocence of a defendant or another person may very well depend on such evidence. The consequences to

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6 Exceptions are permitted by the law for particular purposes: see paras 1.11-1.13 below.

7 Examples of statutory provisions in Western Australia imposing penalties for failure to provide information to a court on request are:

(1) *Justices Act 1902* s 77:

"If on the appearance of a person before justices, either voluntarily or in obedience to a summons, or upon being brought before them by virtue of a warrant, such person refuses to be examined upon oath concerning the matter, or refuses to take an oath, or having taken an oath refuses to answer such questions concerning the matter as are then put to him, without offering any just excuse for such refusal, any justice then present and having there jurisdiction may by warrant commit the person so refusing to gaol, there to remain and be imprisoned for any time not exceeding 7 days, unless in the meantime he consents to be examined and to answer concerning the matter."

(2) *District Court of Western Australia Act 1969* s 63(1):

"If a person . . .

(d) being summoned or examined as a witness in any cause or matter or being present in the Court and required to give evidence, refuses to be sworn or answer any lawful questions,

the District Court Judge concerned may direct the apprehension of the person and if he thinks fit may by warrant under his hand and sealed with the seal of the Court commit the person to imprisonment for a term not exceeding 5 years, or may impose on the person a fine not exceeding $50,000, or may so commit the person and impose such a fine, or in default of immediate payment of the fine imposed may commit the person to imprisonment

(a) until the fine is paid; or

(b) for a term not exceeding 5 years,

whichever may be the shorter period."

8 For a brief description of the adversarial system see paras 3.7-3.12 below.

individual witnesses of failure or refusal to provide such information may also be significant. They could face contempt of court proceedings and be fined or imprisoned.[9]

(b) Exceptions

1.11 Notwithstanding the strong public interest in favour of requiring all relevant evidence to be made available during judicial proceedings, over the centuries courts and legislatures have created a number of exemptions.

1.12 The major exceptions are the hearsay rule (under which a court will generally not admit the reception into evidence of hearsay statements for the purpose of proving that the contents of the statement are true); the rules excluding evidence of the propensity of a defendant to commit the act alleged, evidence of opinion, and confessions (in certain cases); the rules giving courts a discretion to exclude evidence obtained unlawfully or unfairly; and the various heads of privilege - which include the privilege against self-incrimination, public interest immunity and professional privilege.[10]

1.13 In this reference the Commission is only concerned with the exclusionary rule based on privilege, and only with privileges which exist or should exist in relation to information divulged or obtained as a result of confidential communications between professionals and people they deal with in their professional capacity.

(c) Professional confidentiality and the requirement to provide evidence[11]

(i) Introduction

1.14 The terms of reference refer to the law of professional privilege as regards the obligation to disclose confidential communications and records. In this Report, the Commission has interpreted the term "confidential communications" as including:

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9 See n 7 above. Those provisions were applied by the Court of Petty Sessions and by the District Court to penalise a witness in *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989; (unreported) District Court of Western Australia, 7-8 August 1990, No 177 of 1990, discussed at paras 4.17-4.26 below.

10 P Gillies *Law of Evidence in Australia* (2nd ed 1987) 7.

11 For more detail on the nature of confidentiality in relation to information passing between people in a professional relationship and on the nature of the obligation to maintain such confidentiality see DP paras 1.40-1.56.

* the fact that such communications took place;

* the information contained in such communications; and

* the confidential identity of parties to a communication.

(ii) Relationships protected by privilege

1.15 The only professional confidential relationship which receives protection by way of privilege at common law is the lawyer-client relationship.[12]

1.16 Some jurisdictions have created statutory privileges relating to confidential communications within other professional relationships. For example:

(a) Victoria, Tasmania and the Northern Territory have created statutory privileges relating to confidential communications between doctors and patients;[13]

(b) Victoria, Tasmania, the Northern Territory and New South Wales have created privileges relating to certain confidential communications between clerics and penitents.[14]

1.17 The creation of such privileges has not proceeded on any logical basis. It has been suggested in the United States that:[15]

> "As a historical matter, each privilege seems to be the product of a different rationale, some of which are now clearly antiquated.[16] It is much easier to list the core characteristics necessary for a relationship to be privileged than to detail exhaustively the characteristics that are sufficient for a relationship to receive privilege protection. Wigmore's classic definition of privilege[17] focuses on the most central concept: the

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12 See Ch 3.

13 See para 6.2 below.

14 See para 5.2 below.

15 "Making Sense of Rules of Evidence under the Structural (Il)logic of the Federal Rules of Evidence" (1992) 105 *Harvard Law Review* 1339 at 1343-1344.

16 Examples given include the origins of spousal disqualification in the medieval unity of husband and wife and the advent of cleric-penitent privilege in pre-reformation England as a way of promoting confession: id 1343 n 21.

17 See J H Wigmore *Evidence in Trials at Common Law* (McNaughton ed 1961) vol 8 para 2285. The four conditions suggested by Wigmore as necessary before a privilege against the disclosure of communications between persons standing in a particular relationship should be contemplated are:

> relationship at stake must be sufficiently important that society is willing to sacrifice the production of probative evidence to preserve confidentiality within the relationship. In addition, the protected relationship must depend on confidential communications for its essential vitality. Finally, the fundamental character of the relationship must change if that confidentiality is not assured. However, the existence of a confidential relationship is not sufficient for privilege protection; many close, confidential relationships are not protected as a matter of positive law."[18]

Instead, developments of, or restrictions to, these privileges in recent years by courts and legislatures have been justified on public policy grounds.[19]

(iii) Assumptions about confidential relationships: the legal position

1.18 Professionals other than lawyers, and people they deal with in their professional capacity, may assume they are exempt from revealing to courts the content of communications between them because those communications were expressly or impliedly made on a confidential basis, or because perceived public or personal benefits are derived from maintaining that confidentiality. Under the common law as it applies in Western Australia[20] such an assumption is wrong.[21] Courts in Western Australia could, for example, require a Catholic priest, against his wishes and without the penitent's permission, to reveal as evidence what was said during a confession. If the priest refuses, he may be in contempt of court and could suffer the consequences, including imprisonment.

"(1) [T]he communication must originate in a *confidence* that they will not be disclosed;
(2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
(3) the *relation* must be one which in the opinion of the community, ought to be sedulously *fostered*; and
(4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."

For discussion of the Wigmore criteria see DP paras 10.5-10.7.

18 Examples given include the fact that the most recent United States federal cases have rejected the existence of a parent-child privilege and that no doctor-patient privilege exists under United States federal law: op cit n 15 at 1343 n 21.

19 For example McNicol at 2-3 notes:

"[I]n some Australian jurisdictions a statutory privilege exists protecting communications between husband and wife during the marriage, between clergy and communicant, and between doctor and patient. These limited privileges are clear indications of the law's judgment that certain social relationships are worthy of promotion and protection. The common law, for example, has always traditionally aimed at encouraging marital harmony and protecting the institution of marriage, although it chose to do this by creating a common law rule relating to spousal incompetence rather than a common law privilege protecting marital communications. The statutory creation of a marital communications privilege, however, recognised the right of spouses to confide freely and frankly without interference from the law, and also recognised that it is distasteful to compel a reluctant spouse to disclose confidential conjugal communications."

20 For the position in other jurisdictions see paras 4.13-4.14, 5.2 and 6.2 below; Appendix IV.

21 This is despite the fact that a number of professions are guided by codes of ethics which require their members to maintain such confidentiality (see eg para 1.20 below).

1.19 Accountants, bankers, doctors, journalists, clerics and other professionals may be in possession of information provided by clients on the express or implied understanding that it remain confidential.[22] Western Australian law will not necessarily protect that confidentiality if the information is relevant to, and required in, judicial proceedings.[23]

1.20 Many professionals in possession of confidential information are bound by their professional ethics or own moral beliefs not to reveal confidential information obtained from their client. For example, the Australian Journalists' Association's[24] *Code of Ethics*,[25] the Australian Society of Accountants' *Code of Professional Conduct*,[26] the Australian Medical Association's *Code of Ethics*,[27] and the *Code of Canon Law*[28] all, to varying degrees, restrain their members from revealing confidential information obtained as a result of professional relationships. Again, such restraints do not excuse a professional from the obligation to disclose relevant evidence to a court.

(iv) The consequences of disclosure

1.21 People seeking assistance or advice from professionals often reveal confidential information during the course of that relationship. Disclosure of that information by the professional may well be distressing to the people concerned. It may also have serious consequences for their health and mental well-being or result in damage ranging from embarrassment to harassment and financial ruin.

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22 Privilege in the context of relationships with such professionals is considered in Chs 4-7 and in DP Chs 5-8.

23 For discussion of methods available to courts to maintain confidences or reduce the adverse consequences of a required breach of confidence see Ch 2.

24 The Australian Journalists' Association is now a section of the Media, Entertainment and Arts Alliance.

25 Rule 7(a)3: "In all circumstances they shall respect all confidences received in the course of their calling."

26 Section B 7: "Members must not disclose information acquired in the course of their professional work except where consent has been obtained or where there is a legal or professional duty to disclose. Members must not use such information for their personal advantage or that of a third party."

27 Para 6.2.1: "It is the practitioner's obligation to observe strictly the rule of professional secrecy by refraining from disclosing voluntarily without the consent of the patient (save with statutory sanction) to any third party information which he has leamt in his professional relationship with the patient."

28 Canon 983 § 1: "The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion."

(d) Contempt and the absence of privilege

1.22 A professional may face the prospect of being punished for contempt of court should he refuse to reveal the information to the court when required. Penalties for contempt[29] are a significant concern for the professional in the position of having to defend ethical or other obligations to maintain confidentiality in the face of a court order to reveal confidential information.

1.23 Generally, any act or omission intended to interfere with the administration of justice by the courts, or which has a tendency to do so, may constitute contempt of court.[30] In Western Australia, this is a common law offence, not a statutory offence.[31] It is tried in a summary manner.[32] There are a number of forms of contempt. For example:[33]

(1) sub judice contempt (publishing information with the intention of interfering with the course of justice or in a manner which has a tendency to interfere with the course of justice);

(2) publishing information which tends to interfere with the administration of justice as a continuing process by revealing a juror's deliberations or revealing what has taken place in closed court;

(3) improper behaviour in court;

(4) breaching an undertaking to a court or disobeying a court order.[34] This includes refusing to answer a question or produce a document.

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29 See n 7 above.

30 *Re Dunn*; *Re Aspinall* [1906] VLR 493.

31 *R v Lovelady; Ex parte Attorney General* [1982] WAR 65. See also s 7 of the *Criminal Code Act 1913* which states:
"Nothing in this Act or in the Code shall affect the authority of courts of record to punish a person summarily for the offence commonly known as `contempt of court'; but so that a person cannot be so punished, and also punished under the provisions of the Code for the same act or omission."

32 *R v Lovelady*: *Ex parte Attorney General* [1982] WAR 65.

33 See S Walker *The Law of Journalism in Australia* (1989) Ch 3.

34 The Australian Law Reform Commission Report on *Contempt* (Report No 35, 1987) para 119 recommended the abolition of the common law of contempt in the face of the court and the enactment of a series of statutory offences. Under the ALRC's proposals it would be an offence to refuse to answer a question. This new offence would apply in cases where there is no privilege exonerating the witness (eg a journalist wanting to protect a confidential source of information) from the obligation to answer

1.24 Sanctions for contempt range from ordering a person who has disturbed court proceedings to leave the courtroom to imposition of fines and, if the offender is an individual, imprisonment for a fixed period.[35] Imprisonment for contempt is rare. However, this sanction has been imposed in recent Australian cases involving journalists as witnesses, notably:

(1) The 1989 Western Australian case of *DPP v Luders*.[36] Mr Tony Barrass, a newspaper journalist, was a witness in proceedings relating to charges of official corruption under the *Crimes Act 1914* (Cth). He was jailed for seven days and subsequently fined for contempt of court for refusing to reveal the confidential identity of the source of information used by him in a newspaper article.

(2) The 1992 Queensland case of *Copley v Queensland Newspapers Pty Ltd*.[37] Newspaper journalist Mr Gerard Budd refused to reveal the confidential identity of his source of information and was imprisoned for fourteen days by the Supreme Court for contempt. He was released after six days in jail.[38]

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questions. Note also Irish Law Reform Commission Consultation Paper on *Contempt of Court* (1991) Ch 10.

35 *Attorney General v James* [1962] 2 QB 637.

36 (Unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989: see paras 4.17-4.26 below.

37 (Unreported) Queensland Supreme Court, 20 March 1992, No 3107 of 1989: see paras 4.27-4.32 below.

38 For other cases where journalists who refused to answer questions have been imprisoned for contempt, see eg*: R v Bolam; Ex parte Haigh* (1949) 93 Sol Jo 220 (editor committed to prison for three months for contempt under the sub judice rules); *Attorney General v Clough* [1963] 1 QB 773 (journalist imprisoned for six months for failure to answer a question); *Attorney General v Mulholland* [1963] 2 QB 477 (journalists imprisoned for six months and three months respectively for failure to answer questions); Libby Averyt, Corpus Christi, Texas, journalist jailed for two days for failure to answer questions relating to communications she had with a criminal defendant charged with murder: see *New York Times* 8 December 1990, 1, 11:1; J C Goodale et al *Reporter's Privilege Cases* (1991) 2; Brian Karem, TV reporter jailed for refusing to reveal the names of people who helped him get an interview with a murder suspect, jailed for two weeks: see *New York Times* 30 June 1990, 1, 6:4; Goodale, op cit 1-2; James Campbell and Felix Sanchez, Houston journalists sentenced to 30 days' imprisonment for not revealing the identity of witnesses to a murder but released on appeal to District Court for the Southern District of Texas: see *Campbell v Klevenhagen*, cited in Goodale, op cit 2-3, and telex report to the *Sunday Times* from Michelangelo Rucci, New York 6 February 1991; *State v Lawrence* (unreported) Johannesburg Magistrate's Court, 4 March 1991, No 8/588/91 (journalist jailed for 10 days for refusing to answer questions); *R v Nicholls* (unreported), South Australian Supreme Court, 20 April 1993 (journalist acquitted of impersonation, false pretences and forgery but jailed for four months for refusing to reveal confidential source: see paras 4.35-4.36 below).
See also *Hinch v Attorney General* [1987] VR 721 (Australian journalist sentenced to four weeks' imprisonment for a breach of the *sub judice* rules by revealing the identity and previous criminal record of a priest accused of sexual offences against children).

These cases illustrate the possible consequences of a failure to answer relevant questions where there is no legal right to do so.

(e) Judicial proceedings

1.25 The terms of reference are confined to a consideration of professional privilege in "judicial proceedings".[39] This concept involves a court or other body which upon a consideration of facts and circumstances imposes a liability on or affects the rights of others[40] or which "proceeds either to a determination of facts upon evidence or of law upon proved or conceded facts."[41] Generally bodies involved in judicial proceedings will have power to compel the attendance of witnesses.[42]

1.26 Bodies conducting judicial proceedings are not the only ones with power to compel the attendance of witnesses. For example, Royal Commissions, which may be authorised to inquire into any matter,[43] may summon witnesses to appear before them and may require witnesses to give evidence and to produce documents.[44] Royal Commissions have power to administer oaths or affirmations to witnesses.[45] If witnesses fail to attend or produce documents in accordance with a summons, refuse to be sworn or answer any relevant question, they may be dealt with as if in contempt of the Supreme Court.[46] Other bodies conducting inquiries may be empowered to summon witnesses.[47]

1.27 Issues concerning the absence of professional privilege which arise in judicial proceedings can also arise in non-judicial situations. For example, the Press Council has recently drawn attention to the problems experienced by journalists who wish to protect confidential source material from seizure by investigators and law enforcement agencies.[48] Legal professional privilege applies to non-judicial investigations such as searches.[49]

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39 Because the Commission is concerned with Western Australian law the terms of reference do not cover Commonwealth judicial proceedings: see n 2 above. For discussion of the law relating to privilege before Commonwealth judicial proceedings see ALRC *Evidence* Report Ch 16.

40 *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 *CLR* 77, 83 per Williams J.

41 *Black's Law Dictionary* (5th ed) 762.

42 See eg *Liquor Licensing Act 1988* s 18.

43 *Royal Commissions Act 1968* s 5.

44 Id s 9.

45 Id ss 11-12.

46 Id ss 13-14.

47 See eg *Coal Mines Regulation Act 1946* s 23(2); *Health Act 1911* s 14.

48 General Press Release No 168, 2 March 1993: see paras 8.54-8.56 below.

49 See Byrne & Heydon para 25250; para 3.5 below.

5. OPTIONS FOR REFORM

1.28 The Discussion Paper identified options for reforming the law relating to professional privilege for confidential communications.[50] Variations on some options were suggested by respondents to the Discussion Paper.

1.29 The options for reform considered by the Commission can be summarised as follows:

1. create a statutory privilege for confidential communications within all professional relationships;[51]

2. leave development of the law relating to professional privilege to the common law;[52]

3. establish a body or nominate an existing body, other than the court, to determine issues relating to privilege;[53]

4. create a statutory privilege for confidential communications within particular professional relationships, the privileges to be absolute or subject to specified restrictions;[54]

5. give courts and other judicial bodies a statutory discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence;[55]

6. in the absence of a legal right to refuse to reveal confidential information, adopt or encourage use of judicial procedures to protect confidential

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50 See DP Ch 10.
51 DP paras 10.10-10.11.
52 DP paras 10.2-10.9.
53 DP paras 10.47-10.51.
54 DP paras 10.12-10.20; see also Chs 4- 7.
55 DP paras 10.21-10.46; see also Ch 8.

communications or to avoid adverse consequences of a forced revelation of confidential client information.[56]

6. REJECTION OF OPTIONS 1, 2, 3, 4

1.30 After considering arguments put forward in the Discussion Paper and submissions received in response to it, the Commission has rejected options 1 to 3. Adoption of option 1 would totally ignore the public interest in relevant information being available to judicial proceedings. Option 2 was considered viable in the Commission's 1980 Report on *Privilege for Journalists*,[57] but the common law in Australia has not developed as anticipated by the Commission. Option 3 is unrealistic in view of the practical difficulties referred to in the Discussion Paper.[58]

1.31 In Chapters 4, 5, 6 and 7, the Commission considers and rejects option 4.

7. COMMISSION'S RECOMMENDATION: ADOPTION OF OPTIONS 5 AND 6

1.32 In Chapter 8[59] the Commission recommends the enactment of a judicial discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[60]

1.33 The provision recommended by the Commission is set out below. It is based on section 35 of the *Evidence Amendment Act (No 2) 1980* (NZ), with variations shown in italics.

> "(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question *(including a question as to the identity of a source of information)* or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the answer or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

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56 DP paras 9.7-9.13; see also Ch 2.

57 Project No 53: see paras 4.3 below; Appendix III.

58 DP paras 10.50-10.51.

59 See paras 8.38-8.56 below.

60 This is not described as a judicial discretion to treat information as privileged because the word "privilege", as defined in para 1.2 above, means a legal right.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceedings:
(b) The nature of the confidence and of the special relationship between the confidant and the witness:
(c) The likely effect of the disclosure on the confidant, *any other person or the community, taking account of the ethical, moral or religious dictates of those professions or vocations which unequivocally demand non-disclosure, even in the face of the Court's order to disclose*:
(d) *Any means available to the Court to limit the adverse consequences of a required disclosure of confidential information or confidential sources of information and any alternative means of proving relevant facts.*

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section "Court" includes

(a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and
(b) Any other person acting judicially."

8. SUPPORT FOR WHISTLEBLOWER PROTECTION SCHEME

1.34 The Commission supports the adoption of a whistleblower protection scheme, provided that it limits the circumstances in which whistleblowers can reveal information to the media, rather than government authorities, to those recommended by the Queensland Electoral and Administrative Review Commission in its *Report on Protection of Whistleblowers*[61] and contains the other protections found in that Commission's Draft Bill.[62] Such a scheme would address the concerns that potential sources of information may have

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61 See para 4.72 below. The Queensland Commission recommends that protection for such disclosures apply only where there is a serious, specific and imminent danger to the health or safety of the public.

62 See para 4.82 below.

which, despite the enactment of a judicial discretion as recommended above, may make them disinclined to disclose information on criminal or improper practices or other matters of public interest.

Chapter 2

PROTECTING CONFIDENTIALITY IN THE ABSENCE OF PRIVILEGE

1. INTRODUCTION

2.1 Courts in Western Australia are sensitive to the desire of some witnesses not to reveal confidential information in judicial proceedings. Although courts do not have a discretion to disallow relevant and admissible evidence of confidential matters,[1] they are able in appropriate circumstances to minimise the extent of disclosure of information given in evidence, and to reduce the adverse effects of such disclosure, by way of the inherent jurisdiction of courts to control and regulate proceedings.

2.2 There is at present no statutory or common law requirement for courts to use their power to minimise the extent of or reduce the adverse consequences of disclosure of confidential information by witnesses.[2]

2. THE INHERENT JURISDICTION OF THE COURT

2.3 Courts have an inherent power to regulate their own proceedings so that they accord with the interests of justice. One commentator has observed:

> "Under its inherent jurisdiction, the court has power to control and regulate its process and proceedings, and it exercises this power in a great variety of circumstances and by many different methods. . . . [I]t is difficult to set the limits upon the powers of the court in the exercise of its inherent jurisdiction to control and regulate its process, for these limits are coincident with the needs of the court to fulfil its judicial functions in the administration of justice."[3]

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1 See para 8.1 below.

2 But this will be one of the matters which courts will need to address when exercising the judicial discretion recommended by the Commission: see paras 2.18-2.19 below.

3 I H Jacob "The Inherent Jurisdiction of the Court" (1970) 23 *CLP* 23, 32-33.

(a) Hearings in camera

2.4 An example of the exercise of this inherent jurisdiction is the power of courts to order that the case be heard in camera (closed court) where the interests of justice so require.[4]

2.5 The types of case in which a court could sit in camera include:

* those where the court is guarding the interests of a person under its parens patriae jurisdiction;

* those where the effect of publicity would destroy the subject matter of the litigation;

* "other circumstances in which the administration of justice would be rendered impracticable by the presence of the public". [5]

2.6 However, according to Mr Justice Seaman:

> "It is only in wholly exceptional circumstances where the presence of the public or public knowledge of the proceedings is likely to defeat the paramount object of the court, which is to do justice in accordance to law, that the courts are justified in proceeding in camera. . . . No more of a hearing should be in camera than justice requires, as when the court is closed to the public for a short period in the course of a hearing to enable it to deal with a claim to privilege against incrimination."[6]

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4 Id 39. Under the common law, a judge may exclude the public where it is necessary for the administration of justice such as in the situation of "[t]umult or disorder, or the just apprehension of it": *Scott v Scott* [1913] AC 417, 445 per Earl Loreburn). Other circumstances which have led courts to exclude persons from the court include where the presence of such a person might intimidate a witness: *R v Governor of Lewes Prison, ex parte Doyle* [1917] 2 KB 254; deter a party from seeking relief: *Scott v Scott* [1913] AC 417, 446 per Earl Loreburn; prevent a witness from giving evidence: *Jamieson v Jamieson* (1913) 30 WN (NSW) 159; involve the divulging of a secret process: *Sandner v Curnow* [1905] VLR 648; endanger legitimate business interests: *Re Parker deceased; Bagot's Executor & Trustee Co Ltd v King* [1948] SASR 141; or endanger national security: *Robbie v Director of Navigation* (1944) 44 SR (NSW) 159. In such a situation the judge may exclude "all from whom such interruption is expected, and, if such discrimination is impracticable, the exclusion of the public in general": *Scott v Scott* [1913] AC 417, 446 per Earl Loreburn.

5 P Seaman *Civil Procedure: Western Australia* (1990) para 34.0.2. The author notes that proceedings from which the public are improperly excluded are voidable: see *McPherson v McPherson* [1936] AC 177.

6 Op cit n 5, para 34.0.2, citing *Sharp v Australian Builders Labourers' Federated Union of Workers* [1989] WAR 138, 151. The author notes that when it is necessary to hear a case in camera, the court should structure its reasons for judgment and its orders in such a way that as much of them as possible is revealed without destroying the secret matter so as to preserve the right of the public to know what orders are being made: see *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294, 301 per Street CJ, 307 per Hutley AP, 310 per Samuels JA. See also *Scott v Scott* [1913] AC 417; *Raybos*

2.7 In criminal trials, the fundamental rule that hearings be conducted in an open and public court, and the exception where justice demands, is set out in section 635A of the *Criminal Code*[7] which states:

> "(1) Unless expressly provided otherwise, the court-room or place of hearing where a trial or other criminal proceeding is conducted is an open and public court to which all persons may have access so far as is practicable.
>
> (2) If satisfied that it is necessary for the proper administration of justice to do so, a court may
>
> (a) order any or all persons or any class of persons to be excluded from the court-room or place of hearing during the whole or any part of the trial or other criminal proceeding. . . .
>
> (3) On an application by the prosecution or an accused person a court may order any person who may be called as a witness in the trial or other criminal proceeding to leave the court-room or place of hearing and to remain outside and beyond the hearing of the court until called to give evidence.
>
> (4) Counsel or a solicitor engaged in the trial or other criminal proceeding shall not be excluded from the court-room or place of hearing under this section.
>
> (5) A person who contravenes or fails to comply with an order made under this section commits an offence punishable
>
> (a) by the Supreme Court as for contempt; or
>
> (b) after summary conviction, by imprisonment for 12 months or a fine of $10,000.
>
> (6) Only the Attorney General or a person on his behalf may take proceedings for a contravention of or a failure to comply with an order made under this section."

A similar provision is set out in section 65 of the *Justices Act 1902*[8]

(b) Non-disclosure of information

2.8 Superior courts have an inherent jurisdiction, for the purposes of preventing the abuse of the judicial process, to direct that witnesses need not disclose their names and to prohibit publication of anything which may lead to their identification.[9] As to the publication of materials generally, it has been observed:

> "A court may in its inherent jurisdiction rule that there shall be no publication of certain material in the case before it if there is a necessity in the interest of the due

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Australia Pty Ltd v Jones (1985) 2 NSWLR 47, 50-55 per Kirby P; art 14(1) of the International Covenant on Civil and Political Rights contained in *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Schedule 2.

7 As inserted by the *Acts Amendment (Sexual Offences) Act 1992*.

8 As inserted by the *Acts Amendment (Sexual Offences) Act 1992*.

9 *Taylor v Attorney General* [1975] 2 NZLR 675, 677-678 per Wild CJ, 684 per Richmond J.

> administration of justice to depart from the general principle of open justice in the courtroom. It may be a contempt to disobey the order, and it is desirable in appropriate circumstances for the court to warn those present of the purpose of the order and that to frustrate it may be a contempt of court.[10] To prevent the abuse of judicial process, a superior court has inherent jurisdiction to direct that a witness need not disclose his name and that publication of anything which may lead to his identification is prohibited."[11]

2.9 However, it is also suggested that a court should only prohibit publication of a judgment or order pronounced or made in open court in the most exceptional circumstances:

> "because public proceedings in open court should not result in judgments or orders about which the public are not permitted to know". [12]

2.10 In relation to criminal proceedings, section 635A(2) of the *Criminal Code* provides:

> "If satisfied that it is necessary for the proper administration of justice to do so, a court may . . .
>
> (b) make an order prohibiting the publication outside the court-room or place of hearing of the whole or any part of the evidence or proceedings;
> (c) make an order prohibiting the publication outside the court-room or place of hearing of the whole or any part of the evidence or proceedings except in accordance with directions by the court."[13]

Section 65 of the *Justices Act 1902*[14] contains a similar provision.

(c) Editing and publication of documents

2.11 Courts are able to block out certain material in a document which might be either irrelevant or contrary to the public interest if published, while making other parts of the document available for inspection and use in open court.[15] For example, a judge may order production of a document on the condition that the holder is permitted to block out certain parts or names, sometimes if necessary substituting anonymous references.[16] Even when the

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10 See *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 453 per Lord Diplock, 456 per Lord Dilhorne, 465 per Lord Edmund-Davies, 469 per Lord Russell of Killowen.
11 Seaman op cit n 5, para 55.4.21.
12 Id para 41.1.3.
13 As inserted by the *Acts Amendment (Sexual Offences) Act 1992*.
14 As inserted by the *Acts Amendment (Sexual Offences) Act 1992*.
15 *Sankey v Whitlam* (1978) 142 CLR 1, 109 per Aickin J.
16 Byrne & Heydon para 25060.

power to give such a direction does not exist, the press will normally act upon the "advice" of the judge that specified material not be published.[17]

(d) Other

2.12 In oral testimony, a witness may be permitted not to give his address where he has good reason to conceal it.[18] Alternatively, as in the case involving Queensland journalist Gerard Budd,[19] the witness may be permitted to give a written response which is shown to the judge, jury and counsel, rather than give the evidence orally in open court. Documents containing confidential material may be produced to the court and not read aloud.

2.13 Judges might also consider it appropriate to encourage parties to:

* admit facts;
* call other evidence.

2.14 It is also possible for access to documents to be restricted to persons who are prepared to give an undertaking as to confidentiality.[20] McNicol has observed:[21]

> "The court's inherent jurisdiction to ensure that the ambit of discovery is not wider than necessary to dispose fairly of the action or to prevent an abuse of process or a contempt of court will also be invoked if, for example, discovery or inspection of documents is used, not for the purpose of the instant litigation, but for a collateral purpose or if discovery is directed exclusively to the credit of the other party. The English Court of Appeal in the case of *Church of Scientology of California v Department of Health and Social Security*[22] confirmed the general power of the court to impose restrictions on inspection, if, for example, there were a real risk of the right of unrestricted inspection being used for a collateral purpose."

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17 Ibid.
18 Ibid.
19 See paras 4.27-4.32 below.
20 See eg *Warman International Ltd v Envirotech Australia Pty Ltd* (1986) 67 ALR 253, 266 where Wilcox J approved the procedure whereby a judge receives the documents and any evidence in relation thereto in closed court subject to the receipt of undertakings from specified persons that the documents will not be used in subsequent proceedings; see also McNicol 41 n 254.
21 Id 41-42.
22 [1979] 1 WLR 723.

3. EFFECTIVENESS OF COURT'S POWER TO IMPOSE RESTRICTIONS

2.15 Where appropriate, courts have used their inherent jurisdiction to preserve confidentiality. For example, the Australian Law Reform Commission Report on *The Recognition of Aboriginal Customary Law* noted:

> "The courts have shown considerable sensitivity in customary law cases. . . . In *R v Gudabi*,[23] all women were excluded from the court, an all male jury was (again with the Crown's consent) empanelled and the court staff was composed only of men. An order was granted preventing publication of much of the proceedings. In a recent child abduction case in Alice Springs, Justice O'Leary ordered the suppression of all evidence. The matter proceeded, with the consent of the prosecution, by way of affidavit. A number of similar examples could be given."[24]

2.16 In a number of Western Australian cases publication of confidential information was suppressed by courts to protect the interests of one or more parties or witnesses to the proceedings. For example:

(1) In a 1990 Supreme Court case[25] Ipp J permitted evidence to be given subject to a confidentiality order. The judge discussed that evidence in a schedule attached to his reasons for judgment. The schedule was published only to the parties and was also subject to the confidentiality order.[26]

(2) Recent Western Australian cases involving people suffering from AIDS have been the subject of suppression orders so that nothing in the public record of the cases would identify the affected party.[27]

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23 (Unreported) Northern Territory Supreme Court, 30 May 1983, SCC No 85 of 1982.

24 (Report No 31, 1986) para 654.

25 *Mallesons Stephen Jacques (a firm) v KPMG Peat Marwick (formerly Peat Marwick Hungerfords (a firm)* (unreported) Western Australia Supreme Court, 19 October 1990, Nos 2452 and 2425 of 1990.

26 Id 12.

27 Eg *D L (Representing the Members of People Living with AIDS (WA) Inc v Perth City Council* (1992) CCH Australian and New Zealand Equal Opportunity Law & Practice 92-422. In that case a council refused planning permission for a `drop-in centre' for AIDS sufferers. The Equal Opportunity Tribunal put a suppression order on the complainants' names because all members of People Living with Aids are HIV positive and if their names were revealed they could be the subject of discrimination. The suppression order was continued during the Supreme Court appeal. In *Ashton v Wall* (1992) CCH Australian and New Zealand Equal Opportunity Law & Practice 92-447 the complainant alleged that she had been sexually harassed by her employer. The respondent employer applied for an order that the complaint be heard in private. The complainant wanted the hearing to be held in public and the evidence to be available for publication. The Tribunal ruled that the hearing should be held in public but that any evidence given on information which might enable identification of the parties or of witnesses should be suppressed. The matters in issue were "of an intimate kind which some witnesses would feel embarrassed discussing and the Tribunal did not want any witness to be deterred from saying what he or she knew of

2.17 However McNicol noted a disadvantage associated with a witness relying on the court's power to impose restrictions or to order disclosure on a limited basis:

> "[T]o place too much emphasis on the court's power to impose restrictions on the use of evidence disclosed by compulsion of law will be counterproductive. It would, for instance, surely be unsatisfactory for a witness to have a valid claim to withhold confidential information sacrificed on the altar of compromise simply because the court was aware that it could `keep everyone happy' by ordering restricted disclosure on a limited basis. Nevertheless, it seems clear that Woodward J in *Maurice*[28] was of the opinion that a court's procedural decision to restrict access to a limited group of people would reduce the strength of the substantive argument against disclosure on the grounds of public interest."[29]

4. EXERCISE OF JUDICIAL DISCRETION TO TAKE INTO ACCOUNT CURRENT MEANS TO PROTECT CONFIDENCES

2.18 In Chapter 8 the Commission recommends the statutory creation of a judicial discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence. One matter which the Commission recommends the judicial body should consider when exercising the discretion is "[a]ny means available to the court to limit the adverse consequences of a required disclosure of confidential information or confidential sources of information and any alternative means of proving relevant facts."[30]

2.19 Courts are able, in ways such as those outlined above, to respect the desire of people involved in judicial proceedings not to reveal confidential information. The Commission considers it essential that this continue after the enactment of a statutory discretion. The

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the matters in issue by apprehension that publicity might attach to the answer given or to the proceedings generally". (Once the respondent was found to be not liable, different considerations applied and the names of the parties were subsequently published.) In the Supreme Court case of *In the Matter of a Proposed Proceeding: "TK" and Others v Australian Red Cross Society* (1989) 1 WAR 335, 341, Malcolm CJ held that public knowledge of the identity of the proposed plaintiffs (haemophiliacs who had contracted HIV) would be likely to defeat the paramount object of the courts which is to do justice according to law, because "the proposed plaintiffs would be reasonably deterred from bringing proceedings unless public disclosure of their identities could be prevented". Exercising the inherent jurisdiction of the court Malcolm CJ permitted the applicants to bring their actions anonymously. If it were publicly known that they were potential AIDS sufferers they could suffer "great distress, prejudice or ostracism". Cases involving the alleged abuse or custody of young children will often be the subject of a suppression order to ensure that the child cannot be publicly identified.

28 *Attorney General for the Northern Territory v Maurice* (1986) 65 ALR 230, 256-257.

29 McNicol 42-43.

30 See para 8.45 below.

exercise by the courts of their existing powers in this manner will complement the proposed statutory discretion.

Chapter 3

PROFESSIONAL RELATIONSHIPS: LAWYERS AND CLIENTS

1. LEGAL PROFESSIONAL PRIVILEGE

3.1 In all common law jurisdictions reviewed by the Commission certain confidential communications between clients and their lawyers are the subject of a privilege.[1] The privilege, which emerged in the late 16th century in England, enables witnesses in judicial proceedings to withhold certain confidential information despite the relevancy of the information to issues to be determined by the proceedings.

3.2 In all cases, the holder of the privilege is the client of the lawyer. Although it is the duty of the lawyer to claim the privilege if it exists, the privilege exists for the benefit of the client. Only the client, as holder of the privilege, has power to waive[2] it by consenting to the release or disclosure of the protected information.[3]

3.3 The privilege is commonly referred to as "legal professional privilege". Although the Commission believes that this term does not adequately reflect the fact that the privilege exists for the client's benefit[4] it has used the term throughout this Report for purposes of consistency.

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1 For discussion of the nature of, and the justifications for, this privilege see DP Ch 4.

2 In this context "waiver" is conduct which amounts to the giving up of the right to keep certain information confidential. The result of waiver is release or disclosure of information which was previously protected.

3 Once the privilege has attached to a particular document, it continues after the death of the client: see eg *Dunesky v Elder* (1992) 107 ALR 573, where a claim to privilege was upheld notwithstanding the client's death. It was held not to be necessary at the time the privilege was claimed that some relevant detriment to the client or his estate might result from the disclosure. The lawyer must not, without the consent of the client or the client's personal representative, disclose the document. If the lawyer does disclose the privileged communication, he may be liable to the client for breach of duty. It should be noted that legal professional privilege will not protect the identity of the client, even if the client makes non-disclosure a condition of the engagement of the lawyer: *Southern Cross Commodities Pty Ltd (in liq) v Crinis* [1984] VR 697 and other cases cited by McNicol 81 n 228.

4 There may well be benefits accruing to lawyers from the existence of the privilege. For example, it has been claimed that because no privilege attaches to confidential communications between accountants and their clients, potential clients of accountants may take their business to lawyers rather than their accountants because they know that what they say to their lawyer will generally go no further, even during judicial proceedings, no matter how relevant the information is to the particular judicial proceedings. On privilege issues in relation to accountants, see paras 7.6-7.12 below.

3.4 McNicol has described legal professional privilege as follows:

> "[I]n civil and criminal cases, a person is entitled to preserve the confidentiality of statements and other materials which have been made or brought into existence for the sole purpose of seeking or being furnished with legal advice by a practising lawyer, or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings.[5] This rule is most commonly applied to communications between a client and lawyer. However, it also covers:
>
> (a) communications between the client's lawyer and an agent of the client, if made solely for the purpose of enabling or obtaining legal advice or for the purpose of obtaining information necessary for actual or contemplated litigation;
>
> (b) communications between the client's lawyer and third parties if made for the purpose of actual or contemplated litigation; and
>
> (c) communications between the client (or the client's agents) and third parties if made for the purpose of obtaining information for the client's lawyer in order for the client to obtain advice on actual or contemplated litigation."[6]

3.5 The privilege can be claimed at the interlocutory stages of civil proceedings, during the course of a civil or criminal trial and in non-judicial proceedings. In Australia it has been held that the privilege is not merely a rule of evidence applicable in judicial and quasi-judicial proceedings "but is a fundamental principle capable of applying in non-judicial proceedings, such as in administrative and investigative proceedings, in the extra judicial processes of search and seizure and in proceedings before bodies which have statutory power to require the giving of information". [7]

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5 In *Baker v Campbell* (1983) 153 CLR 52 the High Court held that legal professional privilege protected communications between client and lawyer and was not confined to the protection of documents from disclosure in judicial or quasi-judicial proceedings. The "sole purpose" test was laid down by the High Court in *Grant v Downs* (1976) 135 CLR 674.

6 McNicol 53.

7 Ibid.

2. RATIONALE OF THE PRIVILEGE

3.6 The rationale of the common law rule is that the general public interest in treating certain confidential communications between lawyers and clients as privileged overrides the public interest in courts being provided with all relevant evidence to adjudicate matters before them. This is so despite the fact that lawyers are often in possession of information most relevant to the issues being adjudicated. Although there have been numerous attempts to elaborate exactly what the overriding public interest is, such efforts have generally lacked consistency and specificity. Nevertheless, it is apparent that the principal public interests being promoted and protected by the existence of legal professional privilege are:

(1) The adversarial system of law, which is the basis of court proceedings in all Australian jurisdictions. In Australian courts, the judge is a neutral umpire whose primary task is to decide issues on the basis of evidence adduced by the parties.

(2) The importance of the client receiving the benefit of legal advice, so that the client may make an informed decision as to how to act. The lawyer in representing the client becomes the client's "alter ego".

(a) The adversarial system of law

3.7 The system of law operating in all Australian courts is the adversarial system. In contrast, the system which operates in a number of countries in continental Europe and many parts of Asia is the inquisitorial system. Lord Devlin has outlined the major difference between the two systems:

> "[T]he one is a trial of strength and the other is an inquiry. The question in the first is: are the shoulders of the party upon whom is laid the burden of proof, the plaintiff or the prosecution as the case may be, strong enough to carry and discharge it? In the second the question is: what is the truth of the matter? In the first the judge or jury are arbiters; they do not pose questions and seek answers; they weigh such material as is put before them, but they have no responsibility for seeing that it is complete. In the second the judge is in charge of the inquiry from the start; he will of course permit the

> parties to make out their cases and may rely on them to do so, but it is for him to say what it is that he wants to know."[8]

3.8 A specific comparison of the two systems is made by Professor Kaplan in the context of the German inquisitorial and the United States adversarial systems:

> "[T]he systems we have been examining profess similar aims. Fundamentally the systems seek to promote the use of reason in the process of adjudication. But this purpose does not delimit a single, narrow road to its attainment, for there are a number of plausible ways of going about garnering, presenting, and considering proofs and reasoned arguments so that substantive norms may be cogently applied to the resolution of disputes. Moreover the aim of reasoned decision must be held in balance with a host of other aims including speed and economy. Each system can thus be viewed as a vector of considerations: the considerations are similar but the values assigned to them in the systems differ, the vectors differ. For example, the American system exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge. The German system puts its trust in a judge of paternalistic bent acting in cooperation with counsel of somewhat muted adversary zeal. Vigorous counsel will search out the facts and law fully and carefully; the clash between them will bring out the true points at issue; the judge will come to a sounder decision if he has not sought to advise the litigants and been thus obliged to carry successive opposing briefs. So the American system argues. But adversary contention can obscure rather than clarify if left unchecked; it tends toward expense; it makes against equality of opportunity before the tribunal. So the German system retorts. True, the elements of each system have been determined in some measure by historical stresses and accidents, not by deliberate decision based on analysis. But they are still submissible to assessment in terms of postulated aims, and such an exercise is valuable because the systems are capable of some degree of deliberate choice. In the end the mélange of rules and habits which together make a procedural system somehow accords with the larger patterns of the society which the system serves, and it is in this sense that Calamandrei spoke of a procedural system reflecting the society in which it is found as a drop of water reflects the sky."[9]

3.9 In each system, the ultimate objective is the ascertainment of truth, though this is reached by different routes. In the words of Professor Jescheck, again comparing the German and American systems:

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8 P Devlin *The Judge* (1979) 54. For a comparison of the two systems see 54-83. See also C J Hamson "Civil Procedure in France and England" (1950) 10 *Camb LJ* 411; C J Hamson "English and French Legal Methods" (1955) 67 *Jurid Rev* 188; C J Hamson "Prosecution of the Accused: French and English Legal Methods" [1955] *Crim LR* 272; G Williams *The Proof of Guilt* (3rd ed 1963) Ch 2; `Justice' *Going to Law* (1974) Ch 5; G E P Brouwer "Inquisitorial and Adversary Procedures A Comparative Analysis" (1981) 55 *ALJ* 207; W Zeidler "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure" (1981) 55 *ALJ* 390; P Stein *Legal Institutions* (1984) Chs 3-5; J H Merryman *The Civil Law Tradition* (2nd ed 1985) Chs 16-17. The two systems have tended to merge in recent years: see eg M Zander "From Inquisitorial to Adversarial The Italian Experiment" (1991) 141 *NLJ* 678; J Monahan "Sanctioning Injustice" (1991) 141 *NLJ* 679 (examining recommendations for adoption of adversarial procedures in France).

9 B Kaplan "Civil Procedure Reflections on the Comparison of Systems" (1960) 9 *Buffalo L Rev* 409, 431-432.

> "The goal of the German proceeding, like that of the American, is the determination of the objective truth on the basis of and within the framework of the procedural forms which the law prescribes. It is error to view the Anglo-American trial merely as a sporting match between the attorneys involved without any goal of ascertaining the truth, as unfortunately continental critics all too often assume. Similarly, it is just as wrong to view the continental trial as a means of convicting the accused at any price, a tendency of which the American critic can be guilty. Rather, the object of both trials is the same search for truth within the permissible legal framework. . . . The difference between German and American procedural law does not lie, therefore, in the high ideals which have been set, but rather in the *methods* chosen to obtain them."[10]

3.10 An essential ingredient of the adversarial system is the ability of parties to litigation and their lawyers to withhold materials or information gathered for the litigation from the court and the other side. As Brennan J stated in *Baker v Campbell*,[11] one of the purposes of the privilege is the "maintenance of the curial procedure for the determination of justiciable controversies the procedure of adversary litigation" and that:

> "[i]f the prosecution, authorized to search for privileged documents, were able to open up the accused's brief while its own stayed tightly tied, a fair trial could hardly be obtained; in a criminal trial, to give the prosecution such a right would virtually eliminate the right to silence. It would deprive an accused of such right to an acquittal as he has by reason of a weakness in the Crown case which could be, but must not be, remedied by disclosure of the accused's instructions to his legal advisers."

3.11 In *Waugh v British Railways Board*[12] Lord Simon of Glaisdale quoted the words of James LJ in *Anderson v Bank of British Columbia*[13] that:

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10 H-H Jescheck "Principles of German Criminal Procedure in Comparison with American Law" (1970) 56 *Va L Rev* 239, 240-241. Similar views were expressed by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63. For a contrary viewpoint see eg R Eggleston "What is Wrong with the Adversary System?" (1975) 49 *ALJ* 428, 431-433; Hon Mr Justice R W Fox "Expediency and Truth-Finding in the Modern Law of Evidence" in E Campbell & L Waller (ed) *Well and Truly Tried: Essays on Evidence* (1982) 140; J H Langbein "The German Advantage in Civil Procedure" (1985) 52 *U Chi L Rev* 823, 833; *Whitehorn v R* (1983) 57 ALJR 809, 819 per Dawson J. See also Barry J in *Mooney v James* [1949] VLR 22, 25-26, quoting Professor Edmund M Morgan's foreword to the American Law Institute's *Model Code of Evidence* (1942) 3-4:
"Thoughtful lawyers realize that a law-suit is not, and cannot be made, a scientific investigation for the discovery of truth. The matter to be investigated is determined by the parties. They may eliminate many elements which a scientist would insist upon considering. The Court has no machinery for discovering sources of information unknown to the parties or undisclosed by them. It must rely in the main upon data furnished by interested persons. . . . The trier of fact can get no more than the adversaries are able and willing to present. . . . [T]here must be a recognition at the outset that nicely accurate results cannot be expected; the society and the litigants must be content with a rather rough approximation of what a scientist might demand."

11 (1983) 153 CLR 52, 108.

12 [1980] AC 521, 537.

13 (1876) 2 Ch D 644, 656.

> "as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief".

Lord Simon then commented:

> "The adversary's brief will contain much relevant material; nevertheless, you cannot see it because that would be inconsistent with the adversary forensic process based on legal representation."

3.12 Were legal professional privilege not available in the adversarial system, obvious injustice could result:

> "If the privilege were to be abolished in our adversarial legal system, an individual client accused of a criminal offence could not tell the lawyer the full version of his/her involvement in the crime without the prosecution becoming aware of such details. The defence lawyer would become a vehicle for disclosing the client's inculpatory admissions. The lawyer would be viewed by the client as another part of the legal establishment. Thus such a client would be devoid of a confidante to assist in the face of complex legalities and the overwhelming power imbalance in favour of the State."[14]

(b) The lawyer as the client's "alter ego"

3.13 The law is a "complex and complicated discipline".[15] The administration of justice can only be enhanced by members of the public having access to the law to be able to organise their affairs in accordance with it. Without full and frank disclosure of relevant information to the lawyer, appropriate legal advice cannot be given. People would be less likely to seek legal advice if they were not assured that confidential communications with their lawyers would be privileged.[16] This might result in a higher incidence of breaches of the law through inadvertence or ignorance.[17]

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14 D J Boniface "Legal Professional Privilege and Disclosure Powers of Investigative Agencies: Some Interesting and Troubling Issues Regarding Competing Public Policies" (1992) 16 *Crim L J* 320, 325.

15 *Grant v Downs* (1976) 135 CLR 674, 685 per Stephen, Mason and Murphy JJ.

16 As Byrne & Heydon para 25340 state:
"The traditional basis for legal professional privilege is the law's recognition that its principles are complex and difficult to apply. It is desirable for members of the public to have access to these laws and this can be achieved only where a candid disclosure to the legal adviser is made."

17 J Kluver "ASC Investigations and Enforcement: Issues and Initiatives" (1992) 15 *UNSWLJ* 31, 35 n 17, referring to an argument commonly stated by critics of *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319, discussed at paras 3.26-3.34 below.

3.14 The lawyer is the agent or alter ego of his client in everything said by the client to the lawyer, as if the client had said it to himself. Thus, the client has to be in the position of being able to confide in his lawyer without reservation. Legal professional privilege is said to promote the public interest by assisting and enhancing the administration of justice through facilitating the representation of clients by legal advisers:

> "This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor."[18]

3.15 This rationale for the privilege has been stated with different emphasis by courts according to the circumstances of the case. In recent years it has been expressed in terms of the benefit gained by the representation of the individual in the face of government power.[19] In *Baker v Campbell*[20] Wilson J stated:

> "The multiplicity and complexity of the demands which the modern state makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection."[21]

3.16 The Law Council of Australia[22] has suggested that compulsory disclosure of legal advice would, over time, undermine community respect for the rule of law because it would multiply the instances in which persons are held legally accountable for the breach of legal provisions they did not know or did not understand. It was considered that, in all complex legal areas, an undermining of the relationship of trust between legal advisers and their clients would multiply the instances of non-compliance with the law through ignorance and that this, in turn, would undermine community respect for the system of justice.

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18 *Grant v Downs* (1976) 135 CLR 674, 685 per Stephen, Mason and Murphy JJ.

19 See D F Partlett and E A Swedza "An Embattled Profession: The Role of Lawyers in the Regulatory State" (1991) 14 *UNSWLJ* 8, 25-26.

20 (1983) 153 CLR 52.

21 Id 95.

22 "Privilege Must be Reaffirmed" *Australian Law News* August 1992 10, 11-12.

3. EXCEPTIONS TO THE PRIVILEGE

3.17 There are a number of limitations or exceptions to the operation of legal professional privilege[23] principally:

(a) where the communication was made to facilitate the commission of a crime or fraud;

(b) where the innocence of the accused depends upon admission of the evidence;

(c) disclosure of the whereabouts of certain children; and

(d) where the information did not form part of the confidential communication between the lawyer and the client.

3.18 These exceptions and limitations are an acknowledgement by courts and legislatures that in certain cases the public interests promoted by disclosure of confidential information are more important than public interests promoted by the privilege's existence.

3.19 The Commission's recommendations in Chapter 8 will indirectly affect the scope of legal professional privilege and its exceptions. Lawyers and their clients are not excluded from the "special relationship" referred to in the statutory judicial discretion recommended by the Commission.

(a) Crime or fraud

3.20 Legal professional privilege does not operate where the communication between the client and his lawyer was made in order to facilitate the perpetration of a crime or fraud.[24]

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[23] See also M J Beazley QC *The New South Wales Evidence Bill 1991 - Commentary* (University of Sydney Faculty of Law Continuing Legal Education, August 1991); D Bennett QC *The New South Wales Evidence Bill 1991: Legal Professional Privilege* (University of Sydney Faculty of Law Continuing Legal Education, August 1991). The High Court has dealt extensively with legal professional privilege in six cases in the last ten years. *O'Reilly v Commissioner of the State Bank of Victoria* (1982) 153 CLR 1, *Baker v Campbell* (1983) 153 CLR 52 and *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319 dealt with the construction of statutory restrictions on legal professional privilege in non-judicial contexts. *Attorney General for the Northern Territory v Kearney* (1985) 158 CLR 500 dealt with the exception to privilege in the case of crime or fraud. *Attorney General for the Northern Territory v Maurice* (1986) 161 CLR 475 dealt with waiver of privilege. *Waterford v Commonwealth* (1987) 163 CLR 54 dealt with the legal professional privilege of salaried legal advisers employed by Government.

This limitation is not a static one. In recent years it has developed so as to reduce the circumstances in which the privilege operates:

> "In this century, a subtle erosion of the professional privilege has occurred, and in recent years the erosion has accelerated. Courts in both Australia and the United States have broadened the exception by decreasing the quantum of evidence required to trigger the exception. The scope of the exception has also increased by the rapid increase in criminal law, particularly in regard to behaviour traditionally not dubbed `criminal'. As more behaviour becomes criminal, more and more attorney-client communications are subject to disclosure because it is easier for prosecutors to make out a case that the attorney was consulted in the furtherance of crime."[25]

(b) Innocence of the accused

3.21 Legal professional privilege must also give way to the rule that in a criminal trial no one should be able to refuse to produce documents which might establish the innocence of the accused.[26] Whether in any given case the privilege will be overridden by the interests of an accused person will depend on the circumstances of the case, including the materiality of the document to the issues raised bona fide by the defence.[27] In *R v Barton*[28] the defendant was charged with fraudulent conversion, theft and falsification of accounts whilst in the course of his employment as a legal executive with a firm of solicitors. The defendant served on a

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24 *R v Cox and Railton* (1884) 14 QBD 153.

25 Partlett & Swedza op cit n 19, 26. This exception has been extended to cover communications in furtherance of a deliberate abuse of statutory power whereby others are prevented from exercising their rights under the law: see *Attorney General for the Northern Territory v Kearney* (1985) 158 CLR 500 (discussed at DP para 4.7). In that case it was decided that a higher public interest would prevail over the competing public interest that confidential communications between lawyer and client be protected, where there were reasonable grounds for believing that the privilege granted in the public interest was being used to the detriment of the public interest ie to protect communications made to further a deliberate abuse of statutory power. The Australian Law Reform Commission was of the view that *Kearney's* case might lead to the result that the exception included any consultation which was deliberately in furtherance of "unlawful activity": see ALRC *Evidence* Report para 198, draft Evidence Bill cls 107(12)-(13). The ALRC considered it important for clients to be able to approach a lawyer to ascertain whether their plans are appropriate or would be within the law without the fear that what they say may be later used against them. They therefore considered that it would be consistent with principle to extend the exception only to "communications in furtherance of deliberate abuse of statutory power". Any further extension would create the untenable situation where the lawyer and client could have no certainty about whether their communications were protected or not. McNicol 112 considers that the current uncertainty relating to the precise limits of the crime-fraud exception is unsatisfactory and in urgent need of clarification. See also the statement of Mr Harris Weinstein, chief counsel for the United States Office of Thrift Supervision, quoted in J Podgers "Changing the rules" ABA Journal July 1992, 53, 54, who claims that once a lawyer reveals privileged information, there is no right to mislead:
"The attorney-client privilege protects silence; it does not protect misrepresentations. The privilege protects and promotes confidential communications that remain private. Once the attorney reveals information secured in privileged circumstances, there is no right to mislead."

26 Byrne & Heydon para 25300.

27 *Cain v Glass* (1985) 3 NSWLR 39.

28 [1973] 1 WLR 115.

solicitor, a partner in the firm, a subpoena to give evidence at the trial and produce certain documents which he claimed would help show his innocence. The solicitor claimed that the documents were covered by legal professional privilege, but this was rejected and the court ordered their production. The judge held that justice required that any documents in the possession or control of a solicitor, which were both relevant and admissible to the proof that a defendant was innocent of the alleged criminal offences, were not privileged in a criminal trial.[29]

(c) Whereabouts of children

3.22 No privilege exists to protect a lawyer from the obligation to disclose the whereabouts of a child in relation to whom an order for custody has been made[30] or who is a ward of court.[31]

(d) Communications only

3.23 Legal professional privilege only applies to confidential communications and not to facts observed or discovered by either party in their relationship as client and legal adviser. Thus the privilege does not extend to matters of fact which the lawyer knows by means other than confidential communication with the client.[32] Any facts that the lawyer would have ascertained in any event, irrespective of a confidential communication with the client, will not be privileged. Examples of such facts are given by McNicol:

> "[T]he client's name and address are facts which are often not communicated confidentially to the legal adviser. Similarly, facts such as the client's handwriting, the client's mental capacity, the existence of a retainer between the legal adviser and the client and the fact that the client put in pleadings and swore an affidavit have all been held within the exception to legal professional privilege. Furthermore, it appears that any information which is communicated other than by oral or written means is not protected by the privilege."[33]

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29 For a discussion of possible limitations to this exception in Australia see McNicol 101-104.

30 *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141. Stephen J at 152 stressed that the privilege is one granted by law to the client. A client who by his conduct is guilty of great impropriety in concealing the court's ward thereby loses his entitlement to the privilege.

31 *Ramsbotham v Senior* (1869) LR 8 Eq 575.

32 See *Dwyer v Collins* (1852) 7 Ex 639, 155 ER 1104; *National Crime Authority v S* (1991) 100 ALR 151. 165 per Heerey J. See also McNicol 97.

33 Id 97-98.

4. STATUTORY LIMITATIONS

3.24 Because it is a product of the common law, legal professional privilege can always be abrogated by statute, either explicitly or by necessary implication.[34] It is rare for the privilege to be expressly abrogated by statute.[35] An example is section 22 of the *Legal Services Commission Act 1977* (SA) which provides:

> "(1) A legal practitioner
>
> (a) shall disclose to the Commission any information relating to the provision of legal assistance to assisted persons that the Commission may require; and
>
> (b) may disclose any such information that he considers relevant to the provision of legal assistance,
>
> and the assisted person shall be deemed to have waived any right or privilege that might prevent such disclosure.
>
> (2) Except as provided in subsection (1) of this section, the relationship of legal practitioner and client, and the privileges arising therefrom, are unaffected by the fact that he is acting for an assisted person."

3.25 Abrogation of common law privileges in statutes which create investigatory bodies charged with finding the "truth" highlights the apparent conflict between public interests which underlie such legislation and public interests used to justify the privilege's existence.[36] As Boniface has observed:

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34 For examples and discussion see McNicol 113-135.

35 Following *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319 (see paras 3.26-3.34 below) it appears that the courts will simply ascertain the public policy underpinning the legislation empowering investigative agencies to gather information. The court will then determine whether it is the intention of the legislature to abrogate legal professional privilege. Boniface op cit n 14, 348 observes:
"This process reinforces the assumption that the public policy identified by the courts as the legislative purpose is of paramount importance. Such a process thus obviates the necessity to review or analyse or explicitly balance the importance of the public policy which is said to underpin the privilege with other relevant public policies."

36 As to the rationale for legal professional privilege see paras 3.6-3.16 above. See also discussion of the apparent conflict of public interests in Boniface op cit n 14. Boniface suggests that the High Court in *Corporate Affairs Commission of New South Wales v Yuill* (1991) 172 CLR 319 took very little notice of the public interests behind legal professional privilege. At 341-342 he notes:
"The significance and ramifications of abrogating the traditional environment which has been said to encourage lawyer-client confidences were matters to which the majority in *Yuill* did not refer, or provide their views. . . . The majority judgments in *Yuill* did not recognise the importance of legal professional privilege as a mode of preserving individual rights . . . [T]he reasoning of the majority in *Yuill* was confined to analysing linguistic, textual and historical considerations without reference to the underlying policy debate. By implication, the public policy that underpins legal professional privilege was displaced in *Yuill* by the court's identification of the public policy that underpinned the Companies Code. Such a method of analysis reinforces the application of an assumption that the public policy identified by the

> "[E]xistence of the [legal professional] privilege poses a conflict between assisting the administration of justice by encouraging full disclosure by the client to the legal adviser, so that clients can make informed decisions; and impairing the administration of justice by refraining from disclosing relevant and often cogent information, so that injustice can result. It is this apparent conflict of public policies which has made the judicial search for an appropriate balance both interesting and troubling."[37]

3.26 A controversial example of implied abrogation is the High Court decision in *Corporate Affairs Commission of New South Wales v Yuill,*[38] which concerned the interpretation of provisions in the Companies (New South Wales) Code provisions now substantially reproduced in the *Australian Securities Commission Act 1989* (Cth).[39] A majority[40] held that, on their interpretation of the provisions, assertion of legal professional privilege was not a reasonable excuse for refusing to produce documents or answer questions when required to do so under Part VII of the Code.[41] The majority were persuaded that the intention of the legislature by necessary implication was to abrogate claims of legal professional privilege by clients. In other words, a corporation or person required to produce

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courts as the legislative intention is of paramount importance rather than the public policy that is said to underpin legal professional privilege."

37 Op cit n 14, 322-323.

38 (1991) 172 CLR 319. The issue was whether legal professional privilege was a defence to a demand for books by an inspector appointed under the Companies Code. It has also been suggested that s 155 of the *Trade Practices Act 1974* (Cth) impliedly abrogates the privilege although in a Federal Court decision prior to *Yuill* legal professional privilege was conceded in the context of Trade Practices Commission investigations: *Shannahan v Trade Practices Commission* (1991) ATPR 41,115. Legal professional privilege is fully available in tax investigations: *Federal Commissioner of Taxation v Citibank Ltd* (1989) 85 ALR 588; *Allen Allen & Hemsley v Deputy Commissioner of Taxation* (NSW) (1989) 86 ALR 597 and in hearings by the National Crime Authority: *National Crime Authority v S* (1991) 100 ALR 151. Boniface, op cit n 14, 347, after noting that the Australian Tax Office, the Trade Practices Commission and the National Crime Authority have investigative powers comparable to the Australian Securities Commission, puts forward the view that because the High Court in *Yuill* displaced legal professional privilege on the basis of the public interest which was said to underpin the legislation, the same general policy could be seen to underpin the legislative powers available to other investigative agencies. However he suggests that the investigative agencies may not have to test this because information regarding privileged communications may be obtained by other investigative agencies pursuant to s 18(2) of the *Australian Securities Commission Act 1989* (Cth) "which provides power for the Minister to give a copy of an ASC investigation report to the Australian Federal Police, the NCA, the DPP or a prescribed agency, and/or s 127(4) which provides power for the chairperson, if satisfied that information will assist an agency to perform a function or exercise a power, to disclose such information to that agency".

39 In *Australian Securities Act v Dalleagles Pty Ltd* (1992) 108 ALR 305 French J confirmed that the principles in *Yuill* apply to ASC investigations commenced under Part 3 Division 1 of the *Australian Securities Commission Act*. The respondents in that case were ordered to comply with notices issued under s 33 of the Act notwithstanding that documents sought may otherwise have been protected by legal professional privilege.

40 Brennan, Dawson and Toohey JJ, Gaudron and McHugh JJ dissenting.

41 It has been observed that the High Court in *Yuill* did not attempt to balance the public interest underlying legal professional privilege with the public interest underpinning corporate investigations facilitated by the Companies Code. Instead the majority of the Court focussed on the intention of the legislature "and in doing so after interpreting such intention neglected to counterpoise the public policy which underpins legal professional privilege": Boniface op cit n 14, 337.

documents to the Corporate Affairs Commission pursuant to the *Companies Code* could not decline to do so on the ground that those documents were protected by the privilege.

3.27 Commentators on *Yuill's* case have suggested that the effect of the High Court's decision is that persons can be required to produce to the Australian Securities Commission any documents relating to the affairs of a company that contain legal advice if the documents are in their possession. Where a lawyer has advised his client in relation to the legal consequences of the company's past or proposed conduct, the Australian Securities Commission will be able to:

> "call upon the legal resources of the impugned company's own solicitors to help make a case. In a very real sense, the ASC will be able to rely on a company's own solicitors to perform part of its investigative process."[42]

3.28 Legal professional privilege may be lost for ever once disclosure is compelled in which case the information could be available for future judicial proceedings. Under the *Australian Securities Commission Act* the privilege can still be claimed by a lawyer on his client's behalf. However, if the lawyer refuses to provide the Australian Securities Commission with the privileged material he must at least provide the Commission with a written notice setting out, among other things, the name and address of the person by whom or to whom the privileged communication was made:

> "This no doubt is designed to assist the ASC representative in preparing a fresh demand directed to those persons who have received privileged material from their solicitor." [43]

3.29 It has been suggested that *Yuill's* case does not have a far-reaching effect on legal professional privilege.[44] However, there is a strong opinion within the legal community that

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42 S Climpson & M Proctor "The ASC and Privilege" *Australian Law News* May 1992, 26.

43 Id 27.

44 *Yuill* was distinguished in the Tasmanian Supreme Court case of *Re Transequity (in liq)* (1991) 6 ACSR 517, where Zeeman J said that in his view "legal professional privilege is unaffected by the provision of s 597 of the *Corporations Law*". He referred to the need for a clear statutory provision to remove the privilege against the seizure or production of documents. See K White "Tasmanian Judge Rules Professional Privilege not Affected by Corporations Law: *Yuill* Reconsidered" (1992) 30 *Law Society Journal* 21. Bennett op cit n 23, 3 is also of the opinion that the conclusion of the majority in *Yuill* does not have any real general application. By contrast *Yuill* was applied (ie the privilege was impliedly abrogated) in *Spedley Securities Ltd (in liq) v Bank of New Zealand* (1991) 6 ACSR 331. In *Re BPTC Ltd (in liq*) (1992) 7 ACSR 539, McLelland J followed *Re Transequity* rather than *Spedley Securities* in holding that legal professional privilege remained available to a person required to provide information under s 597. See generally J Kluver "ASC Investigations and Enforcement: Issues and Initiatives" (1992) 15 *UNSWLJ* 31, 31-35.

Yuill's case has significantly limited the operation of this privilege. One commentator has observed:

> "Although the decision construes provisions providing for special investigations under the *Companies Code*, it seems probable that *Yuill* applies to investigations held by the ASC under the ASC Law. However, the matter is not free from doubt and the decision has already generated a significant amount of commentary. . . . A startling aspect of the High Court's decision in *Yuill* is that none of the judges spent any time considering the policy and philosophical issues at stake in finding that legal professional privilege was abrogated under the *Companies Code*. The decision . . . represents a profound erosion of legal professional privilege in Australia. . . . In light of the *Yuill* case legal professional privilege faces an uncertain future in Australia."[45]

3.30 The Law Council of Australia is so concerned with the ramifications of *Yuill's* case that it has requested the Commonwealth Government, as a matter of urgency, to introduce legislation to amend the *Australian Securities Commission Act* to preserve legal professional privilege.[46] The Law Council is of the view that the long term implications of *Yuill's* case, and in particular its attrition of the right of an individual to seek confidential legal advice without fear that the advice may be the subject of compulsory disclosure and subsequent use against the individual without his consent, would be detrimental to the observance of the law and maintenance of community respect for the system of law and justice.

3.31 The majority in *Yuill's* case suggested that if the privilege continued to exist such matters as breach of duty and negligence by corporations may not be discovered. However, the Law Council's view is that if directors whose conduct is under investigation wish to assert that their conduct was justified by legal advice, they will, in a practical sense, be obliged to disclose the contents of the advice voluntarily in any court or investigative proceedings:

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45 J P Longo "The Powers of Investigation of the Australian Securities Commission: Balancing the Interests of Persons and Companies under Investigation with the Interests of the State" (1992) 10 *Companies and Securities LJ* 237, 244-245.

46 "Privilege Must be Reaffirmed" *Australian Law News* August 1992, 10. The Law Council recommended (at 12) that a new subsection be added to s 68 of the *Australian Securities Commission Act 1989* (Cth) as follows:

"For the purposes of this Part, of Division 3 of Part 10, and of Division 2 of Part 11, it is a reasonable excuse for a person to refuse or fail:
(a) to give information;
(b) to sign a record; or
(c) to produce a book
in accordance with the requirement made of the person, that the information, signing the record or production of the book, as the case may be, would disclose matter which is the subject of legal professional privilege."

> "In such circumstances, however, the disclosure will result from the nature of the defence they wish to maintain rather than from the exercise of the inquisitorial legal compulsion. In the Council's view, the long history of successful proceedings for breach of directors' duties indicates that if resources and energies are applied, proceedings in respect of these matters can successfully be prosecuted without the compulsory disclosure of legal advice."[47]

3.32 In response to a suggestion[48] that disclosure of legal advice will promote observance of the law by providing an additional sanction against those who do not heed the advice, while those who do comply with their legal obligations need have nothing to fear, the Law Council stated:

> "[T]his approach does not have regard to the fact that clients can elect not to see a lawyer and will be unable to ascertain in advance whether they will or will not comply with the advice they need to seek."[49]

3.33 The Law Council was also of the view that the unfairness likely to be involved in the use of client-lawyer communications as evidence against the client is likely to alter the relationship by removing the elements of trust and candour in favour of adoption of clients of evasions and reference to fictitious or hypothetical examples.

3.34 Despite the Law Council's views, the Commonwealth Government has not introduced legislation to preserve legal professional privilege.

5. OTHER CONSIDERATIONS

(a) Depriving judicial proceedings of information

3.35 A number of respondents to the Discussion Paper were concerned that the operation of legal professional privilege would deprive judicial proceedings of information which would be relevant to the determination of issues and to the interests of justice.[50] Subject to the limitations and exceptions referred to above, the types of information which may currently be

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47 Id 11.

48 Made in discussions "on behalf of Australian Securities Commission officers": ibid.

49 Ibid. Boniface op cit n 14, 341-342 has also noted that the majority decision in *Yuill* did not acknowledge the important role that professional legal advice can play in encouraging compliance with the law.

50 In its submission to the Commission the Law Society of Western Australia supported the views of the Law Council of Australia referred to in DP para 8.11. The Law Council said that confidentiality of communications between lawyer and client was essential to the administration of justice because it facilitated representation of clients.

the subject of legal professional privilege are unlimited, provided that the communication was made to enable the client to obtain, or the lawyer to give, legal advice, or with reference to litigation that is actually taking place or was in the contemplation of the client. The information may in all other respects be identical to information provided to an accountant, a doctor or other professionals.

3.36 The Commission acknowledges that the protection of confidential communications between a client and his lawyer can result in relevant information not being provided in judicial proceedings, just as can the protection of communications between other professionals and their clients.[51] However, the continuing existence of the privilege indicates the importance of the public interest rationales[52] which support its existence. If the legislature at any time decides that the privilege should be limited or abrogated in any particular circumstance, it can legislate accordingly, as it has done in the instances previously given. Presumably, such limitation or abrogation will be on public interest grounds which, in the circumstances, override the public interests promoted and maintained by the existence of the privilege.

(b) Other public interests

3.37 Non-legal professionals and lay people may consider other public interests to be as important, if not more important, to society than the interests being promoted and maintained by the provision of all relevant evidence to courts. A number of respondents to the Discussion Paper made suggestions to this effect. To avoid unnecessary confusion, the balancing of the various public interests should be done in the context of particular professional relationships. This has been done in this Report.

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51 One medical practitioner, in response to the DP, wrote:
"The main thrust of consideration has been related to extending privilege or not in some fashion to other than lawyers. What seems immutable is legal privilege, perhaps understandably given the composition of the Law Reform Commission of WA. However, it seems to me reasonable to question `legal privilege'. There must be situations in which justice is not done where a judge's discretion to seek information from a lawyer would be in the interests of justice. The argument advanced on page 62 section 4.8 [of the DP] that `unlike other confidential relationships, the lawyer is the advocate etc' is not altogether valid. Other professionals including medical practitioners also spend considerable time as advocates for patients. The Law Council's response to the accountants' claim at 8.11 makes an assertion of `public interest'. It does not exist in the public interest if justice is thwarted by the unavailability of evidence in the hands of a lawyer but denied to the court by privilege."

52 See paras 3.6-3.16 above.

(c) Codification of the privilege

3.38 Mr Justice Kirby has suggested that as a result of the High Court's vacillation on legal professional privilege, particularly in light of *Yuill's* case, there may now be justification for legislative intervention, presumably to entrench or protect the privilege.[53]

3.39 The Commonwealth Evidence Bill 1991[54]attempts to codify the common law legal professional privilege for the purposes of Commonwealth matters. These provisions are set out in Appendix II.

3.40 The Commission has formed no concluded view as to whether legal professional privilege should be codified, and prefers to leave this issue to further public debate.[55]

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53 In *Yuill v Corporate Affairs Commission of New South Wales* (1990) 20 NSWLR 386 (reversed by the High Court (1991) 172 CLR 319) Kirby P stated at 401:
"To assume that Parliament had such an `intention' as to abolish the valued and ancient common law right to consult a lawyer, and to secure legal advice immune fro m subsequent official scrutiny is, in my opinion to read more than would be justified into the language of the Code. To say that Parliament had such an intention, although many members of Parliament would doubtless have been ignorant of the state of the common law is, in my view, to make too bold a claim."

54 Cls 116-118. The New South Wales Evidence Bill 1991 is in almost identical terms.

55 This may occur when the Evidence Bill (Cth) is reintroduced.

Chapter 4

PROFESSIONAL RELATIONSHIPS: JOURNALISTS AND SOURCES OF INFORMATION

1. INTRODUCTION

(a) The issue

4.1 No Australian jurisdiction has recognised, either at common law or by statute, a legal right for journalists to refuse to disclose relevant information in their possession during judicial proceedings.[1]

4.2 Journalists and journalists' associations[2] have expressed concern that this prevents journalists from legally being able to refuse to disclose in judicial proceedings the confidential identity of sources of information. The legal requirement to provide such information

(1) breaches journalists' undertakings of confidentiality to their sources;

(2) places journalists in an ethical dilemma, since the AJA *Code of Ethics* forbids members from revealing the confidential identity of sources of information even in the face of a judicial requirement to do so;[3]

(3) may threaten interests such as freedom of the press and the public's right to know.[4]

(b) Previous consideration of journalists' privilege

4.3 The Commission has had a previous opportunity to consider whether a professional privilege for journalists should be introduced. In 1980, in its Report on *Privilege for*

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1 See para 4.6 below.

2 Such as the Media, Entertainment and Arts Alliance, Australian Journalists' Association Section (referred to in this Chapter as the AJA), consisting of a number of amalgamated unions including the Australian Journalists' Association, and the Australian Press Council.

3 See para 4.48 below. A failure to comply with a judicial requirement to provide relevant information may result in the journalist being punished for contempt: see paras 1.22-1.24 above. Disclosure of the information would put the journalist in conflict with the AJA *Code of Ethics* and he may have to suffer disciplinary proceedings by the AJA and hostility from colleagues.

4 As to these interests see paras 4.52-4.58 below.

Journalists,[5] it recommended that there be no statutory privilege for journalists and that any development in this regard should continue to be for the common law. Further details of the recommendations in this Report are given in Appendix III.

(c) The current reference

4.4 Since 1980 the absence of a journalists' privilege has continued to be a matter of controversy.[6] In this review the Commission has not regarded itself as bound by its earlier recommendations. Over the last decade there have been a number of developments in the law relating to privilege in jurisdictions reviewed by the Commission,[7] and the experience of those jurisdictions and submissions received by the Commission in response to its Discussion Paper have influenced the recommendations made in this Report.

(d) The Commission's approach

4.5 The Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence. In appropriate circumstances, confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion. In making a decision whether to exercise the discretion, courts would take into account the public interests in preserving confidential information held by journalists.[8]

2. THE PRESENT LAW

(a) Absence of privilege

4.6 In Western Australia, as in all other Australian jurisdictions, journalists have no legal right to refuse to disclose relevant information in their possession, or the confidential identity

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5 Project No 53. The terms of reference were "to consider and report on the proposal that journalists should be given the right to refuse to disclose in court proceedings the source of their information".

6 See paras 1.24 above, 4.15-4.44 below.

7 See para 4.13 below; Appendix IV.

8 See paras 4.45-4.58 below.

of the the sources of such information, in judicial proceedings.[9] The absence of such a privilege has been affirmed in a number of cases in which journalists have been punished for contempt of court for refusing to reveal their sources.[10]

(b) The "newspaper rule"

4.7 Under the "newspaper rule", except in special circumstances, a defendant in a defamation action who is a newspaper publisher, proprietor or editor will not be compelled in *interlocutory proceedings* to disclose the name of the writer of the article which is the subject of the action or the sources of information on which the article was based. According to the High Court in *John Fairfax & Sons Ltd v Cojuangco*,[11] the newspaper rule is one of practice, not of evidence, and it "guides or informs the exercise of the judicial discretion".[12]

4.8 The rationale of the rule was stated by Dixon J in *McGuinness v Attorney General of Victoria*[13] as being founded on:

> "the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matter contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity".[14]

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9 The Evidence Bill 1991 (Cth) contains no privilege for journalists. However, the Parliament of New South Wales Legislative Assembly *Report of the Legislation Committee on the Defamation Bill*, 1992 (1992) 109 recommended that:

> "because of the particular problems faced by journalists required to disclose their sources, the provision of closed courts and suppression orders in defamation actions should be examined by the Law Reform Commission. The Committee recognises that a journalist may be required to disclose sources in certain circumstances on the grounds of public interest, but is of the view that it may be that protection is more appropriately contained in the laws relating to contempt".

Following this recommendation the New South Wales Law Reform Commission was given a reference to inquire into and report on the law of defamation in New South Wales with reference to a number of particular matters, including:

"(g) The need for the provision of `shield laws' to protect journalists' sources".

10 Eg *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989; *Copley v Queensland Newspapers Pty Ltd* (unreported) Queensland Supreme Court, 20 March 1992, No 3107 of 1989. For discussion of these and other Australian cases see paras 4.15-4.44 below. For English and United States cases see Ch 1 n 38.

11 (1988) 165 CLR 346. In that case the High Court ordered New South Wales journalist Peter Hastings to reveal the identity of sources who had supplied him with allegedly defamatory information about a prominent Filipino businessman who had extensive landholdings in Australia. The information had formed the basis of an article in the *Sydney Morning Herald*. The High Court held that although newspapers and journalists would normally not be compelled to reveal their sources in defamation and related actions, disclosure would be required if necessary in the interests of justice.

12 Id 356.

13 (1940) 63 CLR 73.

14 Id 104.

4.9 As Hunt J said in *Cojuangco*, the newspaper is liable for what it publishes so that it is unnecessary at the interlocutory stages of proceedings for the plaintiff to "delve around for other targets".[15] The rule has no application at trial where disclosure may be necessary to show malice so as to defeat a defence such as qualified privilege pleaded by the media organisation.

4.10 The newspaper rule has recently been applied by the Queensland Court of Appeal in *Hodder v Queensland Newspapers Pty Ltd.*[16] The court held that it was not necessary in the interests of justice that the appellant answer interrogatories prior to trial concerning the identity of confidential sources of information. Fitzgerald J said that the newspaper rule had a practical purpose in assisting courts to balance the effective administration of justice with other public interests, including freedom of speech and the public's right to information. The balance struck in relation to disclosure of media sources entitled a person alleging defamation to ascertain details at trial, but generally did not require disclosure before trial when litigation could be abandoned after the sources had been disclosed.

(c) Preliminary discovery

4.11 The House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners*[17] revitalised an equitable procedure for discovery under which the identity of a wrongdoer can be ascertained. The English case of *British Steel Corporation v Granada Television Ltd*[18] illustrates the application of this equitable procedure to the media. In that case the British Steel Corporation brought an action for disclosure of the name of the person who supplied documents to Granada which formed the basis of a programme televised by them. The majority of the House of Lords held that a court should not compel disclosure unless it was necessary in the interests of justice. Because British Steel Corporation had abandoned all claims against Granada, the interests of justice required disclosure, since it was necessary to obtain an effective remedy.

4.12 *Cojuangco's* case concerned an application for preliminary discovery against a media organisation for the names of the sources of information on which certain publications were

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15 *Re Application of Cojuangco* (1986) 4 NSWLR 513, 519.
16 [1993] ATR 81-207.
17 [1974] AC 133.
18 [1981] AC 1096.

based. The High Court held that for such an application to succeed the applicant must show that it is necessary in the interests of justice to order the respondent to disclose the information. If an applicant has an effective remedy against a media organisation, an order will not be made for preliminary discovery of the name of the source.

3. OTHER JURISDICTIONS COMPARED

4.13 Some of the overseas jurisdictions reviewed by the Commission have introduced some form of statutory protection for the confidential identity of sources of journalists' information. Most of these provisions give a court a discretion to treat certain information as protected. This is the case, for example, in the United Kingdom, where section 10 of the *Contempt of Court Act 1981* provides that courts may not require a person to disclose sources of information contained in a publication unless it is established to the court's satisfaction that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

4.14 A number of jurisdictions in which such provisions have been introduced or proposed are discussed in Appendix IV.

4. ABSENCE OF PRIVILEGE AND ITS IMPACT ON JOURNALISTS

4.15 Until recently, few Australian cases have had to deal with refusals by journalists to disclose the identity of their sources of information. There are a number of possible explanations:

> "[J]ournalists' sources may not often be relevant to litigation or investigations; the parties may not press the matter; if a government is involved it may not wish to appear to attack the media. Furthermore, to ensure public confidence in the authenticity of information, journalists generally identify its source; the issue of compulsory disclosure usually arises only in the comparatively rare case where, not only does the informant not want to be identified, but also the information is published notwithstanding that the source is not identified."[19]

4.16 However, in recent years, some Australian journalists have been fined or imprisoned for contempt of court for failing to disclose the identity of sources of information. Other

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[19] S Walker "Compelling Journalists to Identify Their Sources: `The Newspaper Rule' and `Necessity'" (1991) 14 *UNSWLJ* 302, 305.

journalists and media personnel have faced the prospect of punishment for contempt. In response, the press and media organisations have referred to the need for the creation of a legal privilege relating to the confidential identity of journalists' sources of information and to inappropriate penalties for contempt of court imposed on journalists. The following incidents which have recently prompted public debate are detailed below:

(a) The Barrass case.
(b) The Budd case.
(c) The Hellaby case.
(d) The Cornwall case.
(e) The Nicholls case.

(a) The Barrass case

4.17 In *DPP v Luders*[20] the defendant, an employee of the Australian Taxation Office, was charged with official corruption under section 70(1) of the *Crimes Act 1914* (Cth) for publishing Commonwealth documents without authorisation. Proceedings were commenced by the Commonwealth Director of Public Prosecutions.

4.18 Committal proceedings in the Perth Court of Petty Sessions were followed by a trial in the District Court. Both courts were exercising federal jurisdiction and the law applied was federal law.[21]

4.19 During the committal proceedings a *Sunday Times* journalist, Mr Tony Barrass, was requested by the prosecution[22] to reveal the identity of the source of the Australian Taxation Office information which had been leaked from that Office and formed the basis of a number of media stories. It was apparent that the answer would have been highly relevant to the prosecution for the purpose of establishing the defendant's guilt or to pursue others, whether independent of the defendant or accomplices.[23]

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20 *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989 (committal proceedings*); DPP v Luders* (unreported) District Court of WA, 7-8 August 1990, No 177 of 1990 (trial).

21 See Ch 1 n 2.

22 Committal proceedings transcript 27 November 1989, 10. The defendant's counsel did not object to the question and in fact considered it relevant and necessary in the interests of justice: id 13-14.

23 Id 18 per Thobaven SM.

4.20 Mr Barrass refused to reveal the source of his information on the basis of his profession's ethical duty to maintain the confidentiality of such sources.[24] The witness acknowledged the fact that the law does not recognise a privilege for journalists. Nevertheless, he continued to refuse to disclose the source of his information.

4.21 The magistrate acknowledged that the impact of refusing to answer questions in court was more serious in relation to some matters than to others.[25] However, this matter was considered relatively serious because at that stage the answer to the question appeared to go directly to the prosecution's establishment of guilt or otherwise and to the defendant's ability to present a proper case if it went to the District Court.

4.22 It was not apparent to the magistrate that the question could be reworded so as to avoid the dilemma in which Mr Barrass found himself that is, either to breach his ethical obligations as a journalist or to face punishment for contempt of court.[26] Nor could the question be ignored on the basis that it was irrelevant to the case before the court. Because the proceedings were part way through, the magistrate considered it imperative that the answers be given and that the court should use its full powers to ensure that they were given. A fine against Mr Barrass was considered inappropriate given the seriousness of the matter. The magistrate committed Mr Barrass to imprisonment for seven days pursuant to section 77 of the *Justices Act 1902*.[27] During that period it would have been possible for the witness to answer the question and so be released. Mr Barrass remained in prison for five days and did not answer the questions.

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24 The prosecutor asked Mr Barrass: "How did [print-outs from the Taxation Department computer] come to be in your possession, Mr Barrass?" Mr Barrass answered: "I'm not going to answer that question sir, I'm sorry, because as a journalist I'm bound by certain ethics, one of those pertaining to the fact that if I reveal certain information that points to a source I am, in fact, breaking the code of ethics. Therefore, I'm not going to answer that question": Committal proceedings transcript 27 November 1990, 10.
Defence counsel also considered the question relevant and necessary in the interest of justice (id 13-14) and indicated that he also wished to question the witness on the same matters: transcript 11 November 1989, 4.
The magistrate also put to Mr Barrass: "I am going to give you an opportunity now to indicate whether or not you are prepared to answer the questions [which would reveal the identity of the source], or not?" Mr Barrass replied: "With all due respect, sir, no": id 3.

25 Committal proceedings transcript 27 November 1989, 21-22.

26 Committal proceedings transcript 11 December 1989, 3.

27 The media's attention focused on the magistrate's decision: eg *The Australian* 13 December 1989, 3: "A-Gs may review journalist's jailing"; *Sunday Times* Editorial December 17 1989 38: "The information Barrass received was authentic and accurate and was clearly a matter of public concern. How supremely ironic then that he should be the first journalist to be jailed by a court for ethical commitment. At the absolute minimum, the law that sent Barrass to jail should be amended to protected journalists from judicial coercion when the criteria of authenticity, accuracy and public interest can be demonstrated as they have been in the Barrass case."

4.23 The trial of Mr Luders was heard before the District Court of Western Australia in August 1990. Mr Barrass was called as a witness for the prosecution and again refused to answer questions in court which would have revealed the source of his information.[28] Judge Kennedy warned Barrass:

> "You are obliged to answer the question. You are a competent and compellable witness and you are obliged to answer any question that is put to you and the penalty for refusing to do so is a maximum penalty of 5 years' gaol and $50,000 fine."[29]

4.24 Mr Barrass maintained his refusal,[30] referring to his profession's ethical obligation to protect the confidentiality of sources of information. Judge Kennedy gave very little weight to this argument:

> "The administration of justice is of far greater importance [than the journalist's point of view]. We have an adversary system which depends on those who are competent and compellable coming to court and truthfully telling what they know. If they decline to do that the administration of justice could break down. If any person has any problem with that concept they might like to consider their position if they were wrongfully charged with an offence and the one person who could give evidence for an acquittal declined to answer relevant questions. The rule of law is an important way in which this community is distinguished from various totalitarian regimes. No matter how important you think your objective when you are considering overturning the law to get to the devil you should consider what protection you will then have if the devil turns on you."[31]

4.25 The judge went on to observe:

> "It is for you and your conscience what you have, in fact, done to Mr Luders. You have caused him in the end great damage. I do not refer so much to the conviction and the penalty but the fact that he lost a job; a young man with no skills and probably the only chance he had to have a decent job in his whole life, and he has lost that. It seems to me that that is also a consideration for journalists: whether the damage they are likely to do to individuals outweighs any supposed benefits to the entire community."[32]

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28 The prosecutor asked: "When did you first meet this person who gave you the documents?" Mr Barrass replied: "I think, sir, I will have to refuse to answer that question. Your Honour, I'm sorry, but I understand my duty as a witness, but I also am bound by a code of ethics as a member of the Australian Journalists' Association . . . and I think if I give any information that may point to a source, well then I'm breaking that Code": trial transcript 6 August 1990, 70.

29 Id 70.

30 Eg id 77.

31 Id 64. Judge Kennedy referred to the "gravamen" of his offence in the terms that "it strikes the heart of the administration of justice": trial transcript 8 August 1990, 31.

32 Id 64-65.

4.26 Judge Kennedy convicted Mr Barrass of contempt. The Judge regarded contempt as a very serious matter, and in her deliberations on the appropriate sentence was mindful of the fact that if a substantial fine could not be paid by Barrass then he would have to be imprisoned. Mr Barrass was fined $10,000.[33]

(b) The Budd case

4.27 A former Brisbane Courier-Mail reporter, Mr Gerard Budd, was jailed for 14 days by the Queensland Supreme Court for contempt in the face of the court when, as a witness in a defamation action,[34] he refused to answer questions[35] put to him by the plaintiff's counsel and

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33 The $10,000 fine was paid by the Sunday Times: *Sunday Times* 9 August 1990, 3. Editorials in both Western Australia's major newspapers criticised Judge Kennedy's decision and the laws that allowed Barrass to be fined:
The West Australian 9 August 1990, 10:
"Whatever the law may say, there was no justice in the punishment meted out to former Perth journalist Tony Barrass in the District Court yesterday. A $10,000 fine was harsh treatment for bringing to public notice a scandal in the Australian Taxation Office over the leaking of confidential tax records . . . Something is drastically wrong with contempt laws when Luders [the defendant] is fined $6,000 for official corruption, but Barrass a witness in the case who simply obeyed the code of ethics binding his profession is fined $4,000 more than that for contempt of court. . . . [T]he prosecution in the lower court and the District Court established its case against Luders without the evidence sought from Barrass. It has dangerous implications for all journalists investigating important matters of public interest that could end up in court."
Sunday Times 12 August 1990, 40:
"The real victim here . . . is the public and its right to know. If people are to be deterred from giving information to the press in the public interest, and if newspapers were inhibited from publishing such material, that right must be severely threatened. . . . [T]here are plenty of senior politicians, public servants and police officers in this State who would be horrified if they thought they could be identified, under judicial coercion, as the source of information they provide in the public interest.
The *Sunday Times* recognises the conflict between a journalist's legal obligations and adherence to the profession's code of ethics. It does not seek a blanket exemption that would provide a refuge for unscrupulous journalists who make up their sources. Journalists who do so will be sacked. But we again call for amendments to the law. If a published report can be demonstrated to be accurate, authentic and in the realm of the public's right to know, the law should direct courts to take those factors into account and apply a wide discretion and not punish a journalist who refuses to disclose a source.
And on the question of penalties, who offends more against society a journalist who abided by ethical principles and was fined $10,000 . . . a man who killed two Vietnamese brothers in a head-on smash but was fined a total of $3,000 on two counts of dangerous driving causing death . . . a heroin addict who was involved in two bank hold-ups and planned a third but was given three years' probation . . . a youth who killed his best friend in a traffic accident but was ordered to do 240 hours of community service for dangerous driving causing death . . .?"
Mr Luders was convicted. Mr Barrass did not reveal the identity of his source.

34 *Copley v Queensland Newspapers* Pty Ltd (unreported) Queensland Supreme Court, 20 March 1992, No 3107 of 1989. Mr Budd is no longer with the Courier-Mail.

35 Eg transcript 254-255:
Plaintiff's counsel: "Who is this mysterious person to whom you gave the assurance but wouldn't disclose his name?"
Mr Budd: "The person was one of my contacts."
Counsel: "Who is he?"
Mr Budd: "I can't identify."
Dowsett J: "You will have to answer the question."

Dowsett J concerning the identity of an unnamed source of information referred to in an article written by Mr Budd in the *Courier-Mail*.[36]

4.28 Dowsett J considered the questions put to Mr Budd to be relevant to the issues being dealt with in the case and, in particular, to testing the credibility of Mr Budd as a witness:

> "It is very easy for a witness to say that he made inquiry of an unknown source, a source whom he cannot now remember or whose name he is not willing to disclose. It compels an additional level of honesty upon him if he has to disclose a name even if the plaintiff is not now in a position to call evidence to rebut that allegation. A witness who identifies the name of the person from whom he derived information is put at risk of that person coming forward and denying the fact with whatever consequences that may have.
>
> Thus it seems to me to be more than a reasonable way of testing credibility to insist upon identification of source. I think too that the identity of the source of that information goes to the question of good faith in the allegation which the plaintiff asserts is made in the article that there has been a coverup, involving the plaintiff in that coverup. . . . The identity and office of the person who made such an allegation to Mr Budd may well be very relevant in assessing his good faith in the way in which he dealt with that information as compared with the way he dealt with the allegations made against Mr Copley. I think therefore that in both respects the question of the identity of the source of information is a relevant matter and a matter of sufficient importance in the conduct of the case to justify me in directing the witness to answer the questions designed so to identify the source."[37]

4.29 Neither defence counsel nor counsel representing the witness in the Budd case attempted to argue in favour of the recognition of a professional privilege for journalists.[38] Instead, arguments were directed to the relevance of the evidence and the appropriate penalty for contempt.

Mr Budd: "With due respect, your Honour, this person spoke to me on the condition that they not be identified."
Dowsett J: "I don't know where people get this idea from. Journalists can't make this rule. The law of the country says you have to answer the question. That is the law and it applies to all of us."
Mr Budd: "I realise it was my duty as a journalist at the time to protect that source. . . . It is part of the journalistic code of ethics."

36 "Code of Silence", 1 September 1989, in which it was alleged that an insinuation could be perceived of a police coverup of police involvement in misconduct in Toowoomba. The article also dealt with the conduct of the prosecution case against one of the police officers by the plaintiff. The implication alleged was that the plaintiff (a lawyer) was also involved in the coverup.

37 Transcript 267.

38 Nor were such arguments put forward in *DPP v Luders*: see para 4.20 above.

4.30 The judge took some steps to facilitate the maintenance of the alleged confidence.[39] He invited the journalist to identify the source in writing for communication only to the Bar Table. Counsel for the plaintiff indicated that, for the purposes of the trial, he would be willing to accept that method of identification, but the journalist declined the offer. The journalist was also given an opportunity to contact his source to seek a release from the confidentiality, but reported to the court that he was unable to make contact.

4.31 The judge was reluctant to fine Mr Budd because:

> "The trouble with fines in cases like this is that it leaves it open to the inference that you can buy your way out of this if you want to."[40]

4.32 In convicting Mr Budd of contempt and sentencing him to a term of 14 days' imprisonment,[41] Dowsett J indicated his strong objection to the journalism profession's claim to privilege:

> "I cannot begin to understand a situation in which responsible members of the community seek to put themselves above the law. I particularly have difficulty in understanding how journalists as a class, who perhaps more than all other professions apart from the law itself, should be able to see the need for the application of the law uniformly to all, should claim an entitlement to exempt themselves from its obligations. In recent times, there has been an attempt by the press, it seems, to in some way identify this sort of privilege with that claimed by the clergy as to confession. I cannot see that there is any comparison. The clergy, after all, claim such privilege as originating at a time immemorial, whereas the claim made by journalists is very new indeed.
>
> Further, particularly in a case such as this, I find it impossible to understand why any journalist should think that he is entitled to make statements about another person which may, on their face, be correct or otherwise, and when proceedings are brought to establish that they are not true and that they are defamatory, seek to conceal the

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39 For other methods available to courts to maintain confidences or reduce the adverse consequences of a forced breach of confidence see Ch 2.

40 Transcript 270. In *DPP v Luders* Mr Barrass was fined $10,000 by the District Court. As noted at n 33 above, the fine was paid by the *Sunday Times*.

41 Mr Budd was released after 6 days: *The West Australian* 27 March 1992. Following Mr Budd's conviction the Queensland Premier, Mr Wayne Goss, was reported as backing Mr Budd's stand: "Change law, urges writer" *The West Australian*, 27 March 1992. It was also reported that contempt of court laws would be reviewed by the Standing Committee of Attorneys General in October 1992: "Plea to change contempt laws" *The West Australian* 23 March 1992. For discussion of the case see A Field "A Gypsy's Curse" *Courier-Mail* 26 March 1992, 9. One mistake in that article is in the assertion by the author that the judge stated that clerics had a privilege in Queensland. In fact he merely referred to the claim by clerics to a privilege, in the same way as he referred to the claim by journalists to a privilege: transcript 271. No changes to the law of privilege have been made in Queensland since the *Copley case*.

source, contrary to law, asserting some highhanded view that this is in the public interest and that he, or his profession, is entitled to decide what is the public interest.

Having said all that, though, I accept completely that however misguided I may think your views to be, you hold them conscientiously. I accept that subject to any questions as to your credibility, which I will have to decide in the course of the trial, you are taking this point because of your views as to the way in which you are professionally bound. How you justify to yourself the very serious interference with the administration of law which this causes, I don't know.

I take into account, also, the fact that you have sought a release from whoever is the source of your information, but have not been able to obtain it. That seems to me to have been the least you could have done. In any event, of course, as far as the law is concerned, neither you nor he has any proper interest in seeking to restrain the provision of the information in answer to the questions which have been put to you.

I take into account, too that you appear not to be likely to gain anything from coming here to give evidence. I take into account the fact that there is a great risk of prejudice to you in your present employment as a result of any sentence of imprisonment."[42]

(c) The Hellaby case

4.33 On 4 September 1992 Cox J of the Supreme Court of South Australia ordered a reporter from the *Adelaide Advertiser*, Mr David Hellaby, to hand over to the court documents used in preparing two reports relating to the South Australian Auditor General's inquiry into the State Bank of South Australia.[43] The judge also ordered the journalist to hand over papers relevant to the authorship of the articles, the journalist's belief in their accuracy, his sources, attempts to verify the articles and any directions given to him regarding the writing of the articles. The Bank told the court that it was considering suing the journalist for injurious falsehood[44] but to decide whether to proceed it first needed access to the journalist's

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42 Transcript 271.

43 *State Bank of South Australia v Hellaby* (unreported) Supreme Court of South Australia, 4 September 1992, No 1627 of 1992. The reports appeared in the *Adelaide Advertiser* on 7 and 8 July 1992. They referred to claims from alleged sources within the State Bank inquiry that suspected criminal activity in the State Bank had been uncovered on an incredible scale.

44 The tort of injurious falsehood has been defined by Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524, 527-528 as consisting of:

> "written or oral falsehoods . . . where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage. . . . To support it, actual damage must be shewn, for it is an action which will only lie in respect of such damage as has actually occurred."

R P Balkin & J L R Davis *Law of Torts* (1991) 723 summarise the four elements of the action as:

> (1) a false statement of or concerning the plaintiff's goods or business;
> (2) publication of that statement by the defendant to a third person;
> (3) malice on the part of the defendant - that is, that the statement was made mala fide or with a lack of good faith; and

documents. The journalist was given leave to appeal to the Full Court against the order for discovery but the Full Court dismissed the appeal, and an application for special leave to appeal to the High Court was refused.

4.34 Under the order for discovery Mr Hellaby had 14 days to reveal his source, with the possibility that he would be imprisoned for contempt of court if he refused.[45] On the 14th day his lawyers filed some of the documents required by the order, but none of the documents filed disclosed the identity of his source. Mr Hellaby was found guilty of contempt of court, but Duggan J adjourned the hearing for a week to give Mr Hellaby more time to ask his source to release him from his undertaking of confidentiality.[46] Eventually, under a confidential settlement between the Bank and Mr Hellaby's lawyers, the Bank agreed not to proceed with moves to identify the source. However, Duggan J fined Mr Hellaby $5,000 for the period he had been in contempt.[47] It is noteworthy that this case, unlike the Barrass and Budd cases, involved a pre-trial discovery order rather than the giving of evidence in court.

(d) The Nicholls case

4.35 On 19 April 1993 Mr Chris Nicholls, formerly a radio journalist with the ABC, was sentenced to four months' jail after pleading guilty to a contempt of court charge for refusing to reveal a source. Mr Nicholls had been charged with impersonation, false pretences and forgery as a result of his investigations into allegations that a South Australian Cabinet minister had assisted her partner, Mr Jim Stitt, to obtain commercially valuable information. The prosecution alleged that Mr Nicholls had made telephone calls to Mr Stitt's bank and had pretended to be Mr Stitt in order to obtain confidential information. Mr Nicholls' defence was that the telephone calls were made not by himself but by a source to whom he had given an undertaking of confidentiality. When Mr Nicholls gave evidence he refused to reveal his source's identity.[48] The jury acquitted Mr Nicholls of the criminal charge,[49] but he was then

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(4) proof by the plaintiff that he has suffered a particular and identifiable loss as a result of the statement.

45 "Reporter faces jail for hiding sources": *The West Australian* 13 March 1993, 35. See also "Source of discontent" *The Australian* 6 May 1993.

46 "Journalist in contempt over State Bank source" The Australian 7 May 1993, 5; "Reporter guilty, awaits sentence" *The West Australian* 7 May 1993, 28.

47 "Journalist fined after legal deal" *The West Australian* 15 May 1993, 15.

48 "Journalist refuses to name source" *The Australian* 6 April 1993.

49 "Journalist not guilty of impersonation" *The Australian* 17-18 April 1993; "Journalist cleared of impersonation charges" *The West Australian* 17 April 1993.

imprisoned for four months for contempt of court in refusing to disclose the source of his information.[50] On appeal, the Full Court reduced the sentence to 12 weeks' imprisonment.[51]

4.36 Commenting on the Hellaby and Nicholls cases, Mr Stephen Halliday, President of the Australian Journalists' Association section of the South Australian Media, Entertainment and Arts Alliance, said that the union would continue its push for national shield laws for journalists to protect their sources.[52] He advocated the New Zealand system under which courts had discretionary powers to excuse a witness from giving evidence that would disclose confidential communications.[53] South Australian Democrat leader Ian Gilfillan promised to introduce a private member's bill into the South Australian Parliament to protect journalists who refused to reveal their sources,[54] and the South Australian Attorney General, Mr Chris Sumner, said that he was willing to consider legislation under which reporters would not have to name sources in court in certain circumstances.[55]

(e) The Cornwall case

4.37 On 25 March 1993 contempt of court proceedings were commenced against Deborah Cornwall, a reporter with the *Sydney Morning Herald*, who had refused to reveal the source of her information for a story on a murder case to the New South Wales Independent Commission against Corruption.[56] Ms Cornwall wrote a story which said that unnamed police officers had told her that one Neddy Smith had informed on a man subsequently convicted of murder. Ms Cornwall had been summoned before the ICAC to give evidence but had refused to name the police officers concerned. ICAC Commissioner Ian Temby said that it had been established that Mr Smith was not the informant, and suggested that the unnamed source's information was designed to discredit Smith and warn off other potential ICAC informants. Mr Temby said that the fact that the information had been established to be false removed any obligation on Ms Cornwall to protect her source, but Ms Cornwall disputed

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50 "Reporter jailed for four months" *The Australian* 20 April 1993, 1-2; "Jail for contempt" *The West Australian* 20 April 1993.

51 "ABC journalist's jail sentence cut" *The West Australian* 22 May 1993, 32.

52 See "Reporter jailed for four months" *The Australian* 20 April 1993, 1-2; "Source of discontent" *The Australian* 6 May 1993.

53 The Commission's recommendation that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach of confidence is based on the New Zealand legislation: see paras 8.15-8.23, 8.38-8.56 below.

54 "Move to shield journalists" *The West Australian* 23 April 1993, 34.

55 "Talks look at law on media silence" *The West Australian* 10 May 1993.

56 "Reporter faces contempt charge" *The Australian* 26 March 1993, 2.

that the information was false and maintained that she was bound by the AJA *Code of Ethics* to maintain her source's confidentiality.[57]

4.38 In the hearing before Abadee J in the New South Wales Supreme Court, which commenced on 27 April 1993, Ms Cornwall maintained her refusal to identify her sources, and said that Mr Temby's claim that her sources had lied to her was not enough to ignore important moral and social consequences of maintaining confidentiality.[58] On 3 May 1993 Abadee J reserved his decision.[59] That decision was expected to be given shortly after the date of this Report. Section 37 of the *Independent Commission Against Corruption Act 1988* provides that witnesses summoned to attend or appearing before the Commission are not entitled to refuse to answer questions or to produce documents, and it seemed likely that this might be a major factor in the eventual decision.

(f) Other recent cases

4.39 Other recent incidents have also highlighted the problem of journalists being required to reveal their sources.

(i) The Parry case

4.40 On 9 April 1992, during the hearings of the Royal Commission into Commercial Activities of Government and Other Matters on the Western Australian Teachers Credit Society, a Western Australian journalist, Mr Geoff Parry, declined to answer questions put to him relating to the identity of a confidential auditor's report.[60] Mr Parry had used information from the report for a Channel Seven television news story on a former deputy Opposition leader.[61] Mr Parry claimed he was bound by the AJA *Code of Ethics* not to reveal his sources.

4.41 Royal Commissioner Geoffrey Kennedy adjourned Mr Parry's evidence and stated that the Commission would review the situation and decide if it was necessary to press the

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57 "Ethics source of landmark legal battle" *The West Australian* 12 April 1993.
58 "Journalist refuses to name police sources" *The West Australian* 28 April 1993 33.
59 "Judge delays sources ruling" *The West Australian* 4 May 1993 12.
60 "Silent journalist faces fine" *The West Australian* 10 April 1992.
61 Claiming that that person had borrowed $42,000 from the Society without any proper documentation.

question.[62] The Commission did not return to the matter before the completion of its inquiry.[63]

(ii) The Four Corners case

4.42 On 1 September 1992 a judge of the Equity Division of the Supreme Court of New South Wales ordered reporter Neil Mercer and executive producer Marian Wilkinson to reveal the name of the person who supplied the reporter with documents relating to "Blood Money", a "Four Corners" television programme on overservicing by pathologists.[64] The order was sought by directors and shareholders of a company which provided pathology services. They claimed to be entitled to sue some person or persons whom they had not been able to identify to protect the confidentiality of certain information. The reporter and executive producer were to be asked at a future hearing who supplied the documents for the programme. However, the matter was settled without the need to disclose the identity of the source.[65]

(iii) The 7.30 Report case

4.43 On 3 September 1992 it was reported[66] that Melbourne businessman Mr John Elliott would be applying to the Supreme Court of Victoria in a bid to make the Australian Broadcasting Corporation disclose the identity of informants used in two episodes of the "7:30 Report". Counsel for Mr Elliott was reported as telling a court on 2 September 1992 that an existing defamation action against the ABC arising from a 1990 broadcast had been "overtaken by recent events". The two programmes examined various aspects of Mr Elliott's business activities.[67] Up to the date of this report there had been no further developments.[68]

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62 Under s 14(1) of the *Royal Commissions Act 1968* a witness who refuses to answer a question put to him by a Commissioner which is relevant to the inquiry may be dealt with on the motion of the Attorney General as if he were in contempt of the Supreme Court.

63 The Royal Commission became functus officio in relation to its investigations when it delivered its second and final report on 12 November 1992. The former Royal Commissioners continue to have limited responsibilities under the *Royal Commission (Custody of Records) Act 1992*.

64 "Reporter ordered to reveal source" *The West Australian* 2 September 1992, 41.

65 Information provided by ABC Legal and Copyright Department, 20 November 1992.

66 "Elliott seeks informants' names" *Financial Review* 3 September 1992.

67 Telephone interview with Mr Jeffrey Sher QC, counsel for Mr Elliott, on 5 October 1992. Mr Sher confirmed that the matter was still "under consideration" and that no action had yet been taken to force the disclosure of the identity of the informants. This was still the situation as of 20 November 1992 (information provided by ABC Legal and Copyright Department).

68 Information from ABC Legal and Copyright Department 23 April 1993.

(iv) The Synnott case

4.44 On 6 January 1993 it was reported that Mr Duncan Gay MP, the chairman of a New South Wales Parliamentary committee investigating the dispute between New South Wales Police Commissioner Tony Lauer and the former Police Minister Ted Pickering, had suggested that a journalist who reported evidence given in camera to the committee by Mr Pickering could be called on to reveal his source.[69] Mr John Synnott, a reporter with the Sun-Herald, reported that Mr Pickering had told the committee that he had personally investigated a heroin dealer out of frustration at police inaction, and had made allegations of police corruption. A spokesman for the New South Wales Free Speech Committee praised Mt Synnott for drawing the public's attention to these allegations, and said that informing the public about corruption was a major function of the media. Mr Gay however said that the report was in contempt of Parliament and would be referred to the parliamentary privileges committee, which could ask the reporter to reveal his source.

5. POSSIBLE RATIONALES FOR A PRIVILEGE

4.45 Possible rationales for recognising a journalists' privilege to refuse to disclose the sources of their information are journalists' ethics and interests such as freedom of the press and the public's right or need to know.

4.46 In the Commission's view, the public interest in the protection of confidential information in the hands of journalists, including the confidential identity of sources of information, does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

4.47 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[70] In appropriate circumstances, confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion.

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69 "Call to protect reporter's source" *The WestAustralian* 6 January 1993, 25.

70 See paras 8.38-8.56 below.

(a) Journalists' ethics

4.48 Where Australian journalists have declined to provide relevant information to judicial proceedings, thus placing themselves in the position of being in contempt of court, they have sought to justify their actions on the basis of obligations pursuant to the AJA *Code of Ethics*. The Code forbids its members from revealing the confidential identity of sources of journalists' information, providing that "In all circumstances they [members] shall respect all confidences received in the course of their calling."[71]

4.49 A professional code of ethics usually regulates the conduct of the members of that profession. The public interests served by such regulation might be many and varied. For example, such a code will usually require members to provide a high standard of professional service to clients, and will establish a mechanism for the professional to be disciplined should he fail to adhere to the requisite standards. Codes might also prohibit members from conducting themselves in a manner unbecoming to the profession.

4.50 To date the common law has failed to recognise a public interest in protecting the ethical beliefs of an individual professional, or of his profession generally, which would, by itself, justify the creation of a professional or other privilege. The creation of a privilege cannot be justified unless the public interests to be promoted or maintained thereby override the public interest in the ability of courts to require as much relevant information as possible for the determination of issues.

4.51 On its face the provision in the AJA Code amounts to an absolute prohibition on a journalist revealing a confidential source. However, practice suggests that a considerable degree of discretion is involved. According to Padraic McGuinness:

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[71] Rule 7(a) 3. Mr R Millhouse referred the Commission to a view that the Code does permit a breach of confidence in certain circumstances. The preamble states:

> "Respect for the truth and the public's right to information are overriding principles for all journalists. In pursuance of these principles journalists commit themselves to ethical and professional standards."

It might then be argued that, when faced with a court order to reveal a source, a journalist's "overriding principles" are "respect for truth and the public's right to information". Before the adoption by the AJA of the current preamble and *Code of Ethics*, a legal opinion on the operation of the preamble was sought by Mr Millhouse from Feez Ruthning & Co. The opinion was that:

> "[W]e incline to the view that a court would interpret the ten (10) specific ethical rules enumerated in section 49 independently from the general introductory words of the section, and would therefore not entertain as a defence to any allegation of a breach of any of the ten (10) specified rules that the journalist in question was simply acting in `respect for truth and the public's right to information.'"

> "[I]f [the AJA Code provision] is to be treated as a genuine ethical principle, not just as a shield for a journalist pursued by the authorities, it has to be considered in all its implications. A journalist has to consider whether it means that he or she has not only a duty to refrain from naming sources without their permission, but also a duty not to name a source when it might be embarrassing to that source but to the benefit of the journalist involved, or a matter which the journalist feels should be made public.
>
> There is here a classical conflict between an oft-cited, but unmentioned in the code, principle of the public's `right to know' and the journalist's duty to respect confidences. In recent times this ethical principle has been selectively interpreted to allow journalists to breach confidence whenever it seems appropriate to them.
>
> This illustrates one of the greatest traps of codes of ethics - they become statements of hi-falutin principle which are rarely considered in their entirety or discussed in their application to specific cases."[72]

(b) Freedom of the press and the public's right or need to know

(i) General

4.52 In recent years, in response to journalists being fined or imprisoned or facing the prospect of being so punished for refusing to reveal the confidential identities of sources of information during judicial proceedings, the media, AJA and other media bodies[73] have stated that without such a privilege fundamental "rights" such as "freedom of the press" and the public's "right to know" are being undermined.[74]

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72 P McGuinness "The Journalist's `Shield'" *City Ethics* Spring 1992, 1.

73 Eg the Australian Press Council.

74 These arguments have also been forcibly put in submissions made to this Commission and others by such bodies as the Australian Press Council. In a submission to the Minister for Transport and Communications on the Broadcasting Services Bill (Cth), the Council expressed concern about provisions in the Bill (now the *Broadcasting Services Act 1992* (Cth), assented to on 14 July 1992) which may have had potential to compel news organisations and journalists to provide documents or reveal sources (letter to the Minister of 3 July 1992):

> "The Code of Ethics of journalists provide that they should protect the identity of sources who provide information in confidence. That is the very basis of investigative journalism. The revealing of such sources, and even the existence of a power to compel, has a chilling effect on the free flow of information. The existence of this power to compel has been advanced as one of the principal reasons for Robert Maxwell's successful frauds the other being British libel law (*Columbia Journalism Review* May-June 1992 p 48)."

On 15 September 1992 it was reported that Federal Cabinet had decided to amend the Act so that there would be a "reasonable excuse" for journalists to refuse to answer a question from the Australian Broadcasting Authority on the grounds that it might identify a source: "Move to give media sources cover" *The West Australian* 15 September 1992. Senator Collins (Transport and Communications Minister) was reported as saying: "The Government believes journalists have a vital role to play in the maintenance of a free society."

4.53 Referring to the public's right to know in the context of the newspaper rule,[75] Kirby P in *Cojuangco v Fairfax & Sons Ltd (No 2)* (dissenting) stated:

> "The basic justification for protecting the confidentiality of discussion between journalists and their sources goes far beyond the desirability of preserving confidences generally. At stake is more even than the journalist's need to have access to a wider range of information than would be provided by attributed comments. At its heart, the policy reason behind the newspaper rule is the protection of the public's right, in a free society, to have access to information essential for the purpose of reaching informed opinions and making decisions on serious matters as befits people living in a democracy."[76]

4.54 The Commission acknowledges that journalists have an important role in giving the public accurate information on matters of interest and concern to the community, such as official corruption in the legislative, executive and judicial arms of government. There may be times when information of interest to the public is likely to be volunteered to a journalist only if the source of the information is assured that his identity will remain confidential.[77] However, not all information in the hands of journalists would be of significant public interest, even though the same information may be necessary for the determination of issues before future judicial proceedings. Creation of a legal right for journalists to refuse to reveal the identity of their sources of information would mean that such information would invariably be denied to possible future judicial proceedings.[78]

4.55 In Western Australia journalists have never had a legal right to withhold confidential information from judicial proceedings. The Commission has received no submissions which indicate or discuss the practical effect of this. The Commission is unaware of any other data which would indicate whether or not the absence of such a right has influenced potential sources of information of public interest not to reveal such information to the press.

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75 See paras 4.7-4.10 above.

76 (Unreported) New South Wales Court of Appeal, 13 November 1990, No 40039 of 1989, 39-40.

77 However not all sources of information wish to remain anonymous. The Commission acknowledges that there may be a number of reasons why a person would reveal information to a journalist. The source may be paid a fee by the journalist; he may receive some other reward; or may simply receive some personal satisfaction from being responsible for the revelation of the information.

78 Compare the position in the law of defamation, where it is virtually impossible for the media successfully to plead the common law defence of qualified privilege. This defence is an acknowledgement that in some circumstances it is in the public interest for people to express themselves freely, and be protected, even if the publication is untrue and defamatory. It is only available if the information was obtained and used carefully and responsibly and without any improper motive. At common law a statement will attract qualified privilege if the material was published in the performance of a duty or to protect an interest. However, courts have refused to recognise that the relationship between the media and the public is sufficient to support a defence of qualified privilege: see eg *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632; *Antonovich v West Australian Newspapers Ltd* [1960] WAR 176.

However, it may be that a person with such information would be hesitant to share it with a journalist because the law does not guarantee the protection of the person's identity, even though the journalist would probably refuse to disclose the identity to any one else, including a court.

4.56 Even without a journalists' privilege matters of public interest have been "exposed" by journalists and the media. This may be as a result of journalists' express or implied undertakings that they would never reveal the confidential sources of information, even if required to do so by a court. One New South Wales investigative reporter, Mr Bob Bottom, suggests that to date the ability of journalists to expose corruption has depended on confidential sources trusting them with sensitive or incriminating evidence. Mr Bottom, with passing reference to existing privileges for lawyers and clerics,[79] has said:

> "Of all the royal commissions in Australia, there has never been one prompted by any lawyer or any priest. From the Moffitt Commission into organised crime in NSW in 1973 to Fitzgerald in Queensland, all of them occurred because of disclosures by journalists. There would never have been a Fitzgerald inquiry in Queensland, if it was left to the judiciary and the justice system of this State [Queensland]."[80]

Former *Courier-Mail* reporter Mr Phil Dickie, who is credited with helping to prompt the Fitzgerald Inquiry using information from confidential sources, said that he escaped a jail term for contempt of court for refusing to disclose the identity of his sources of information "only through luck and the `sense and sensitivity' of Tony Fitzgerald".[81]

(ii) The law of defamation and professional privilege compared

4.57 The law of defamation may be a greater practical restriction on freedom of the press and the public's right to know than the absence of a journalist-source privilege.[82] The Western Australian Royal Commission into Commercial Activities of Government and Other Matters noted:

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79 A privilege for clerics exists in Tasmania, Victoria, the Northern Territory and New South Wales: see para 5.2 below.

80 "Prison stigma for ethics" *Journalist* April 1992, 1.

81 Ibid.

82 Note that the terms of the New South Wales Law Reform Commission's reference on defamation refer specifically to the issue of whether there should be shield laws for journalists: see n 9 above.

> "The present law [of defamation] may well have inhibited public investigation and media discussion of at least some aspects of the events into which we have inquired. But, given the national character of modern media practices, reform of this aspect of the law of defamation, if it is to be effective, requires a national approach."[83]

The Royal Commission considered such a review to be particularly appropriate in the light of two recent High Court cases dealing with implied rights under the *Australian Constitution*.[84]

4.58 The *Australian Constitution* does not include a Bill of Rights.[85] Nevertheless, the High Court has stated that the *Constitution* contains an implied right to freedom of communication, at least in relation to Commonwealth public affairs and political discussion,[86]

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83 Report of the Royal Commission into the Commercial Activities of Government and Other Matters: Part II (1992) para 1.3.19. The law of defamation has been the subject of many recommendations (including proposals for Australia-wide uniformity) in recent years: see Australian Law Reform Commission *Unfair Publication: Defamation and Privacy* (Report No 11, 1979); Law Reform Commission of Western Australia *Report on Defamation* (Project No 8, 1979). Subsequently, the Standing Committee of Attorneys General considered the recommendations made in these Reports, but decided not to proceed further. More recently, however, proposals for uniform defamation law reform have been under consideration. A Bill was introduced into the New South Wales Parliament and referred to a Legislative Assembly Committee, and the New South Wales Law Reform Commission has been given a reference to review the law in this area: see n 9 above.

84 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 66 *ALJR* 695 (Political Broadcasting Act case); *Nationwide News Pty Ltd v Wills* (1992) 66 *ALJR* 658 (Industrial Relations Act case). Professor Blackshield "How Free is your Expression?" *The Gazette of Law and Journalism*, November 1992 1, 3, has observed:

"Probably the most interesting thing these judgments may hold for journalists is their possible influence over defamation laws. Potentially it may be leading to something like a public figure test."

A case testing the limits of the implied right of freedom of speech, *Stephens v West Australian Newspapers Ltd*, is pending before the High Court: see "High Court allows freedom test case" *The Australian* 1 May 1993 7. The Court is being asked to determine whether it would provide a defence to defamation involving a State Parliamentarian's performance if publication of the defamatory material was reasonable.

Despite some enthusiasm in Australia for the introduction of a public figure defence to defamation (though note T E F Hughes, "Defaming Public Figures" (1985) 59 *ALJ* 482), such a defence has caused numerous problems in the United States. Although initially considered plausible, the public figure defence and its associated actual malice rule enunciated in *New York Times Co v Sullivan* (1964) 37 US 254 have been criticised by public figure plaintiffs and media defendants. The view of the former is that public figure plaintiffs cannot adequately protect their reputation because they must meet a nearly impossible burden of proof (that the defendant had knowledge of the statement's falsity or reckless disregard for its truth) to obtain damages. Media defendants complain about the massive costs of defending defamation litigation, eg because of the amount of pretrial discovery plaintiffs require when inquiring into the defendant's state of mind and editorial processes. See eg W W Hopkins, *Actual Malice: Twenty-Five Years After Times v Sullivan* (1989) and review by D G Wille (1991) 89 *Mich L Rev* 1414; A Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991) 200-218: F Schauer, "Uncoupling Free Speech" (1992) 92 *Col L Rev* 1321.

For adoption of the Sullivan reasoning in the United Kingdom see *Derbyshire County Council v Times Newspapers* [1993] 2 WLR 449. For discussion of art 10 of the European Covention on Human Rights (freedom of expression) and its relationship to the press see *Sunday Times v United Kingdom* (No 2) [1992] 14 EHRR 229, para 50; A Lester "The Impact of Europe on the British Constitution" (1992) 3 *Public Law Rev* 228, 234-237.

85 Nor are Bills of Rights found in State Constiutions.

86 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1992) 66 ALJR 695. The High Court held that freedom of communication is guaranteed by Australia's democratic system even though the Constitution lacks a specific provision such as the United States first amendment. Mason CJ said at 707

and an implied right to criticise governmental institutions.[87] It remains to be seen whether the High Court will be required to consider whether these decisions support a journalist's claim for privilege to attach to the confidential identity of his sources of information.

6. ARGUMENTS AGAINST A RIGHT TO WITHHOLD CONFIDENTIAL INFORMATION

(a) Importance of such information to the proceedings

4.59 Although information held by journalists is often hearsay or secondhand, there will be cases where journalists will have relevant information which must be made available as evidence in judicial proceedings in order for justice to be done. It would be detrimental to the public interest in the proper administration of justice to interfere with this by giving journalists a right to withhold information without very good reasons.

4.60 For example, if the identity of a journalist's source of information or other confidential information held by a journalist were not revealed during judicial proceedings an accused person might be wrongly convicted or acquitted,[88] or parties to civil proceedings might lose the opportunity to seek redress for wrongs allegedly committed against them.

4.61 In the Commission's view, the public interest in the protection of confidential information in the hands of journalists, including the confidential identity of sources of information, does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

4.62 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which

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that there was "no reasonable justification for the restrictions on freedom of communication" in Electoral Act amendments overturned by the High Court on 28 August 1992. He said that the principle of responsible government was behind the absence in the Constitution of the specific guarantees of human rights in the United States Constitution: "The very concept of representative government and representative democracy signifies government by the people through their representatives": id 703. Those representatives had to be accountable and had a responsibility to take account of the views of those they represented: "Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion": ibid.

87 *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658.

88 This might also occur as a result of the operation of legal professional privilege, although note the exception to legal professional privilege relating to the "innocence of the accused": see para 3.21 above.

would otherwise be a breach by the witness of a confidence.[89] In appropriate circumstances, confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion.

(b) Fabrication of stories

4.63 A privilege created specifically for confidential information held by journalists could inadvertently protect the unscrupulous journalist who has concocted his story or the fact of an unnamed source. In apparent defence of his professional ethics such a journalist could be regarded as a martyr for refusing to name the fictitious source of information. Further, punishment for contempt of court could be seen as a relatively trivial matter even if the court indicates that it has considered failure to reveal information to be a serious contempt and that, as a result of that failure, a grave injustice may result.

4.64 In an occupation such as journalism, where there are no prerequisite higher education or formal training requirements, and where membership of a professional organisation with a Code of Ethics is also not a prerequisite, it is perhaps more likely that there will be members of the profession (not necessarily members of the AJA) who will fail to obey the profession's commonly held ethical principles.[90]

4.65 The Australian Press Council submitted that the standards of the journalistic profession themselves militate against fabrication:

"Keen judgement and respect, inquiry by other journalists and the necessary reputation for reliability and objectivity, indeed continuing employment, provide the checks and balance which control breaches of these standards."

4.66 However, the Australian Press Council also acknowledged that there will be some journalists who breach ethical codes[91] although it argued that journalism is not alone here:

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89 See paras 8.38-8.56 below.

90 See paras 4.48-4.51 above.

91 The Press Council referred to one case of fabrication that has been exposed in recent years. Janet Cooke invented the story, "Jimmy's World", about a poor boy in a ghetto. The story won the 1981 Pulitzer Prize. Once the fabrication was exposed the newspaper which printed the story took action to correct the fabrication. The journalist was dismissed and, according to the Press Council, she met with the disapproval of colleagues and potential editors and employers.

> "[T]he Council knows of no evidence to support the proposition that this is more widespread than, say, in the church, academic circles, medicine or the law."

(c) Confidentiality can be protected without recognising privilege

4.67 Chapter 2 dealt with a number of ways in which courts can maintain a degree of confidentiality in relation to professional communications, or at least reduce the adverse consequences of a forced breach of confidence during judicial proceedings, without the need for statutory intervention. An attempt to do this was made by the judge in the *Copley* case.[92]

7. ALTERNATIVE PROTECTION OF PUBLIC INTEREST THROUGH WHISTLEBLOWER PROTECTION LEGISLATION

(a) Introduction

4.68 An alternative method of protecting the public interest sought to be protected by advocates of a journalists' privilege is whistleblower protection legislation. This involves the provision of mechanisms whereby people can report an allegation of misconduct and be confident that it will be investigated and, simultaneously, be protected against victimisation and harassment for making that report. To date, such statutory protection has generally only been made available to public servants wishing to report misconduct within the public sector. There is as yet no whistleblower protection legislation in Western Australia. However, there have been two developments

(1) A Bill to amend the *Official Corruption Commission Act 1988* was introduced into Parliament by Independent MLA Ian Thompson on 21 October 1992. The Bill provided that any person who suspects official corruption can expose it to the Official Corruption Commission despite being bound by codes of secrecy. The amendments would make it illegal to victimise anyone helping the Official Corruption Commission. The Bill seeks to implement recommendations made in the 1992 Report of the Select Committee on the *Official Corruption Commission Act* that certain public officials should be obliged to report suspected corrupt conduct to the Official Corruption Commission and that the informers be afforded legislative protection. The Select Committee also recommended that any person may give the

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92 See paras 4.27-4.32 above.

Official Corruption Commission information in good faith "notwithstanding the provision of any other law".[93]

(2) The Royal Commission into Commercial Activities of Government and Other Matters has recommended that:

> "The Commission on Government review the legislative and other measures to be taken
>
> (a) to facilitate the making and the investigation of whistle-blowing complaints;
>
> (b) to establish appropriate and effective protections for whistleblowers; and
>
> (c) to accommodate any necessary protection for those against whom allegations are made."[94]

(b) Whistle-blower protection legislation in Queensland

4.69 Whistleblower protection legislation was introduced in Queensland in 1990[95] following a recommendation of the Fitzgerald Royal Commission that there be:

> "[l]egislation for protecting any person making public statements bona fide about misconduct, inefficiency or other problems within public instrumentalities, and providing penalties against knowingly making false public statements."[96]

4.70 The Report noted that honest public officials are the major potential source of information needed to reduce public maladministration and misconduct, but that in the past it

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93 In a letter to the Law Reform Commission dated 26 October 1992 the then Premier stated that the Government supported the recommendations of the Select Committee that informers be given legislative protection. It should also be noted that certain protection against civil proceedings is provided to witnesses in formal investigations: see *Parliamentary Commissioner Act 1971* s 23A; *Royal Commissions Act 1968* ss 20, 31(2).

94 *Report of the Royal Commission into Commercial Activities of Government and Other Matters: Part II* (1992) 4.7.18.

95 By the *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld). Note also the *Whistleblowers Protection Act 1993* (SA), which received the royal assent on 18 April 1993.

96 *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 370.

had been "extremely difficult for such officers to report their knowledge to those in authority".[97]

4.71 The 1991 Queensland Electoral and Administrative Review Commission (EARC) Report on Protection of Whistleblowers reviewed laws regulating the protection of persons who disclose information which reveals misconduct or wrongdoing. The Report included a draft Whistleblowers Protection Bill.

4.72 EARC made a number of recommendations for improving the Queensland whistleblower protection scheme including, for example, that protection for public interest disclosures extend to disclosures made to any person where there is a serious, specific and imminent danger to the health or safety of the public.[98] This would permit disclosure to the media in such circumstances. In all other respects, in order to obtain protection, disclosures must be made to "the proper authority".

4.73 The exception permitting disclosure to any person, rather than to a "proper authority," was in response to a perceived need for such protection where there is a serious, specific and immediate danger. In those cases:

> "The person who takes it upon himself or herself to disclose information directly to the media, without submitting it for investigation by a proper authority, would be eligible for protection under the recommended scheme provided all the other conditions of eligibility for protection (including an honest belief on reasonable grounds) are satisfied. And indeed, a media organisation which published the information, based on an honest and reasonable belief that it evidenced a serious, specific and immediate danger to the health or safety of the public, would also be eligible for protection under the scheme."[99]

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97 Id 134.

98 Report on Protection of Whistleblowers (1992) para 5.107, Draft Bill cl 13. *The Report of the Royal Commission into Commercial Activities of Government and Other Matters: Part II* (1992) para 4.7.7 supported the possibility of a whistleblower being able to go directly to the media:
"Although there may need to be some constraint on the freedom of a person to disregard alternative procedures and go public directly, we are of the view that a whistleblowing scheme should not prevent this course being taken."
In contrast, the *Whistleblowers Protection Act 1993* (SA) s 5 limits the authorities to which disclosure may be made to government agencies.

99 *Report on Protection of Whistleblowers* (1992) para 5.74. EARC explained the qualification that the danger be "immediate":
"It is designed to encourage a person who believes there is a danger to public health or safety which is not immediate, to disclose it to a proper authority, with the expertise to conduct verifying studies or investigations. If the danger should then be either confirmed, or become immediate, the Commission would expect the proper authority, acting responsibly, to make a considered disclosure through the media of the extent of the danger to public health and safety. However, if a person who had made a disclosure to a proper authority, honestly and reasonably believed that the danger had become

4.74 EARC recognised that this exception would be controversial. However, it believed that in theory it struck the correct balance, by elevating the public's interest in being alerted to a serious, specific and immediate danger to public health or safety over the interests of persons or organisations whose business or reputation may suffer as a result of public allegations which ultimately prove to be inaccurate.

4.75 The Queensland Parliamentary Committee for Electoral and Administrative Review examined EARC's recommendations and draft Bill and specifically agreed with the recommendation concerning disclosure to the media, if that is necessary to protect the health or safety of the public.[100]

4.76 The Queensland Branch of the AJA criticised EARC's recommendations because they provided protection for public interest disclosures to the media only in "extremely limited circumstances", and offered "no reasonable protection to journalists quoting confidential sources".[101]

4.77 The AJA argued that whistleblower protection legislation should extend to all persons making statements to the media and to the protection of journalists from the requirement to identify any confidential source:

> "It is ironic that the entire Fitzgerald process, including EARC and your Parliamentary Committee, owes its existence to a whistleblower whose conduct is specifically denied protection in EARC's recommendations. Nigel Powell, the former Queensland police officer who took his story to the Four Corners television program and the *Courier-Mail* newspaper, made important statements through the media and in the public benefit in circumstances where the `proper channels', in his judgement, could not be trusted.

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immediate, and no action had been taken by the proper authority, that person might then disclose the danger through the media, and still be eligible for protection under the scheme. Thus, to take a hypothetical example, if construction engineers employed by the Department of Transport believe on reasonable grounds that a new bridge under construction is structually unsound, they ought to raise their concerns internally through their Department. If they still believe that their concerns have not been addressed when the bridge is about to be opened for public use, then disclosure to the media might be justified, and protection could still be available under the legislative scheme.

It is possible also that a case could arise where an `insider' becomes aware that a serious danger is already occurring, or is so imminent that there is no justification for the delay involved in making a disclosure to a proper authority. In their case the most appropriate course may be to issue a warning to the public through the media without delay."

100 *Whistleblowers Protection* (1992) para 3.5.6.

101 Id para 3.5.7.

> Although the EARC recommendations create new and broader `proper channels', they do not appear to provide protection for those who do not trust those channels.
>
> In short, Nigel Powell, the archetypal Fitzgerald whistleblower, would not have been protected or assisted by EARC's recommendations unless he had considerable faith in complaints bodies such as those which EARC regards as appropriate.
>
> He would also have been required to keep his complaints from the media, despite the clear public benefit which we believe flowed from his disclosures.
>
> Aside from the rights of whistleblowers, and aside from the existence of complaints bodies as recommended by EARC, another closely related and very important value needs to be considered the public's right to know.
>
> Why should serious matters of public maladministration, ultimately the responsibility of the public and their elected representatives, be kept from the public and from at least most of their elected representatives?
>
> Even if Powell had been satisfied with available channels for complaints investigation, the AJA believes there would still have been a moral responsibility on all concerned to keep the public informed.
>
> Although the defence of qualified privilege does not normally apply to information conveyed to the public at large, its moral basis does apply here in our submission. Where a group of people has responsibility for the proper operation of a club or trade union or other organisation, it can be argued that they have a right to be informed and that others have a right to inform them of matters which they reasonably believe to be true.
>
> The AJA submits that the public at large is responsible through the ballot box for the proper functioning of any democratic society and therefore has a responsibility and a right to be informed.
>
> Similarly the media and information sources, confidential and otherwise, have a moral right to do the informing. Many would argue that this is not only a right, but also a responsibility; that the media have an obligation to inform the community no matter what the law may say."[102]

4.78 With respect to the issue raised by the AJA, EARC noted in its Report that "the price of whistleblower protection may be that, in the first instance, the disclosure has to be made to a proper authority rather than to the public"[103] because

(1) the disclosure ought normally to be made to the authority having the responsibility to investigate the matter;

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102 Id para 3.5.8, quoting submission from the AJA.

103 *Report on Protection of Whistleblowers* (1992) paras 6.2-6.3.

(2) premature public disclosure may prejudice an investigation;

(3) parties need to be protected from allegations which prove to be baseless and malevolent.

EARC recommended that the requirement that disclosure should be made to a proper authority should only be departed from where there is a serious and immediate danger to the public.

4.79 The Queensland Parliamentary Committee for Electoral and Administrative Review endorsed EARC's reasoning in this regard and rejected the AJA's submission that protection should be available for public interest disclosures to the media in all circumstances:

> "As the law currently stands, persons are able to make such disclosures to the media should they so desire, but they run the risk of having to defend themselves in a defamation action should their disclosures be untrue. The Committee agrees with EARC that the removal of such protection for third parties is warranted only in the most serious of circumstances and that normally disclosure should be made to competent investigatory agencies who can determine whether allegations are baseless or not before they are made public."[104]

4.80 EARC also recommended that whistleblower protection should be extended to the private sector. It referred to cases in the United States where misconduct in the private sector had been uncovered due to whistleblowers. It noted:

> "The Commission would have difficulty in accepting an argument that similar incidents could not happen in Queensland. The Commission accepts that an appropriate balance must be struck so as not to impose any unwarranted impediment on the productive capacity of the private sector. The Commission, however, considers that the balance is relatively easy to strike. All private business sector businesses are obliged to comply with the criminal law, whether it be the general provisions of the Criminal Code 1989 or laws specifically enacted to regulate private sector activity in the wider public interest. The Commission considers that no reasonable complaint could be made against a legislative scheme of whistleblower protection which facilitated the disclosure, investigation and correction of breaches of the criminal law by individuals and corporations operating in the private sector - laws which they are bound to comply with in any event provided the scheme has reasonable safeguards against abuse. . . . It must be accepted that statutes which prohibit certain kinds of conduct or impose certain obligations, and then attach penal sanctions for non-

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104 *Whistleblowers Protection* (1992) para 3.5.10.

> compliance, represent the clearest possible indication on the part of popularly elected legislators of their assessment of where the public interest lies. . . .
>
> The Commission considers that no reasonable objection can be taken to a scheme which offers protection to a person disclosing a breach of the criminal law to a proper authority that is under an obligation to observe confidentiality while investigating the disclosure (so that the reputation of a business would not suffer unwarranted damage through premature publicity of an allegation of illegal conduct), at least until such time as the allegation was unsubstantiated.
>
> Likewise, the Commission considers that no reasonable complaint could be made about a scheme which offered protection for the disclosure of matters which constitute a substantial and specific danger to public health and safety, even though there may be no offence involved, eg where the danger arises through negligence rather than any intention to cause harm. The clear public interest in being alerted to and/or protected from dangers of this kind must outweigh the concerns of a particular business for its reputation and/or profitability. Again, a requirement in the scheme that any disclosure be made to a proper authority obliged to observe confidentiality during the course of an investigation would minimise the risk of any unwarranted harm to the reputation and/or profitability of a business against which a public interest disclosure has been made."[105]

4.81 The Queensland Parliamentary Committee for Electoral and Administrative Review[106] agreed with EARC that it is in the public interest that protection be offered for the disclosure of matters regarding private sector organisations where it is alleged that there is some danger to public health and safety. The Committee considered that the public interest in achieving an investigation of such allegations outweighs the private interest of an organisation in maintaining confidentiality.[107]

4.82 EARC's draft bill sets out provisions for the protection of whistleblowers. It provides, for example, that:

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105 *Report on Protection of Whistleblowers* (1992) paras 4.98-4.100.

106 *Whistleblowers Protection* (1992) para 3.6.5.

107 *The Report of the Royal Commission into Commercial Activities of Government and Other Matters: Part II* (1992) para 4.7.10 noted that the actions of persons in the private sector can also put public funds and government itself at risk. The Commission stated: "[W]hile the Commission does not now positively recommend that its proposed whistleblowing legislation be extended generally to the private sector . . . it is essential at least that it extend to allow disclosures about companies and persons dealing with government where those dealings could result in fraud upon, or the misleading of, government, While it may be said that such an extension would erode the loyalty that companies expect of their employees and advisers, loyalty must give way to the prevention of the commission of wrongs upon the government."

* A person is not subject to any liability for making a public interest disclosure and no action may be taken or claim or demand made against the person for making the disclosure.[108]

* A person is not to take, or attempt or conspire to take, a reprisal against another person because, or in the belief that, any person has made or may make a public interest disclosure. A person who takes an unlawful reprisal commits an offence and is liable in damages to any person who suffers detriment as a result.[109]

* There are provisions for injunctions to be taken out to protect against reprisals.[110]

* A person is not to make a record of, or wilfully disclose to another person, confidential information gained through the person's involvement in the administration of the Act as a public official except
  (1) for the purposes of the Act;
  (2) if expressly authorised under another Act;
  (3) to a court or tribunal; or
  (4) if authorised under the regulations.[111]

* "Confidential information" is defined so as to include:
  (1) information about the identity, occupation or whereabouts of a person who makes a public interest disclosure or against whom a public interest disclosure has been made;
  (2) information disclosed by a public interest disclosure;
  (3) information concerning an individual's personal affairs; or
  (4) information that, if disclosed, may cause detriment to a person[112]

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108 Cl 39(1).
109 Cls 41, 43-44.
110 Pt 4 Div 4.
111 Cls 63-64.
112 Cl 63(2). But it is proposed that confidential information may be disclosed to a court or tribunal or if authorised by legislation: cl 64.

(c) Whistleblower protection legislation and professional privilege compared

4.83 Whistleblower protection is a different concept from professional privilege although the practical effect of both may be the same. The former provides protection to the source of information against legal and other consequences of disclosure. The latter offers a mechanism whereby information relevant to judicial proceedings can be withheld without the parties to the information being in contempt of court for failing to disclose the information. Whistleblowing generally involves the disclosure of information. Privilege involves the withholding of information. However, in relation to the confidentiality of sources of journalists' information the two concepts can become entwined. Journalists are interested in keeping secret, even from judicial proceedings, the confidential identity of their sources of information. In the majority of cases, the source will want his identity to remain confidential in order to avoid embarrassment or reprisals from others, or some other detriment. A privilege for journalists may enable journalists to withhold from courts the identity of their sources of information. Whistleblower protection legislation along the lines of the Queensland legislation, and, more significantly, the proposed new Queensland legislation, would offer the source (the whistleblower/informer) a significant degree of protection at law against reprisals, legal responsibilities, etc including suppression of his identity.[113]

4.84 The Commission supports the adoption of a whistleblower protection scheme, provided that it limits the circumstances in which whistleblowers can reveal information to the media, rather than to government authorities, to those recommended by EARC,[114] and contains the other protections found in the EARC Draft Bill.[115] Such a scheme would address the concerns that potential sources of information may have which, despite the enactment of a judicial discretion as recommended by the Commission, may make them disinclined to disclose information on criminal or improper practices or other matters of public interest.

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113 This may include maintaining the confidentiality of the identity of the informer, at least until his identity is required to be revealed during judicial proceedings. Cl 8(4) of the EARC Draft Bill states:

> "The confidentiality of the identity of a person who makes a public interest disclosure is to be preserved unless it is essential , having regard to rules of natural justice, that the identity be disclosed to a person who the information provided by the public interest disclosure may concern."

114 See para 4.72 above.

115 See para 4.82 above.

8. DEFINITIONAL AND PRACTICAL PROBLEMS AS TO THE CREATION OF A JOURNALIST-SOURCE PRIVILEGE

4.85 Several respondents to the Discussion Paper[116] suggested that in any statutory journalistsource privilege "journalist" should be defined simply by reference to membership of the AJA.[117] However, submissions from a journalist, the Australian Press Council and the AJA have highlighted a number of problems with, or limitations to, that approach.

4.86 A journalist[118] who responded to the Discussion Paper observed that at present the qualifications and qualities of "journalists" and "journalism" can be so broad or so various as to include almost anybody. Among the members of the AJA may be artists, photographers, authors, licensed and official shorthand writers, Hansard reporters, officers, and publicity and public relations personnel. The union's current members can include all manner of people, from so called mainstream daily newspaper reporters who deal exclusively in "hard news" to talk show hosts who deal occasionally in "hard news" but who spend much of their time promoting the products of advertisers. AJA membership is not even restricted to these people. Changes in the Association's recruitment policies over the past few years have resulted in a broadening of the criteria for membership. In 1991, for instance, the AJA amalgamated with the Australian Commercial and Industrial Artists Association, and in May 1992 it amalgamated with two other unions Actors' Equity and the Australian Theatrical and Amusement Employees' Association - to form a media alliance.

4.87 This respondent suggested that if the criterion of AJA membership were to be used to determine who would be entitled to a journalists' privilege, discretion may need to be used to exclude those engaged in propagating an overt, vested, commercial or political interest or view through any medium (print, radio or television). It could also be argued that publicity and public relations officers, media liaison officers, and ministerial press secretaries could not adhere to the AJA *Code of Ethics* because of Clauses 1 and 6 of the Code:

1. "They [AJA members] shall report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing relevant, available facts or distorting by wrong or improper emphasis."

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116 Mrs Rosemary Lorrimar; Mr Jens Linde (Danish Union of Journalists); Mrs Mary-Louise Vermeuhlen.

117 The AJA is now part of the Media Entertainment and Arts Alliance: see n 2 above.

118 Mr Robert Millhouse.

6. "They [AJA members] shall not allow advertising or commercial considerations to influence them in their professional duties."

4.88 The respondent also suggested that licensed or official shorthand writers or Hansard reporters no longer fall into the "serious" journalist category:

> "Their AJA membership appears to be more a matter of historical circumstance than professional relevance. The nature of their work also virtually precludes the use of confidential sources, let alone a medium to reveal information provided by confidential sources."

4.89 In addition there will also be members of the AJA who "float" in and out of the industry or particular fields, for example, daily newspaper reporters who move into public relations or vice versa.

4.90 The same respondent also commented on the definition of the related term "journalism":

> "Defining `journalism' in this information age appears much more difficult. It also seems to be a moving feast which, if enshrined in statute today, might become irrelevant tomorrow. It is doubtful, for instance, whether founders of the AJA ever envisaged that press secretaries or newspaper librarians would be classified as journalism practitioners under the AJA's current rules. . . . However, journalism surely includes any regularly and frequently published newspaper, magazine or journal or any radio or television broadcast that publishers or broadcasts pluralist views."

4.91 The respondent therefore suggested the following definition of "journalist":

> "Journalists are those engaged regularly and frequently and substantially in collecting, preparing, writing, and processing articles, words or images for the above."

4.92 In its response to the Discussion Paper, the AJA acknowledged that the issue of defining a journalist is very difficult:

> "[J]ournalism has no formal qualifications. The range of people writing for the media includes people who may usually work in other fields. No single grouping covers all journalists in the media. The AJA's membership is the largest single group, covering more than 90 per cent of journalists. However, it does not cover editors of daily papers, contributors who earn most of their income outside journalism and those who do not wish to join the AJA or who have resigned from the AJA."

4.93 The Australian Press Council's submisssion suggested a wide definition of "journalist" which would include members of the AJA but which would not be limited to such people:

> "A journalist is a person connected with or employed by a newspaper or magazine of general circulation, press association, news service, or radio or television station. Without limiting the generality of the above, journalist includes a member of the Australian Journalists' Association."

4.94 The definition of "journalist" proposed by the Australian Press Council seems quite unwieldy and unrelated to the actual work that a journalist does. The definition refers to people employed by certain organisations and could presumably cover everybody so employed - including secretaries, reporters, administrators, etc. Most people in the community would not consider all such people to be journalists and it would be inappropriate, particularly when the Commission's terms of reference are restricted to a consideration of *professional* privilege, for a privilege to cover confidential communications involving such a diverse range of people.

9. CONCLUSIONS

4.95 Confidential information, including the confidential identity of sources of information, will only be required in judicial proceedings if it is relevant to the determination of issues before the proceedings. Furthermore, it is apparent that courts will, as a matter of practice, go to great lengths to protect confidences or at least reduce the adverse consequences of a forced disclosure of confidential information.[119]

4.96 In the Commission's view, the public interest in the protection of confidential information in the hands of journalists, including the confidential identity of sources of information, does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

4.97 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[120] In appropriate circumstances,

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119 See Ch 2.

120 See paras 8.38-8.56 below.

confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion.

4.98 There have been proposals in Western Australia to move towards providing some form of whistleblower protection.[121] It is possible that such proposals may address many of the concerns that potential sources may have which may deter them from disclosing information on criminal or improper practices or other matters of public interest. The Commission supports the introduction of a whistleblower protection scheme in Western Australia, subject to the provisos that it limits the circumstances in which whistleblowers can reveal information to the media, rather than government authorities, to those recommended by EARC,[122] and contains the other protections found in the EARC Draft Bill[123]

121 See para 4.68 above.
122 See para 4.72 above.
123 See para 4.82 above.

Chapter 5

PROFESSIONAL RELATIONSHIPS: CLERICS AND PENITENTS

1. ABSENCE OF PRIVILEGE

5.1 Clerics[1] in Western Australia have no right either by statute or, it appears, at common law[2] to refuse to reveal confidential information to courts. Nor do courts have a discretion to disallow relevant and admissible evidence of confidential matters.

5.2 Tasmania, Victoria, the Northern Territory, New South Wales and several overseas jurisdictions reviewed by the Commission have specific statutory privileges relating to confidential communications with clerics.[3]

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[1] In this Report the term "cleric" refers to an official of any religion or church who is able to administer spiritual comfort, solace or advice and/or who is able to perform religious ceremonies in accordance with the dictates of that religion or church.

[2] See McNicol 324-328. After reviewing the common law authorities for the argument that no such privilege exists, McNicol concludes (at 328):

> "There is an extreme shortage of common law authority supporting such a view. It is submitted that this is partly because of the paucity of actual litigious cases touching on this area and partly due to the fact that in practice most judges would not compel a clergyman to disclose confidential communications made by a confessor in any event. The lack of testing of this privilege would not, however, be sufficient to refute the traditional belief that there is no common law privilege."

[3] See generally DP Ch 3. The Australian and New Zealand provisions are:

Evidence Act 1910 (Tas) s 96:

> "(1) No clergyman of any church or religious denomination shall divulge in any proceeding any confession made to him in his professional character, except with the consent of the person who made such confession.
>
> (3) Nothing in this section shall protect any communication made for any criminal purpose . . .".

Evidence Act 1939 (NT) s 12:

> "(1) A clergyman of any church or religious denomination shall not, without consent of the person who made the confession, divulge in any proceeding any confession made to him in his professional character.
>
> (3) Nothing in this section shall protect any communication made for any criminal purpose . . ."

Evidence Act 1958 (Vic) s 28:

> "(1) No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs."

Evidence Act 1898 (NSW) s 10:

> "(1) A person who is or was a member of the clergy of any church or 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.
>
> (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.
>
> (3) This section applies even in circumstances where an Act provides:
>
> (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or

5.3 Some clerics in Western Australia, in particular those who are members of the Catholic, High Anglican and Lutheran Churches, are bound by deeply held religious beliefs to refuse to reveal information obtained from penitents[4] or the fact that a confidential communication took place. The absence of a right to refuse to reveal such information could result in clerics being in contempt of court because of such deeply held beliefs. However, for clerics in the churches referred to, a legal requirement to disclose confessional information does not appear to pose a professional or a personal ethical dilemma because, whatever the law is, they are highly unlikely to disclose the information.

5.4 In his response to the Commission's Discussion Paper, the Catholic Archbishop of Perth noted:

> "A law requiring a priest to manifest confessional matters could never be complied with. It would seem unwise to create a system of law which one knows in advance would never be complied with on ethical grounds. . . . [N]o Minister of Religion would reveal confessional matter in any situation. So that for all practical purposes such information would never be relevant because it would never be available."

Similarly, in his submission to the Commission, the Anglican Archbishop of Perth noted:

> "[I]n practice, regardless of the law, it is generally understood that clergy understand themselves to be bound to confessional confidentiality. If an Anglican clergy person were pressed to reveal the fact that a person had made a confession or the contents of

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(b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.

(4) Without limiting the generality of subsection (3), this section applies:

(a) to any hearing or proceedings to which the *Royal Commission Acts 1923*, the *Special Commissions of Inquiry Act 1983* or the *Independent Commission Against Corruption Act 1988* applies; or

(b) in relation to a witness summoned to attend and give evidence before either House of Parliament (or a Parliamentary Committee) as referred to in the *Parliamentary Evidence Act 1901*.

(5) This section applies to religious confessions made before or after the commencement of this section.

(6) In this section `religious confession' means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned."

Evidence Amendment Act (No 2) 1980 (NZ) s 31:

"(1) A minister shall not disclose in any proceeding any confession made to him in his professional character, except with the consent of the person who made the confession.

(2) This section shall not apply to any communication made for any criminal purpose."

For provisions in other jurisdictions see DP paras 3.63-3.64 (Canada), 3.85-3.88 (United States),3.106-3.111 (Japan).

4 The term "penitent" is used in this Report to refer to any person to whom clerics, in their professional capacity, administer spiritual comfort, solace or advice.

> the confession he/she would be encouraged to refuse to comply with requests for information, on pain of penalty for contempt of court, if necessary. In this case the question of unfairness would arise."

The Discussion Paper noted the similar obligation placed on pastors of the Lutheran Church:

> "Since the silence of the confessional reflects the mighty forgiveness of God, which forever removes the sin and guilt, confessional secrecy is obligatory for the evangelical pastor, extending to silence in every area, including his family. . . . Lutheran pastors are silent not in defiance of civil law or in compliance with canon law, but because Christian love demands it."[5]

5.5 However, for clerics in other churches reviewed by the Commission the absence of a right to reveal confidential information does not pose ethical problems for clerics. If the law requires them to reveal confidential information, they will do so.[6]

5.6 As a matter of practice, the Commission is aware of no instance in Western Australia where a cleric has been required to provide information to courts, or has refused to comply with his legal obligation to provide such information.[7] It has, however, been suggested that due to the lack of a privilege for clerics in Western Australia, people have withheld a full account of a situation from a cleric because of the possibility of the cleric being called on to reveal that information.[8]

5.7 Prosecutors in criminal cases are generally reluctant to call clerics as witnesses and to require them to reveal confidential information.[9] This reluctance is likely to be an acknowledgement by prosecutors of a general community respect for clerics and the

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5 *Lutheran Encyclopedia* (1968) and written submission from Rev Schulz, President, WA District, dated 9 October 1990.

6 For example, Rev Mark Heath (Bible Presbyterian Church of Western Australia) submitted:

> "In a church counselling situation I believe it is the responsibility of the counsellor to inform the counsellee that they will not aid the subversion of the law. The law must be upheld for the common good of society. Where error has been made the church may impose ecclesiastical discipline, but this does not exempt the person from legal proceedings."

Other religious organisations which have indicated to the Commission that they would obey the law rather than maintain a confidence in the face of a legal requirement to breach the confidence include the Baptist Church, the Jewish religion (Orthodox and non-Orthodox), the Church of Jesus Christ of Latter Day Saints, Islam and the Buddhist Society (including a submission from the Bodhinyana Buddist Monastery). Some churches indicated that it would be a matter for the individual cleric to decide on, eg the Independent Spiritualists Church: see DP para 6.27.

7 See however the New South Wales case of *R v Young* (unreported) New South Wales Local Court, 16 August 1988, T347H/1 CM (discussed in DP para 3.19), where a priest was pressed to reveal confidential information during judicial proceedings but was not proceeded against for contempt of court when he refused to comply.

8 Mr James Goss (Minister, Kings City Church).

9 DP para 6.15.

confidences they hold.[10] It might also indicate that, in relevant cases, other evidence is available.

5.8 There is likely to be a similar reluctance by parties to civil and other proceedings to require clerics to reveal confidential information. Again, this reluctance is probably a product of the deference paid by the general community to clerics and to the role they play in the community's spiritual and general wellbeing and, in particular, to the sanctity of the confessional in the context of the Catholic, High Anglican and Lutheran Churches.[11]

5.9 Many people in the community do not know that clerics and people who share confidential information with them are not the subject of a statutory or common law privilege.[12] The Catholic Archbishop of Perth's submission to the Commission added weight to this belief, or at least to the fact that many people in Western Australia believe that Catholic priests would never reveal information obtained during confidential communications with priests:

> "[A] significant proportion of the population of this State does believe that de facto a cleric will claim and exercise this privilege whether the law explicitly provides for it or not. For the Catholic population make up a significant proportion of the population of this State. Catholics are insistently taught from their earliest years that in their approach to the Sacrament of Penance, they can be absolutely assured that no priest will ever divulge to any other person for any reason whatsoever what they have manifested to the priest in order to obtain sacramental absolution. Catholics would be so convinced of this that they would be scandalised and disbelieving if anybody suggested otherwise to them. No research would be needed to establish this conviction amongst this significant proportion of the population. It is a given, an absolute, instilled into every Catholic from their most tender years."

2. POSSIBLE RATIONALES FOR A PRIVILEGE

5.10 In the Commission's view, the public interest in the protection of confidential information in the hands of clerics does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

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10 The Catholic Archbishop of Perth submitted that "[i]n the light of the long tradition of Catholic Moral Theology, such hesitancy (on the part of prosecutors) would be indeed well-founded".

11 The Commission acknowledges that priests of these churches would rarely, if ever, consider breaking the secrecy of the confessional or other officially entrusted secrets, even in the face of a court order to that effect.

12 It is also apparent that a number of clerics and churches were unaware of the fact that there is no privilege relating to confidential communications with clerics in Western Australia, or least were unaware of this prior to the release of the DP.

5.11 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[13] In appropriate circumstances, confidential information held by clerics could be withheld as a result of the exercise of that discretion.

5.12 The following public interests may be relevant to the exercise of the judicial discretion:

(1) Restitution and repentance
(2) General community expectations
(3) Psychological and spiritual solace
(4) Freedom of religion
(5) Ethics and conscientious objection

(a) Restitution and repentance

5.13 It has been argued that by protecting confidential communications between clerics and penitents, penitents are more likely to be persuaded to make good their wrongdoing, or at least to acknowledge that what they are confessing or otherwise revealing to the cleric was wrong. There is an obvious public interest in wrongdoers rectifying the wrongs they have committed: a cleric might be able to assist to that end. The following observations were made in submissions to the Commission:

> "It is likely that this information would never come to light anyway. At least if it is divulged to another person, then there is a chance that the person will be encouraged to do everything else that is necessary to clear his/her conscience. This may involve giving oneself up (as I have experienced on a number of occasions), making restitution etc."[14]

> "(With a privilege) people would be encouraged to go for help without immediate threat of exposure during the heat of an event, but they themselves would be led to confess openly later. . . . Only when genuine help is being received and progress

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13 See paras 8.38-8.56 below.

14 Mr James Goss (Minister, Kings City Church).

made and that help would be jeopardised if information was released should privileged information be withheld."[15]

"In the case of confessional privilege the public interest is promoted insofar as a pastor will normally advise a penitent person to make restitution or `give themselves up' to the hands of the law as a sign of repentance and as a prerequisite for receiving absolution. At the outset a penitent may need the assurance of privilege before confessing to a crime; in the course of receiving advice he/she will hopefully see the point of delivering him or herself into the hands of the law. . . . If people simply `bottle up' guilt the general public will ultimately suffer; if there is no access to a mechanism to facilitate repentance the general public will also ultimately suffer."[16]

(b) General community expectations

5.14 Some clerics and penitents believe that a cleric-penitent privilege already exists.[17] There is a public interest in maintaining respect for the law and legal institutions. If a cleric were required by law to breach a confidence, the law and the institutions involved in its administration could be brought into disrepute.[18]

(c) Psychological and spiritual solace

5.15 It has been argued that there is a public interest to be served by the promotion by churches and religions of psychological health and spiritual comfort.

"[A privilege for clerics] would provide psychological and spiritual solace to those in need of it rather like refuge at the altar in early times."[19]

"Privilege in this case [relating to confessions] may positively assist the administration of justice. A mechanism to return to moral and spiritual health is in the public interest. Without confessional privilege such a mechanism may become unworkable."[20]

(d) Freedom of religion

5.16 Although there is no constitutional guarantee of freedom of religion in Western Australia,[21] there is a public perception that people may exercise their religious beliefs in

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15 Mr David Rossiter (Minister, Grace Christian Ministries Inc).

16 Anglican Archbishop of Perth.

17 In a submission to the DP Mr Sjirk Bojema (Minister, Canning Reformed Church) stated: "[I]t is generally assumed that we [clerics] have it [privilege] anyway."

18 See McNicol 328-331.

19 Legal Aid Commission of Western Australia.

20 Anglican Archbishop of Perth.

whatever manner they wish so long as they do not breach commonly accepted modes of behaviour. The public interest in individuals being able to practise their religion freely could be seen in terms of ensuring that we live in a "free society".[22] However, ritualised confessions are not common to all religions or churches operating in Western Australia. As far as the Commission is aware, maintaining confidentiality in the face of a legal requirement to breach the confidence is only a problem for clerics in the Catholic, High Anglican and Lutheran Churches in this State. Further, not all residents of Western Australia follow a religion or belong to a church or believe in a supernatural entity.

5.17 The possible benefits of protecting such confidences have been expressed in terms of significant individual interests which may indirectly benefit a wider community. McNicol, for example, states:

> "[E]very person has a right to `shrive their soul', that is, to seek spiritual forgiveness and absolution for their sins. A religious confession is said to express at the same time an affirmation of faith and a recognition of the state of sin. The admission of sin cannot be explained only by anguish or the feeling of guilt; it is related also to what is deepest in the person; that is, to what constitutes the person's being and the person's action. The awareness of sin is one of the salient features of religion, and confession is viewed as a first step towards salvation in Judaism and Christianity and other religions. The privilege given in this context involves a right of a person to insist on withholding from a judicial tribunal information that might assist it to ascertain facts relevant to an issue on which it is adjudicating. This fundamental right of every citizen to spiritual rehabilitation is essential to the freedom of religion which in turn is protected by s. 116 of the *Australian Constitution*.[23] It is also claimed . . . that some people might be deterred from confiding in their priest if they knew their confidences might be revealed at some later date to a court."[24]

5.18 When weighing up the respective public interests involved in freedom of religion and the administration of justice, the choice could be seen as one between upholding the practices or beliefs of a particular religion (which could result in the withholding of relevant information from judicial proceedings) and requiring disclosure to judicial proceedings of

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21 Cf s 116 of the *Australian Constitution*: see *Attorney General of Victoria (ex rel Black) v Commonwealth* (1981) 146 CLR 559. The mere existence of a constitional guarantee of freedom of religion does not ensure a privilege: for example, there is such a guarantee in the *Tasmanian Constitution*, yet there is a statutory privilege for clerics in that State: see *Evidence Act 1910* (Tas) s 96, quoted in n 3 above.

22 McNicol 329 observes:
"There is little doubt that the community places a high priority on the privacy and inviolacy of the relationship between minister and communicant whether or not the relationship is characterised in strict religious terms or as those of counsellor and confider."

23 But note that there is no such right embodied in the *Western Australian Constitution*.

24 McNicol 328. In relation to the last statement, see para 5.6 above.

relevant information irrespective of the religious context within which the information was generated.

(e) Ethics and conscientious objection

5.19 The confidentiality of ritualised communications between clerics and penitents in some religions is considered by the followers of such religions to be sacrosanct. A Catholic priest, for example, is under an absolute ethical or spiritual obligation not to reveal information obtained during a confession. The consequences for the priest who does reveal the information without the penitent's consent may include his belief that he is cut off from his God, excommunication from his church or serious disciplinary proceedings. A cleric may also undergo great personal suffering should he break an obligation of confidentiality which is at the basis of the cleric's fundamental religious beliefs.

5.20 The public interest in protecting the ethical beliefs of an individual professional or of his profession generally would not in itself be sufficient to justify the creation of a privilege. What would be more influential would be the wider public interest, if any, that the creation of the privilege would promote or protect.

5.21 The objections of some clerics to revealing confessional or some other confidential information obtained from a penitent are based on deeply held conscientious grounds rather than simply on a written code of ethics. Submissions from the Catholic Church, the Anglican High Church and the Lutheran Church highlighted the religious commitment the priests in those churches have to maintaining the confidentiality of confessions.

5.22 The right to conscientious objection might be considered a worthy public interest to protect. McNicol observes:

> "[T]he arguments from natural law (and from conscience, fairness and morality) will always prevail over an argument from positivism, the latter of which emphasises the importance of what the law is, as opposed to what it ought to be. The tension between naturalism and positivism is especially highlighted in this area, and in the New South Wales *Parliamentary Debates*[25] some of the participants impliedly recognised this tension when they urged against the Bill, arguing that governmental protection of the

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[25] On the Evidence (Religious Confessions) Amendment Bill 1989 (NSW) which resulted from the case of *R v Young* (unreported) New South Wales Local Court, 16 August 1988, T347-H/1 CM (discussed in DP para 3.19).

priest-penitent relationship will make no difference whatsoever to existing practices in any event. It is submitted that whilst this argument has merit, it is preferable to protect legislatively the priest-penitent relationship so as to reduce unnecessary friction between church and state and to prevent the needless criminal conviction and in some cases incarceration of ministers."[26]

3. ARGUMENTS AGAINST A RIGHT TO REFUSE TO REVEAL CONFIDENTIAL INFORMATION

5.23 Although there are a number of public interests which could be served by protecting the confidentiality of communications between clerics and penitents, there are other countervailing interests and practical considerations which detract from the desirability of creating a clerics' privilege.

(a) Relevant information

5.24 Although confidential information in the hands of clerics is often hearsay or second-hand information there will be cases where courts will be unable to determine issues satisfactorily without disclosure of information by clerics.

5.25 If confidential information in the hands of a cleric is not revealed during judicial proceedings an accused person might be wrongly convicted or wrongly acquitted.

5.26 In the Commission's view, the public interest in the protection of confidential information in the hands of clerics does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

5.27 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[27] In appropriate circumstances, confidential information held by clerics could be withheld as a result of the exercise of that discretion.

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26 McNicol 330.

27 See paras 8.38-8.56 below.

(b) Discrimination

5.28 It has been argued that the law should not be seen to discriminate either against or in favour of people on the basis of their particular religious persuasion. If a cleric could withhold relevant information from judicial proceedings because Catholic, High Anglican or Lutheran doctrine prevents him from revealing certain confidential information he shares with others, why should rabbis (for example) and persons who share confidential information with them not be offered the same protection? The Victorian and New South Wales statutory provisions which protect only formal or ritual confessions[28] afford protection only to churches with an institutionalised system of confession and penance. Those churches in which spiritual advisers give assistance on a personal and private basis are excluded from protection.

5.29 Such discrimination is said to be justified on several grounds, including:[29]

(1) otherwise "pseudo religions" could claim the protection of the privilege;

(2) it is only when confessions are made for the purpose of obtaining absolution that complete privacy is essential to the relationship;

(3) only when the penitent is under a positive duty to confess sins at regular intervals to a "priest" and, by the canons of the religion, such communications are imperatively demanded of the penitent, should legal protection be afforded to the confession;

(4) in other denominations, where the concept of penitence is more individualistic, the same need for confidentiality does not exist.

Further, in response to the allegation of narrowness, it has also been pointed out that in recent years the Catholic Church has worked to deritualise the confession so that it no longer remains the case that one must go into a confessional box and make a confession in order to attract the protection of the legislation.[30]

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28 *Evidence Act 1958* (Vic) s 28, *Evidence Act 1898* (NSW) s 10 (quoted in n 3 above).
29 McNicol 335.
30 Ibid.

4. DEFINITIONAL PROBLEMS WITH THE CREATION OF A CLERIC-PENITENT PRIVILEGE

5.30 There are a number of definitional problems with the creation of a cleric-penitent privilege.

(a) Confidential communications outside confession

5.31 Consideration would have to be given to whether such a privilege covers confidential information revealed to a cleric outside the context of a ritualised confessional.[31]

(b) Who is a cleric?

5.32 There would need to be a definition of "cleric" for the purposes of a statutory privilege. The range of definitions of "cleric" offered by the submissions to the Discussion Paper includes:

1. "A cleric should be judged to be a Minister of Religion ordained in a particular church for purposes of worship, spiritual leadership and pastoral care of members."[32]

2. "Religiously ordained as per the present situation for marriage celebrants."[33]

3. "Any recognised pastor of souls engaged in leading souls to their God and who in this role gives counselling and advice."[34]

4. "Where the governing body ie [sic] Board of Reference, Board of Elders, deem a person to hold a position as Pastor, or Minister, whether fulltime, parttime or otherwise."[35]

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31 On confidential information revealed otherwise than during a ritualised confession, see Appendix V.
32 Catholic Archbishop of Perth.
33 Mr Sjirk Bojema (Minister, Canning Reformed Church).
34 Mrs Rosemary Lorrimar (registered nurse).
35 Mr James Goss (Minister, Kings City Church).

5. "`Cleric' should be defined as someone who is ordained, or called, by a particular denomination or congregation to exercise spiritual authority within that denomination or congregation."[36]

6. "Any recognised counsellor of the church. Many members engaged in counselling are not members of the staff, but should be included. However, I could see this as potentially an area of confusion."[37]

7. "Any person in an office recognised by others as being an ordained office."[38]

8. "A `cleric' should be defined as a person recognised, in any religious organisation, as such whether by a licence, credential, ordination, etc."[39]

9. "Ordained officials of churches that has [sic] a rite of confession."[40]

10. "By reference to a person ordained by any religious organisation recognised by the laws of Australia."[41]

11. "Only religiously ordained officials of *particular* churches."[42]

5.33 In most of the statutory privilege provisions reviewed by the Commission there is no separate definition of "cleric". The Australian provisions refer to "clergyman of any church or religious denomination";[43] "member of the clergy of any church or religious denomination"[44] and "minister of religion"[45]. In the United States *Uniform Rules of Evidence* (1974) "clergyman" is defined broadly so as to include people others believe to be clerics:

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36 Mr L Galloway (President, Baptist Churches of Western Australia).
37 Rev Mark Heath (Pastor, Bible Presbyterian Church of Western Australia).
38 Mr David Rossiter (Minister, Grace Christian Ministries Inc).
39 Mr Warren Ison (Minister, Church of the Foursquare Gospel in Australia).
40 Rev Peter Abetz (Minister, Willeton Reformed Church).
41 Ms Mary-Louise Vermeuhlen.
42 Australian Physiotherapy Association (WA).
43 *Evidence Act 1910* (Tas) s 96(1); *Evidence Act 1939* (NT) s 12(1); *Evidence Act 1958* (Vic) s 28(1).
44 *Evidence Act 1898* (NSW) s 10(1).
45 Evidence Bill 1991 (Cth) cl 119.

> "[A] minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him."[46]

5.34 Georgia appears to be the only jurisdiction in the United States which has explicitly defined clerics in its privilege provision, limiting that privilege to:

> "any Protestant Minister of the Gospel, and [sic] priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called."[47]

(c) Who can claim or waive the privilege

5.35 The provisions for cleric-penitent privileges in other jurisdictions vary as to who can claim and waive the privilege. Some prohibit clerics from disclosing confidential communications, in which case neither the cleric nor the penitent can waive the privilege. A few jurisdictions grant the privilege to the cleric rather than to the penitent, in which case the penitent has no standing to object to freely given evidence of the cleric. Such a privilege would at least acknowledge the fact that a number of religions do not profess to treat all or any confidential communications as above the requirements of the law. The New South Wales provision is of this kind:

> "A person who is or was a member of the clergy of any church or 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."[48]

5.36 The New South Wales provision also applies where the person was a cleric at the time that the relevant confidential information was disclosed to him, but was no longer a cleric at the time of the judicial proceedings. In such cases the ex-cleric would be entitled to exercise the right to refuse to divulge the information.

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46 Rule 505(a)(1).

47 *Georgia Code* § 24-9-22 (1982). No court has denied the privilege to an individual who claimed to be a cleric because he was not covered by that State's statutory definition of cleric, though courts have denied the privilege to religious practitioners who do not claim to be ordained clergy within their respective churches: "Developments in the Law - Privileged Communications" (1985) 98 *Harv L Rev* 1450, 1457.

48 *Evidence Act 1898* (NSW) s 10(1).

(d) Exceptions

5.37 Most statutory privileges for clerics are subject to exceptions. Most commonly, the privileges do not operate if the confidential communication is made for any criminal or fraudulent purposes. The Commission agrees that this is a justifiable exception to any professional privilege - it exists in relation to legal professional privilege.[49] Although it may be highly unlikely that a cleric of an established religion would be involved in criminal activity, that possibility should be provided for in legislation introducing a privilege.[50]

5.38 The Commonwealth Evidence Bill has the most restrictive provision for clerics reviewed by the Commission.

> "(1) Evidence is not to be adduced of a confidential communication that was made:
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> (a) between a minister of a religion, acting in the capacity of such a minister, and another person; and
>
> (b) in the course of the other person:
>
> (i) making a confession in accordance with the religion; or
>
> (ii) seeking spiritual advice or spiritual comfort.
>
> (2) Subsection (1) does not apply to evidence given with the consent of the other person referred to in that subsection.
>
> (3) Subsection (1) does not apply to evidence of a communication made in furtherance of the commission of
>
> (a) a fraud; or
>
> (b) an offence; or
>
> (c) an act that renders a person liable to a civil penalty.
>
> (4) Subsection (1) does not apply to evidence if, were the evidence not adduced, a person would be reasonably likely to be at greater risk of physical harm than if the evidence were adduced."[51]

5.39 The exceptions in sub-clauses (3)(c) and (4) above are unique among the provisions reviewed by the Commission. It is difficult to envisage a situation where a confidential communication between cleric and penitent was made in furtherance of an act that renders a person civilly liable (presumably in tort, contract etc). Communication is a participatory concept, so even if the penitent sought a priest's advice and this advice was in turn used to render another liable to damages in tort or contract, the communication between the priest and

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49 See Ch 3.

50 This exception does not appear in the Victorian provision: *Evidence Act 1958* (Vic) s 28.

51 Evidence Bill 1991 (Cth) cl 119.

the penitent would not necessarily have been made in furtherance of that liability if the priest did not know that was, or could have been, the result.

5.40 Even the risk of harm to another (sub-clause (4)) would not induce certain clerics to reveal the contents of a confidential communication. If the revelation were made outside the confessional priests may still be prevented by the canons of their church from revealing such information.

5. CONCLUSIONS

5.41 It will be very rare for a cleric to be required in judicial proceedings to reveal confidential information disclosed to him by a penitent. It will be even rarer for a cleric to be required in such proceedings to reveal confessional information.

5.42 Despite this, there may be cases where such confidential information will be of vital importance to the determination of litigation. A person's liberty or reputation may very well depend upon the revelation of the information by the cleric.

5.43 In the Commission's view, the public interest in the protection of confidential information in the hands of clerics does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

5.44 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[52] In appropriate circumstances, confidential information held by clerics could be withheld as a result of the exercise of that discretion.

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52 See paras 8.38-8.56 below.

Chapter 6

PROFESSIONAL RELATIONSHIPS: DOCTORS AND PATIENTS

1. ABSENCE OF PRIVILEGE

6.1 There is no privilege at common law or by statute in Western Australia to protect the confidentiality of information passing between doctors[1] and patients.[2] Unlike some journalists[3] and some clerics,[4] doctors are not generally obliged by ethical, moral or religious dictates to maintain the confidentiality of professional communications with their patients in the face of a legal requirement to reveal confidential information.

6.2 A number of jurisdictions reviewed by the Commission have created a statutory privilege for confidential communications between doctors and their patients.[5] However, the operation of these privileges is limited in a number of respects.

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1 The term `doctor' is used in this Report primarily to refer to medical practitioners registered under the *Medical Act 1894* (WA).

2 The Federal Court has confirmed that there is no privilege at common law for confidential communications between doctors and patients: *Hill v Minister for Community Services and Health* (1991) 30 FCR 272. It was held that there is no privilege attaching to communications between doctors and their patients other than in statute, and even if s 28(2) of the *Evidence Act 1958* (Vic) (see n 5 below) was otherwise capable of applying in relation to proceedings before any Medical Services Committee of Inquiry in Victoria, it was inconsistent with the *Health Insurance Act 1976* (Cth). There are a number of statutory provisions in Western Australia which compel doctors to disclose confidential information, eg *Health Act 1911* s 276 (infectious diseases); s 300 (venereal diseases); *Health (Notification of Cancer) Regulations 1981* (cancer).

3 See Ch 4.

4 See Ch 5.

5 See generally DP ch 3. The Australian provisions are:
Evidence Act 1910 (Tas) s 96:
"(2) No physician or surgeon shall, without the consent of his patient, divulge in any civil proceeding any communication made to him in his professional character by such patient, and necessary to enable him to prescribe or act for such patient unless the sanity of the patient is the matter in dispute.
(2a) No person who has possession, custody, or control of any communication referred to in subsection (2) or of any record of such a communication made to a physician or surgeon by a patient shall, without the consent of the patient, divulge that communication or record in any civil proceedings unless the sanity of the patient is the matter in dispute.
(3) Nothing in this section shall protect any communication made for any criminal purpose, or prejudice the right to give in evidence any statement or representation at any time made to or by a physician or surgeon in or about the effecting by any person of an insurance on the life of himself or any other person."
Evidence Act 1939 (NT) s 12:
"(2) A medical practitioner shall not, without the consent of his patient, divulge in any civil proceeding (unless the sanity of the patient is the matter in dispute) any communication made to him in his professional character by the patient, and necessary to enable him to prescribe or act for the patient.

6.3 The absence of a privilege in Western Australia for communications between doctors and their patients has not, to the Commission's knowledge, stimulated a widespread public, academic or professional interest or concern.[6] Western Australian courts have rarely, if ever, confronted the situation of a doctor or a patient refusing to provide information forming part of a confidential communication between them on the basis of ethical or moral beliefs.[7] This may indicate that not all doctors consider themselves ethically bound to maintain confidentiality in the face of a legal requirement to reveal confidential information. It might also reflect the fact that the Australian Medical Association's *Code of Ethics* does not preclude a member of the Association from revealing confidential information when the law so requires.[8]

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(3) Nothing in this section shall protect any communication made for any criminal purpose, or prejudice the right to give in evidence any statement or representation at any time made to or by a medical practitioner in or about the effecting by any person of an insurance on the life of himself or any other person."

Evidence Act 1958 (Vic) s 28:

"(2) No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding or an investigation by a Complaints Investigator under the *Accident Compensation Act 1985* any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient.

(3) Where a patient has died, no physician or surgeon shall without the consent of the legal personal representative or spouse of the deceased patient or a child of the deceased patient divulge in any civil suit action or proceeding any information which the physician or surgeon has acquired in attending the patient and which was necessary to enable the physician or surgeon to prescribe or act for the patient.

(4) Sub-section (3) shall cease to have any application to or in relation to any civil suit or proceeding at and from the time at which there is no legal personal representative spouse or child of the deceased patient.

(5) Sub-sections (2) and (3) do not apply to or in relation to -

(a) an action brought under Part III of the *Wrongs Act 1958* to recover damages for the death of the patient;

(b) proceedings brought under the *Workers Compensation Act 1958* or the *Accident Compensation Act 1985* to recover compensation for the death of the patient; or

(c) any civil suit action or proceeding in which the sanity or testamentary capacity of the patient is the matter in dispute."

See also DP paras 3.38-3.40 (New Zealand); DP paras 3.65-3.67 (Canada); DP paras 3.82-3.84 (United States); DP paras 3.106-3.111 (Japan).

6 The Australian Medical Association in Western Australia has not made a submission to the Commission on this reference despite written and oral requests.

7 In its review of reported cases in common law and other jurisdictions the Commission found no instances of a doctor being held in contempt of court for refusing to provide confidential patient information to judicial proceedings. Only one instance was referred to the Commission where a doctor initially refused to provide a magistrate with confidential patient information. In that case the doctor revealed the information after failing to obtain the court's authority to withhold it on the grounds that it would be extremely embarrassing to the witness.

8 Para 6.2.4 of the Australian Medical Association *Code of Ethics* (1989) states:

"The doctor's usual course when asked in a court of law for medical information concerning a patient in the absence or refusal of that patient's consent is to demur on the ground of professional secrecy. The presiding judge, however, may overrule this contention and direct the medical witness to supply the required information. The doctor has no alternative but to obey unless he is willing to accept imprisonment for contempt of Court."

6.4 Although there are few reported cases in Australia concerning the existing Australian statutory privileges relating to confidential communications between doctors and patients,[9] it is possible that the very existence of such provisions has influenced litigants in deciding whether or not to call a doctor as a witness and to require him to reveal confidential patient information. However, people in Western Australia are unlikely to be more deterred from revealing confidential information to their doctors than people in Tasmania, Victoria or the Northern Territory where such a privilege exists.[10]

2. POSSIBLE RATIONALES FOR A PRIVILEGE

6.5 In the Commission's view, the public interest in the protection of confidential information in the hands of doctors does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

6.6 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[11] In appropriate circumstances, confidential information held by doctors could be withheld as a result of the exercise of that discretion.

6.7 The following public interests may be relevant to the exercise of the judicial discretion:

(1) Medical ethics

This is in contrast to the position of members of a number of other professional organisations, such as members of the Australian Journalists' Association: see Ch 4. It is also in contrast to the position of some clerics such as Catholic priests: see Ch 5.

9 See n 5 above. For a summary of relevant Australian cases on these provisions see McNicol 356-369.

10 There is an absence of research into whether the general public in any Australian jurisdiction would be influenced in their decision whether or not to seek medical advice by the fact that no privilege would attach to communications between doctor and patient. McNicol 348-349 discusses research conducted in the United States which indicated that people would not be deterred from seeking medical help because of the possibility of disclosure in court: see D W Schuman & M S Weiner "The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege" (1982) 60 *NC L Rev* 893 in which the authors conclude that both proponents and opponents of a privilege in Texas had overstated their case the existence of the privilege was of consequence to few patients and in few cases. See also Z Chafee, "Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?" (1943) 52 *Yale L J* 607; T P Wise "Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of *Tarasoff*" (1978) 31 *Stan L Rev* 165.

11 See paras 8.38-8.56 below.

(2) Invasion of privacy

(3) Medical treatment dependent on adequate record keeping

(4) Health of the community

(5) Similarity to lawyer-client relationship

(6) Community expectations

(a) Medical ethics

6.8 Ethical considerations involved in the doctor's disclosure of confidential patient information were discussed in detail in the Discussion Paper.[12] Generally, Australian doctors are under an ethical duty to maintain confidentiality. However, Australian Medical Association members, at least, are permitted by their code of ethics to reveal confidential patient information when required to do so during judicial proceedings. Doctors might also be able to reveal such information without contravening their ethical responsibilities where there is a statutory requirement to provide information to a particular body or authority, and the public interest requires disclosure of the confidential information.[13]

6.9 Apart from the Australian Medical Association's *Code of Ethics*, individual doctors may still be in an ethical dilemma when required by courts to reveal confidential patient information. Not all Australian doctors are members of the Australian Medical Association, nor would all members of that Association take comfort from the fact that the Code permits members to reveal confidential patient information when legally required to do so. An individual doctor may conscientiously believe that it would not be in his patient's interest to reveal to a court information which might be highly embarrassing or damaging.[14] A legal requirement for a doctor to breach his personal ethical beliefs could be seen as unduly harsh on the doctor.

6.10 The public interest, if any, in protecting the ethical beliefs of an individual professional or that profession generally would not itself be sufficient to justify the creation of

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12 Paras 5.4-5.24.

13 McNicol 342-343 has suggested five circumstances in which it would be ethically appropriate for a doctor to reveal confidential patient information: when the patient gives consent; when it is undesirable to seek consent on medical grounds; the doctor's overriding duty to society; for certain medical research; and when it is required by due legal process.

14 The University of Western Australia School of Medicine has a tradition whereby prior to graduation, students make a declaration to uphold the principles of the Hippocratic Oath. This is not a requirement of obtaining a degree, although it does not appear that any student to date has failed to make the declaration.

a general right to refuse to reveal confidential information to courts. More influential would be the wider public interest that creation of such a right would promote and protect.

6.11 It has been argued[15] that because some individual doctors may choose to suffer the penalty for contempt of court rather than comply with a court order to reveal confidential patient information, the legal system could be brought into disrepute. After all, such doctors would suffer simply for protecting their patients' privacy and wishes. However, the Commission is not aware of any doctor in an Australian jurisdiction who has (on those or any other grounds) ultimately refused to comply with such a court order.[16] Nor is it apparent that the public interest in compliance with court orders is at risk from the absence of a general right for doctors to refuse to reveal confidential patient information. It is apparent, however, that the information held by doctors is vitally important to a wide range of judicial proceedings.[17]

(b) Invasion of privacy

6.12 The Commission acknowledges that when a doctor is required to reveal otherwise confidential patient information in judicial proceedings, not only the doctor but also the patient could be placed in a difficult position. The patient may suffer inroads into his privacy, embarrassment and other more tangible consequences as a result of the doctor's forced revelation of confidential information. An example was provided by a medical practitioner responding to the Discussion Paper:[18]

> "In the late '70s, early '80s . . . I examined a 17 yr old rape victim. It is considered good medical practice to examine the victim for sexually transmitted disease at the initial examination, so that if she develops any infection as a result of the assault, this is well documented. In this instance, the young girl had gonorrhoea at that initial

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15 McNicol 341-344.

16 McNicol 343-344 suggests that there is some slight evidence that doctors will refuse out of ethical duty to divulge patient confidences even in the face of a court order. She notes (at 343 n 30): "Dr E H Molesworth, a member of the New South Wales Medical Board stated `there is a very strong body of medical opinion that a medical attendant should refuse, even in the face of a command from a judge, to disclose information given to him in confidence by a patient': see ALRC Report No 26 (1985) Vol 1 para 914, pp 512-513. The Australian Law Reform Commission also stated that a policy of disobedience to the law is hardly the best method of meeting the position. The other alternative, however, is also unsatisfactory, namely, the course adopted by some doctors in keeping two sets of records one for treatment and one for use in evidence. On the other hand, some of the cases themselves indicate that a doctor when faced with a court order will give the required evidence. See for example, *Nuttall v Nuttall and Twyman* (1964) 108 Sol J 605."

17 See paras.6.24-6.25 below.

18 Dr Carol Deller.

> examination, and I was forced to reveal such details *in open court*. Her `mates' in court thus learned of her infection, and the defence counsel used the evidence to cast doubt on her sexual morals. No initial medical tests were performed on the accused, so even if he had any similar disease, he did not suffer the same exposure in open court. I did request not to reveal the test result that showed infection, but was a directed by the magistrate to give those facts."[19]

6.13 A privilege attaching to confidential communications between doctor and patient may prevent such information being revealed in court and thus avoid the patient's embarrassment. However, patients and doctors are not in a more sensitive position than other persons about whom evidence may be given in court. Embarrassing and damaging information is revealed about individuals in Western Australian courts every day.[20] The public interest in the administration of justice prevails over the public interest in protecting information from disclosure in court which may affect the sensitivities of individuals. Further, courts have powers to protect witnesses and others from exposure to undue embarrassment or other detrimental effects of information being given as evidence in judicial proceedings.[21]

(c) Medical treatment dependent on adequate record keeping

6.14 The Doctors' Reform Society of Western Australia in a submission in response to the Discussion Paper suggested that the absence of a professional privilege relating to information passing between a doctor and his patient might result in inadequate records being maintained of the patient's condition:

> "[There is] some uncertainty as to what may or may not be required to be produced in court. Information which may look prejudicial to a potential witness may therefore not be recorded on medical notes, for fear of being required in court. This could lead to important information being not revealed or forgotten, and less than ideal care being received by the client."[22]

6.15 The Commission would be concerned if this was occurring in Western Australia. It is clearly in the best interests of patients for records of their treatment to be maintained. It is also an integral part of doctors' responsibilities to their patients. The Commission assumes that deliberate failure to keep proper records would be a rare occurrence because the quality

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19 Note the possibility of closing the court in such circumstances under s 635A of the *Criminal Code* and s 65 of the *Justices Act 1902*: see para 2.7 above.

20 For example, most sexual abuse trials are heard in open court. Anyone attending such a trial would hear evidence which could be embarrassing to a witness or party to the proceedings.

21 For examples see Ch 2.

22 The Nurses Board of Western Australia also noted this possibility in their response to the DP.

of medical care given to individual patients is of the utmost concern to doctors and other medical professionals. Without adequate medical records being kept medical care would suffer.

6.16 There is a public interest in maintaining and fostering responsible and thorough medical care in the community.[23] However, the mere possibility of inadequate medical records being kept is in itself not a justification for creating a doctorpatient privilege.

(d) Health of the community

6.17 The proponents of the creation of a right to refuse to reveal confidential patient information invariably refer to the public interest involved in the maintenance and promotion of good health in the community. Unless people fully disclose their problems to their doctors it is unlikely that they will be able to get the most appropriate medical attention.[24] Some people may be deterred from seeking appropriate medical attention if they fear that what they disclose to doctors may be revealed in subsequent judicial proceedings. Consequently, the general health of individuals and the community may suffer.

6.18 It is impossible to quantify the beneficial effects which might result from a guaranteed assurance of doctor-patient confidentiality. This is primarily due to the lack of relevant empirical research.[25] Whether or not people in need of medical treatment refrain from seeking such treatment because of fear of disclosure of communications with their doctor is difficult to determine. It would largely depend on conjecture on the part of patients or potential patients as to how they would react in circumstances which they may find difficult to comprehend.

6.19 Nevertheless, the Commission is reluctant to dismiss the possible adverse effects of lack of a privilege, particularly given the situation in Australia in the 1990s in relation to

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23 See para 6.17 below.

24 For example, in a submission in response to the DP a medical practitioner wrote:
"Evidence of sexual infections, or discussion of injuries/sexual difficulties/pregnancies - the paternity and the outcome, are all very sensitive areas, where the truth can be very important in deciding what advice/therapy to use. The fear of subsequent disclosure in court can inhibit/prevent truthful discussion."

25 McNicol 348 refers to United States research in the 1940s and early 1980s which indicate that people would not be deterred from seeking medical help because of the possibility of disclosure in court and to the inability of the Victorian Statute Law Revision Committee in 1966 to find any evidence to support the contention that the operation of the common law in the other states had any influence on the confidences of patients in doctors.

people's concerns about confidentiality issues and the social stigma attached to some medical conditions such as AIDS, Hepatitis B and sexually transmitted diseases. Recently, there has been public discussion on the social and legal implications of AIDS.[26] If a doctor is required by a court to reveal confidential information which would identify an AIDS sufferer or reveal that a person associated with the litigation has, or is suspected of having, AIDS, others who suspect that they have AIDS or are in a lifestyle where they risk contracting AIDS could be deterred from seeking medical assistance or advice. The health of the wider community could be at risk if such people cannot be assured that what they reveal to doctors will go no further than is necessary for doctors to advise and treat patients.[27] As the *Australian HIV/AIDS Legal Guide* observes:

> "The protection of confidentiality in relation to a person's HIV status is a critical issue for people with HIV. Although all medical information should be regarded as private, this consideration is particularly important in the case of HIV, because HIV infection brings with it a risk of stigma and discrimination that is not present with many other diseases. Moreover, knowledge of a person's HIV status may lead to inferences about that person's sexual and drug taking habits (which may be illegal) and social contacts.
>
> Effective confidentiality protection of HIV/AIDS-related information is necessary for several reasons. It represents an important symbolic statement about the right of each person to decide who should know about his or her HIV status. It assists in preventing discrimination against people with HIV. And it is an important part of public health strategies that require the trust and cooperation of people with or at risk of HIV in order to encourage voluntary HIV testing and measures to reduce the risk of HIV transmission." [28]

6.20 A judicial discretion to excuse witnesses from answering a question or producing a document which would otherwise be a breach of confidence would not assure potential patients of continued confidentiality. However, it would provide for the possibility of confidentiality being maintained.[29] Potential patients can also obtain reassurance from the current practice of courts to suppress the names of parties to litigation who are suffering from

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26 See eg J Godwin et al, *Australian HIV/AIDS Legal Guide* (2nd ed 1993). The issues raised in those discussions are of course applicable to a wide range of community health problems and AIDS is referred to here simply for illustrative purposes.

27 Rose J in the English case of *X v Y* ([1988] 2 All ER 648 at 653 stated:
"In the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future individual patients `will not come forward if doctors are going to squeal on them'. Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward they cannot be counselled and self-treatment does not provide the best care."

28 Godwin et al, op cit n 26, 63.

29 See Ch 8.

AIDS,[30] and from other procedures used by courts to protect confidences or to reduce the adverse consequences of court sanctioned breaches of confidence.[31]

(e) Similarity to lawyer-client relationship[32]

6.21 One respondent to the Discussion Paper sought to justify the creation of a privilege relating to confidential communications between doctors and their patients, or at least the extension of legal professional privilege to such communications, on the basis that doctors and lawyers perform some similar functions - such as advocating on behalf of their patients/clients.[33]

6.22 The public interests maintained and promoted by legal professional privilege are discussed in Chapter 3.[34] Those interests involve the adversarial system and the administration of justice. Although medical professionals may have an impact on these matters in numerous ways, their primary function relates to the health of individuals and the wider community. An extension of legal professional privilege to relationships other than lawyers and their clients cannot be undertaken so long as the law in Western Australia prohibits professionals other than lawyers from giving legal advice.[35]

(f) Community expectations

6.23 Doctors are required by a variety of statutes[36] to reveal otherwise confidential information to relevant authorities. However, the Commission believes that members of the

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30 See para 2.16 above.

31 See Ch 2.

32 McNicol 346 considers this as an aspect of an argument against the creation of a doctor-patient privilege. However, she suggests:

> "No doubt both `privileges' would safeguard the rights of the client or patient and encourage full and frank disclosure on her or his part to the respective lawyer or doctor. It might even be said that legal professional privilege and medical professional privilege will both encourage the use of professional services (legal and medical) and enhance their quality. However, the rationale and operation of the two professions are quite different and hence the need for a privilege in one profession is not necessarily the same as the need for a privilege in the other. As Wigmore so clearly states [J H Wigmore *Evidence in Trials at Common Law* (McNaughton ed, 1961) Vol 8, 831]:
>
> `[T]he services of an attorney are sought primarily for aid in litigation, actual or expected, while those of the physician are sought for physical cure; that hence the rendering of that legal advice would result directly and surely in the disclosure of the client's admissions if the attorney's privilege did not exist, while the physician's curative aid can be and commonly is rendered irrespective of making disclosure.'"

33 Dr David Formby (Princess Margaret Hospital).

34 See paras 3.6-3.16 above.

35 See para 7.8 below.

36 See n 2 above.

public, if asked, would expect doctors to maintain their confidentiality and privacy. This is particularly so given that people traditionally reveal to their doctors information of a medical and personal nature which they would not reveal to others. Most people seeking medical attention probably do not contemplate that what is said between them and their doctors may be required to be disclosed in future judicial proceedings. Further, it is likely that most people are unaware that communications between patients and doctors are not privileged in Western Australia.

3. ARGUMENTS AGAINST A RIGHT TO REFUSE TO REVEAL CONFIDENTIAL INFORMATION

(a) Relevant information

6.24 In many judicial proceedings information held by doctors is very relevant to the determination of issues before courts. Often, without such information, those issues will not be able to be determined satisfactorily, if at all.[37] In civil courts, for example, doctors are most commonly called as witnesses in actions for damages for personal injuries.[38] In such cases averments about the plaintiff's injuries are made by the plaintiff and frequently by the defendant, and all relevant medical records are discovered.

6.25 Other cases where justice would be difficult to achieve without disclosure by a doctor of information obtained in the course of his relationship with a patient include cases of medical negligence, cases where the issue is the sanity or the testamentary capacity of the patient, and cases where the issue is the truth of the statements made by the patient in order to obtain insurance. In jurisdictions with statutory doctor-patient privileges such circumstances are commonly acknowledged by exceptions to the privilege.[39]

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37 In its submission on the Commission's Discussion Paper, the Legal Aid Commission of Western Australia was strongly opposed to the suggestion that a privilege for doctors and their patients be created because: "This would mean that doctors could not be compelled to inform the Court of things such as the patient's information regarding previous injuries which may be relevant to the matter in question. If the interests of justice are to be served then the truth should come out."

38 See DP para 5.31.

39 Eg *Evidence Act 1910* (Tas) s 96; *Evidence Act 1939* (NT) s 12; *Evidence Act 1958* (Vic) s 28 (quoted in n 5 above).

6.26 An example of where the Crown evidence given by a doctor was considered vital to the just resolution of the issues in a criminal case was referred to in a submission to the Commission:[40]

> "In an attempted murder case . . . the defence sought to lead evidence in cross examination from a Crown doctor that the victim of the alleged attempted murder was suffering from alcoholic dementia. The doctor had examined the victim and the evidence, establishing dementia, was admitted. This evidence corroborated the accused's contention that the victim was acting in an unpredictable manner (by reason of alcoholic dementia), thus justifying or excusing the accused's use of force. The accused was acquitted of attempted murder, being convicted only of grievous bodily harm (with no intent) and placed on probation. Clearly, privilege would have prevented the facts ie the dementia, being revealed."

6.27 *Wigmore on Evidence*[41] indicates that the practical employment of statutory doctor-patient privileges in the United States has come to mean little but the "suppression of useful truth - truth which ought to be disclosed and would never be suppressed for the sake of any inherent repugnancy in the medical facts involved". Wigmore asked: "Is the expected injury to the relation, through disclosure, greater than the expected benefit to justice?"[42] The answer was given in the negative:

> "The injury is decidedly in the contrary direction. Indeed, the facts of litigation today are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from influenza to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by everyone - by everyone except the appointed investigators of truth."[43]

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40 The Legal Aid Commission of Western Australia.

41 Op cit n 32, 831. McNicol 345 notes that "Wigmore also claims that 99 per cent of the litigation in which the privilege is invoked consists of three classes of cases: actions on policies of life insurance where the deceased's misrepresentations of health are involved, actions for corporal injuries where the extent of the plaintiff's injury is an issue, and testamentary actions where the testator's mental capacity is disputed. In all of these, the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any real reason for the party to conceal the facts, except as a tactical manoeuvre in litigation. In the first two of these, the advancement of fraudulent claims is notoriously common; nor do the culpable methods of some insurers or carriers, whatever they may have been or still are, justify the infliction of retaliatory penalties, indirectly or indiscriminately, by means of an unsound rule for the suppression of truth."

42 Op cit n 32, 829.

43 Id 830. This may not be as relevant in respect of diseases such as AIDS where the symptoms may not manifest themselves for many years and where there is an obvious stigma attached to any person who has or is suspected of having the disease. Perhaps Wigmore's observations are more appropriate to traditional diseases and ailments.

6.28 Wigmore argued against the creation of a doctor-patient privilege:

> "The extreme of farcicality is often reached in litigation over personal injuries in the common case, a person injured by an automobile amid a throng of sympathizing onlookers. Here the element of absurdity will sometimes be double. In the first place, there is nothing in the world, by the nature of the injury, for the physician to disclose which any person would ordinarily care to keep private from his neighbours; and, in the second place, the fact which would be most strenuously secreted and effectively protected, when the defendant called the plaintiff's physician and sought its disclosure, would be the fact that the plaintiff was not injured at all!"[44]

6.29 McNicol agrees with Wigmore's objections to the creation of a doctors' privilege and suggests that "the creation of a doctor-patient privilege could well constitute an impediment to justice and truth".[45]

6.30 In the Commission's view, the public interest in the protection of confidential information in the hands of doctors does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

6.31 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[46] In appropriate circumstances, confidential information held by doctors could be withheld as a result of the exercise of that discretion.

(b) Protecting confidentiality without privilege

6.32 As with all other professional relationships, in a particular case existing judicial discretions and procedures may well protect the confidentiality of information passing between a doctor and his patient.[47] For example:

* documents which contain confidential material may be produced to the court and not read aloud.

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44 Id 830.
45 McNicol 345.
46 See paras 8.38-8.56 below.
47 See also Ch 2.

* A judge might decide to order production of a document with the blocking out of certain parts or certain names, substituting anonymous references for them if necessary.

* In the case of oral testimony, a witness may be permitted not to give his address where he has good reason to conceal it.

* The witness may be permitted to give a written response which is shown to the judge, jury and counsel, rather than give the evidence orally.

* The court may limit the use which may be made of such communications: the judge may, for example, direct that no use be made of the information outside particular proceedings.[48]

6.33 The primary criticism of discretions and procedures available to protect confidential information during judicial proceedings is that they provide no guarantee of confidentiality. In Western Australia a doctor cannot assure his patient that what the patient reveals to the doctor during the course of professional consultations will go no further. A judicial discretion to protect confidential information would not provide such a guarantee.

(c) Discrimination against other relationships

6.34 It has been argued that protection of the doctor-patient relationship would discriminate against other confidential relationships such as cleric-penitent, accountant-client and journalist-source where one party is under an ethical, moral or professional obligation not to disclose confidences. McNicol states:

> "[W]hilst it would no doubt be unfair legally to protect the doctor-patient relationship over and above any of the other relationships mentioned, it would be unlikely to occur because there is no stronger argument in favour of the protection of the doctor-patient relationship than any of the other above-named relationships."[49]

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48 See *Chantrey Martin (a firm) v Martin* [1953] 2 QB 286. Non compliance with the order would be a contempt of court.

49 McNicol 346.

6.35 However the Commission considers that each professional relationship should be examined on its merits. The public interests, if any, to be maintained or promoted by the protection of confidential communications within professional relationships are likely to differ according to the type of relationship and the nature of the communications.

4. DEFINITIONAL PROBLEMS WITH THE CREATION OF A DOCTOR-PATIENT PRIVILEGE

6.36 There are a number of definitional problems with the creation of a doctor-patient privilege.

* The extent of protection - such a privilege would conver "medical practitioner" registered under the *Medical Act 1894*, but it would be necessary to determine whether it would cover other health professionals;[50]

* Whether a claim to the privilege should be available to the medical practitioner at his discretion, or whether he should be prohibited from revealing confidential information; and

* The appropriateness or otherwise of the limits applying to the doctor-patient privileges in other jurisdictions, including the scope of the discussions between doctor and patient which would be included in the privilege.[51]

6.37 The statutory privileges in Tasmania, Victoria and the Northern Territory are all subject to exceptions. These were discussed in detail in the Discussion Paper.[52] The Victorian provision differs in a number of respects from the Tasmanian and Northern Territory provisions. For example the Victorian provision:

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50 A wide range of health professionals are regulated by other statutes, eg *Chiropractors Act 1964*; *Dental Act 1939; Dental Prosthetists Act 1985; Occupational Therapists Regulation Act 1980; Optometrists Act 1940; Physiotherapists Act 1950; Podiatrists Registration Act 1984; Psychologists Registration Act 1976*. There are other health practitioners who are not regulated by statute, such as acupuncturists and practitioners of "alternative medicine". It is very doubtful whether any proposed privilege for doctors should cover all or any of these categories of health professional.

51 A number of respondents to the DP noted that patients often reveal to their doctors more then simple medical information. Doctors hear confidential social, domestic, financial and other information - all or any of which might be relevant to the doctor's assessment of the most appropriate course of action to recommend in relation to a particular patient's condition.

52 See DP paras 3.2-3.16.

* extends the operation of the doctor-patient privilege beyond the death of the patient - the consent of the deceased's personal representatives or child would be required before such information could be revealed during judicial proceedings;

* permits the possibility of the doctor-patient privilege being used to suppress communications made for criminal purposes;

* does not have the insurance exception found in the Tasmanian and Northern Territory provisions;

* unlike the Tasmanian and Northern Territory provisions, includes an exception in cases where the patient's testamentary capacity is in issue in civil proceedings.

The Victorian provision has been held to prevent a doctor from revealing what he has observed as well as what the doctor was told by the patient.[53]

6.38 The relatively wide scope of the Victorian privilege has been criticised as a potentially serious hindrance to the administration of justice and the court's ability to determine the truth.[54] A significant concern is that it could possibly exclude evidence of great importance, placing a party in a position of being unjustly dealt with or of obtaining an inappropriate result.

6.39 The Tasmanian, Victorian and Northern Territory provisions prevent doctors, rather than their patients, from revealing confidential information. It may therefore be possible for a patient to give evidence of examinations carried out and treatment prescribed, but for the doctor to be prevented from giving such evidence by the withholding of the patient's consent. The result may be that the court receives only part of the available evidence and is deprived of that which is the most valuable. The Australian Law Reform Commission suggested that a

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53 *National Mutual Life Association (Australasia) Ltd v Godrich* (1909) 10 CLR 1; *PQ v Australian Red Cross Society* [1992] 1 VR 19.

54 See ALRC Interim *Evidence* Report paras 453-458; DP para 3.14.

more appropriate approach would be to treat the voluntary disclosure by the patient in court as a waiver.[55]

6.40 The privilege in Victoria, Tasmanian and the Northern Territory only applies to civil trials. This could be explained by the very real community interest in the enforcement of the criminal law. However, it does not address the possibility that the existence of a privilege during civil proceedings may have adverse consequences. Evidence held back from civil proceedings on the basis of the statutory proceedings may be vitally important to the resolution of disputes.

6.41 McNicol suggests that the definitional problems which have surrounded the already limited statutory privilege in Victoria provide an argument in themselves for the abolition of the privilege.[56] However, it does not appear to the Commission that the objections to the Victorian provisions are applicable to the other Australian statutory doctor-patient privileges or that the definitional problems which are common to all the provisions are not necessarily insurmountable. Rather than being an argument against the creation of a doctor-patient privilege, the definitional problems are matters which would need to be addressed when formulating the terms of such a privilege.

5. CONCLUSIONS

6.42 In the Commission's view, the public interest in the protection of confidential information in the hands of doctors does not outweigh the public interest in courts having all relevant evidence available to them so as to justify the creation of a privilege.

6.43 However, the Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence.[57] In appropriate circumstances, confidential information held by doctors could be withheld as a result of the exercise of that discretion.

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55 Ibid.
56 McNicol 348.
57 See paras 8.38-8.56 below.

Chapter 7

PROFESSIONAL RELATIONSHIPS: OTHER PROFESSIONS

1. INTRODUCTION

7.1 The Commission has received submissions in response to the Discussion Paper from a variety of professionals and professional organisations, a number of whom advocated the establishment of a right to refuse to reveal to courts confidential information relating to communications between the professionals in question and their clients. In addition to the professions referred to in earlier chapters,[1] submissions have been received from dentists, a private investigator, accountants, social workers, psychologists, nurses, an oral historian, archivists, librarians and physiotherapists.

7.2 Within any professional relationship there may be communications between professional and client which both parties expect to remain confidential. In particular circumstances, an action might lie against the professional for breach of confidence should the professional disclose the confidential information without the client's consent. However, whether the confidence will be maintained during judicial proceedings depends on the relevance of the information to the issues being adjudicated and the ability and willingness of courts to use available methods to protect the confidence or alleviate adverse consequences of disclosure of confidential information.[2] No professional privilege exists in Western Australia for relationships other than those between lawyers and their clients.

7.3 Apart from certain clerics[3] and journalists who are members of the Australian Journalists' Association,[4] no profession reviewed by the Commission requires its members to refuse to disclose confidential information obtained from clients when legally required to do so. Although there may be public interests to be promoted or maintained by protection of the confidential nature of any type of professional relationship, it appears that most professional organisations do not regard such public interests as generally outweighing the need for

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1 Lawyers: Ch 3; journalists: Ch 4; clerics: Ch 5; doctors: Ch 6.
2 See Ch 2.
3 See Ch 5.
4 See Ch 4.

relevant evidence to be provided to judicial proceedings. This is evident from the codes of ethics of the various professions reviewed by the Commission, most of which permit the professionals in question to reveal confidential client information if required to do so by law.[5]

7.4 In the Commission's view there is no public interest justifying the creation of a right within any type of professional relationship (other than the lawyer-client relationship) to refuse to reveal information to courts. However in such relationships the public interests to be promoted or maintained by the protection of the confidential nature of a specific communication between a professional and his client may in particular circumstances outweigh the public interest in courts having all relevant evidence available to them. In such cases the judicial discretion recommended by the Commission in chapter 8 could be exercised in favour of allowing such information to be withheld.

7.5 Below are comments in relation to professionals or professional organisations who responded to the Discussion Paper. Comments on a number of other professional relationships were made in Chapter 8 of the Discussion Paper.

2. ACCOUNTANTS

7.6 The Commission received submissions from an accountancy body[6] and an accountant.[7] A number of other groups[8] and individuals also commented on the need or otherwise for a privilege relating to confidential communications between accountants and their clients.

(a) Accountants giving legal advice

7.7 Accountants may find themselves in the position of advising their clients on matters of a legal nature. This would most commonly occur in relation to advice on taxation when the advice involves an interpretation of legislation or case law. It has been submitted that in such

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5 Exceptions include the AJA *Code of Ethics* and the *Code of Canon Law*, quoted in para 1.20 above: see paras 4.15-4.44, 5.3-5.5 above.. Most submissions from individual professionals did not object to breaching client confidentiality if required to do so by law.

6 Chartered Institute of Management Accountants.

7 Ms Mary-Louise Vermeuhlen.

8 Eg The Law Society of Western Australia which simply agreed with the response of the Law Council of Australia to the Trade Practices Commission's *Study of the Accountancy Profession*: *Issues for Discussion* (1991). The Law Council's response appears in "Privilege is Misunderstood" *Australian Law News* September 1991, 35. See also DP paras 8.5-8.11.

circumstances the confidential information passing between the accountant and the client should be the subject of legal professional privilege[9] just as if the information had passed between a lawyer and his client.

7.8 In Western Australia it is illegal for anyone not admitted as a legal practitioner in the Supreme Court of Western Australia and holding a current practising certificate to give legal advice for money or other remuneration. Therefore an accountant who is not also a legal practitioner is not permitted to give legal advice, even if such advice is within his area of expertise.[10] As soon as legal skill and knowledge greater than that possessed by the average citizen is required in the giving of advice, any person, other than a legal practitioner, would contravene the *Legal Practitioners Act 1893*.[11]

7.9 O'Connor[12] has stated the limits imposed on accountants by the provisions of the *Legal Practitioners Act* and the cases decided under those provisions as follows:

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9 See Ch 3.

10 According to R K O'Connor "The Effect of the *Legal Practitioners Act 1893 (WA)* on the Giving of Advice by Practising Accountants" *Brief* July 1988, 14, 18, this means that:
"[L]egal advice requiring legal skill and knowledge greater than possessed by the average citizen cannot be provided by an accountant even though he may have one of the following:
(a) a Bachelor of Jurisprudence degree
(b) a Bachelor of Laws degree
(c) Admission as a practitioner of the Supreme Court of Western Australia but not the holder of a current practice certificate."

11 Ss 77, 78, 80 and 81 of the *Legal Practitioners Act 1893* provide:
"77. (1) No person other than a certificated practitioner shall directly or indirectly perform or carry out or be engaged in any work in connection with the administration of law, or draw or prepare any deed, instrument, or writing relating to or in any manner dealing with or affecting real or personal estate or any interest therein or any proceedings at law, civil or criminal, or in equity.
(2) Nothing in subsection (1) shall be construed to affect public officers acting in discharge of their official duty, or the paid or articled clerks of certificated practitioners, or any person drawing or preparing any transfer under the *Transfer of Land Act 1893*.
78. (1) Nothing in the last preceding section contained shall extend to make any person liable to any penalty if such person satisfies the Court or a Judge thereof, as the case may be, that the person has not directly or indirectly been paid or remunerated or promised or expected pay or remuneration for the work or services so done.
(2) Where such person directly or indirectly receives, expects, or is promised pay or remuneration for or in respect of other work or services relating to, connected with or arising out of the same transaction or subject-matter as that to which the said first-mentioned work or services shall relate, the provisions of this section shall not apply.
80. No person other than a practitioner shall in any manner purport or pretend to be or make or use any words or any name, title, addition, or description implying or tending to the belief that the person is a practitioner or recognized by law as such.
81. Without limiting the operation of Part IV [Professional Conduct and Discipline], every person who acts contrary to the terms of this Act, or to any provision of or obligation imposed by or under this Act, or to any rule, or any order of the Complaints Committee or of the Disciplinary Tribunal shall be guilty of a contempt of the Supreme Court, and may be dealt with accordingly by the said Court or a Judge thereof in Chambers on the motion of the Complaints Committee or the Board."

12 R K O'Connor is a member of the independent Bar in Western Australia and also an accountant.

> "[A]ccountants cannot draw or prepare any document (other than a tax return or objection) which is more than of a clerical nature. . . . With regard to the furnishing of advice, it should not be given on any statute where what is required is legal skill and knowledge greater than that possessed by the average citizen. Where work of that nature is required it should be referred to a legal practitioner, because the Act (as interpreted in the cases) provides that it is a contempt of court for anyone other than a certified practitioner, to carry out that work. . . . As soon as legal skill and knowledge greater than that possessed by the average citizen is required, in my view, the accountant would breach the provisions of section 77 (as presently worded and interpreted) if he provided advice on the question asked."[13]

7.10 The Commission's terms of reference do not include a consideration of the arguments for and against the monopoly enjoyed by the legal profession in Western Australia with respect to the giving of legal advice.[14]

(b) Accountants giving non-legal advice

7.11 Rather than extend legal professional privilege to communications between accountants and their clients when accountants are giving legal advice, it has been submitted that the protection of confidential communications between accountants and clients may be of sufficient public interest to justify the creation of a separate legal right for accountants to refuse to reveal confidential information to courts. However, none of the submissions received by the Commission identified any significant public interest to be maintained or promoted by creating such a right - let alone public interests of such significance that they outweigh the need for relevant information to be available to judicial proceedings to enable proper adjudication of issues.[15]

7.12 Nevertheless, in particular cases there may be public interests to be maintained or promoted which outweigh the need for relevant information to be available to judicial

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13 Op cit n 10, 18. His opinions as expressed in that article were confirmed in a telephone submission to the Commission on 29 July 1992.

14 See Trade Practices Commission *Legal Profession: Study of the Professions* (1992) 23-25. In that paper the Trade Practices Commission expressed its interest in exploring the impact on interprofessional competition and the availability of options to limit the adverse effects on competition while preserving the public benefit it provides. It observed (at 24):
"[T]here is a strong indication from submissions received during the accountancy study [see n 8 above] that an incidental effect of [legal professional] privilege is that it is more advantageous to the client to consult a lawyer on certain matters rather than a member of another profession providing a substitute service."

15 There are no registration or qualification requirements for accountants in Australia to help ensure adherence to ethical principles when dealing with clients. In appropriate cases, courts will, as far as they are able, protect confidential communications within professional relationships: see Ch 2.

proceedings. In those circumstances, courts will be able to exercise the discretion recommended by the Commission in Chapter 8 to protect confidential information.

2. RESEARCHERS

7.13 Academic research often involves the passing of confidential information between the subject of the researcher's study and the researcher.[16] This may include the identity of the source of the information. It may also include other information which, if revealed, would cause harm or inconvenience to individuals or community groups.

7.14 If the confidence is essential for the effectiveness of the research then the revelation of the confidential information, even if required by judicial proceedings, could have serious consequences, such as:

* the research being made ineffective;

* physical, psychological or economic harm to the subject of the research;

* loss of community benefits from the research;

* reluctance of researchers and potential subjects to participate in significant research undertakings in the future.

7.15 An example of circumstances where a legal requirement to reveal confidential information obtained by an academic from a research subject could result in harm to the subject or others was provided to the Commission by an oral historian.[17] She referred to situations where aboriginal people pass information to oral historians which, if made public, could cause great embarrassment and damage to certain aboriginal communities or individual members of an aboriginal community.

7.16 Professor David Hawks of the National Centre for Research into Prevention of Drug Abuse referred to the possible results of a lack of privilege in situations where academic

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16 Academics may be involved in many different types of confidential relationships, eg when providing confidential references for students.

17 Mrs Margaret Hamilton.

researchers go into the community and collect sometimes highly personal, and at times incriminating, data about individuals and groups:

> "Researchers expect research subjects to understand that the research, built on the honest answers they give to questions, will benefit the general community and that the subjects should therefore respond. Yet by cooperating with researchers who do not have professional privilege, the subjects are potentially endangering their own safety."

7.17 The Commonwealth and the Australian Capital Territory have recognised that certain epidemiological research projects are significant enough to warrant the creation of a privilege in relation to confidential information generated from those projects.[18] The Commonwealth Act provides that a person who has assisted or is assisting in the conduct of the "Vietnam Veterans" study[19] or another prescribed Commonwealth epidemiological study:

> "shall not be required -
>
> (a) to produce in a court, or permit a court to have access to, a document prepared or obtained in the course of the conduct or that study, being a document concerning the affairs of another person; or
>
> (b) to divulge or communicate to a court any information concerning the affairs of another person acquired by him by reason of his having assisted, or assisting, in the conduct of that study."[20]

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18 *Epidemiological Studies (Confidentiality) Act 1981* (Cth); *Epidemiological Studies (Confidentiality) Act 1992* (ACT). Similar legislation exists in the United States. The *Public Health Service Act* s 301(d), 42 USC s 241(d) (added 1988) provides for certificates of confidentiality which offer a legal basis for protection against civil, criminal, administrative, legislative or other proceedings to compel disclosure of personally identifiable data: C R McCarthy & J P Porter "Confidentiality: The Protection of Personal Data in Epidemiological and Clinical Research Trials" (1991) 19 *Law Medicine and Health Care* 238, 240. The authors note:

> "With certificates of confidentiality there are trade-offs. The holder of the Certificate may have to protect release of identifiable data from compulsory processes which accomplish social purposes other than protection of confidentiality and the conduct of research."

The authors recommend that researchers should use privileges, where they exist, to protect the confidentiality of data and that where they do not exist consideration should be given to enacting such legal protection.

19 A Commonwealth epidemiological study commenced in 1980.

20 *Epidemiological Studies (Confidentiality) Act 1981* (Cth) s 8. S 3 of the Act defines "epidemiological study" as a study of:

"(a) the incidence or distribution, within the population of a country, or a part of a country, or within a particular group of persons, or within a sample or sub-sample of such a population or group, of

(i) a disease;

(ii) a physical or mental state; or

(iii) a condition, circumstance, occurrence, activity, form of behaviour, course of conduct, or state of affairs, that is or may be disadvantageous to, the person concerned or to the community; or

(b) the factors responsible for such an incidence or distribution,

or both, and includes a series of such studies."

There are similar provisions in the Commonwealth and ACT Acts relating to people who have been given access to a document by other provisions in the Act.[21]

7.18 Professor Hawks acknowledged that a privilege may not be appropriate in all academic research projects and not even in relation to all projects involving research into illegal behaviour:

> "First, not all research methodologies would require professional privilege. For example, large-scale randomised surveys which are filled out anonymously and which carry no identifying information might be deemed outside the need for protection. All qualitative research conducted by criminologists, psychologists, anthropologists, sociologists, etc, in which identifying information is collected from subjects, might be considered more in need of protection. . . . Some qualitative research might require such protection depending on the nature of the data collected."

7.19 In its 1990 Report on *Confidentiality of Medical Records and Medical Research*[22] the Commission recommended a statutory scheme to ensure the maintenance of confidentiality of certain medical records while at the same time facilitating appropriate medical research. The Commission recommended that disclosure to researchers of patient-identifiable information without patient consent should not involve a breach of the legal duty of confidence, provided the research had been approved by a prescribed Institutional Ethics Committee in accordance with specific criteria. A number of recommendations were made to protect the confidentiality of such information by researchers, including a recommendation that patient-identifiable information in researchers' hands should be immune from disclosure in judicial proceedings whether in response to a search warrant, a subpoena or a witness summons.[23]

7.20 By recommending that certain information be immune from disclosure in judicial proceedings the Commission was recognising the appropriateness of a privilege for medical researchers under specific circumstances. The statutory scheme proposed in the Commission's 1990 Report has not yet been implemented. In 1992 submissions to the previous Minister for Justice urged the Government to implement the recommendations in

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The prescribed studies referred to in the Australian Capital Territory legislation are "the Canberra Drug Users Study" and "a Territory epidemiological study declared by the regulations to be a study to which that Act applies".

21 *Epidemiological Studies (Confidentiality) Act 1981* (Cth) s 8(2); *Epidemiological Studies (Confidentiality) Act 1992* (ACT) s 8(2).

22 Project No 65 Part II.

23 Id para 9.3.

this Report.[24] Some concerns expressed in those submissions about the current absence of such a privilege are set out in Appendix VI.

7.21 The Commission endorses the recommendations made in its Report on *Confidentiality of Medical Records and Medical Research.* However, it stresses that:

* each recommendation made in that Report was made as part of an integrated set of recommendations to implement a scheme to ensure the maintenance of confidentiality of certain medical records whilst at the same time facilitating appropriate medical research;

* it would be inappropriate to implement the recommendation that patient-identifiable information in researchers' hands should be immune from disclosure in judicial proceedings alone, because it would not include the totality of safeguards which the Commission considered essential.

7.22 One factor an Institutional Ethics Committee should be required to take into account when considering approval of a research project for the purposes of the suggested immunities and privilege is the competing public interests which are likely to be affected by the Committee's decision. To grant approval to a research project the Committee must be satisfied that the public interests to be promoted or maintained by the research project outweigh the need of possible future judicial proceedings to have all relevant information available to them for the proper adjudication of issues.

7.23 In the Commission's view there is no significant public interest to be promoted or maintained by the creation of an academic-research subject privilege which overrides the public interest in courts having all relevant evidence available to them. However in particular cases such public interests may be present, and it will be for the courts to take those interests into account when exercising the judicial discretion recommended in Chapter 8.

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[24] Letter from the Department of Public Health, Queen Elizabeth II Medical Centre to the previous Minister for Justice 13 February 1992; letter from the Public Health Association of Australia (WA Branch) to the previous Minister for Justice 16 April 1992; letter from the Vice Chancellor of the University of Western Australia to the previous Minister of Justice 18 May 1992 (copies of all correspondence provided to the Commission by the previous Minister for Justice).

7.24 In reaching this conclusion the Commission has also taken into account that:

* Whenever appropriate courts will use existing means available to them to respect the confidential nature of communications between academics and the subject of their research.[25]

* Academics and others involved in research projects are not bound by one overriding code of professional ethics, though particular individuals involved may be subject to the ethical obligations of their respective profession.

* Academics are difficult to define by reference to the type of work they do or their professional and academic qualifications. Academics would include scholars at higher education facilities, but would also include others involved in scholarly pursuits such as research. Depending on the type of research, medical doctors, scientists, lawyers, laboratory technicians and an infinite variety and number of other professionals, as well as non-professional people, could be involved.

4. FAMILY COURT COUNSELLORS

7.25 A number of respondents to the Discussion Paper commented on a provision in the *Family Court Act 1975* (WA) which provides a privilege to participants in Family Court welfare conferences. Where parties are required by an order of the Family Court[26] to attend a conference with a welfare worker to discuss the welfare of a child or, if there are any differences between the parties as to matters affecting the welfare of the child, to endeavour to resolve those differences:

> "[e]vidence of anything said or any admission made at a conference that takes place in pursuance of an order made under this section is not admissible in any court but nothing in this subsection prevents a court from admitting evidence of anything said or any admission made at a conference upon the trial of a person for an offence committed at the conference."[27]

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25 See Ch 2.
26 Pursuant to *Family Court Act 1975* s 39.
27 Id s 39(4).

7.26 People other than qualified court counsellors[28] may be involved in welfare conferences. For example, a student who has taken a marriage guidance counsellor's oath under the Marriage Act can participate. The privilege would extend to such a person.

7.27 If, during the course of a welfare conference, information was revealed that may be relevant to judicial proceedings, that information cannot be required to be revealed during those or any other proceedings even information which could lead to the conviction or exoneration of a defendant in a criminal matter.

7.28 The privilege for court welfare workers and others involved in the conference process was introduced when the Family Court Act was enacted in 1975 and was based on similar provisions in the *Family Law Act 1975* (Cth).[29] There was virtually no discussion of the privilege during parliamentary debates on the Western Australian legislation.[30] However it is generally acknowledged that the privilege in both the State and the Commonwealth legislation was created to promote free and frank discussions with court counsellors and encourage settlement of disputes.[31]

7.29 The privilege in section 39 of the *Family Court Act 1975* is a manifestation of a long recognised common law privilege commonly referred to as "without prejudice privilege".[32]

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28 Counsellors are currently required to hold a tertiary degree in a social science and to have had at least five years' practical experience (information from the Acting Director of the Family Court of Western Australia Counselling Service, 2 March 1992).

29 S 62(5) of the *Family Law Act 1975* (Cth), which provides:

> "Evidence of anything said or of any admission made at a conference that takes place in pursuance of an order made under this section is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory, or by consent of parties, to hear evidence."

S 18(2) of the *Family Law Act* confers a similar privilege in respect of admissions made to marriage counsellors.

30 See Western Australia *Parliamentary Debates*, Vol 210, 4002 (Legislative Assembly 30 October 1975). Mr R E Bertram said: "it is interesting to note that section 19 of the Australian Act requires that an affirmation of secrecy by a marriage counsellor shall be made. That seems to be a very essential feature. It occurs to me that in respect of State jurisdiction it is a good idea to require such a counsellor to take a similar oath" to which Hon D H O'Neil replied: "I have made a note of what the honourable member has said. I presume the provision in the clause relates to like counselling and welfare facilities to be undertaken in secrecy. I shall bring this matter to the notice of the Minister for Justice."

31 Informal discussion with the Acting Director of the Family Court of Western Australia Counselling Service, 2 March 1992. See also A Dickey *Family Law* (2nd ed 1990) 70-71.

32 Statutory statements of the "without prejudice" privilege are not unique to the Family Court. Other Western Australian courts have adopted similar provisions in relation to pre-trial procedures, to promote settlement between the parties. For example, Rule 31A.10(1) of the *Rules of the Supreme Court 1971* also provides for the possibility of confidentiality being preserved in relation to what is said at pre-trial conferences in the Supreme Court:

The aim of that privilege is to minimise or settle litigation.[33] Such communications by parties to the proceedings are inadmissible as evidence against each other.[34] The privilege extends to communications associated with offers of settlements.

7.30 There are common law limitations and qualifications to the privilege which may not be present under the "without prejudice" statutory formulations such as section 39 of the *Family Court Act*. For example, at common law if such communications move beyond negotiations and result in an agreement, communications prima facie retain their privilege:

> "but not in certain cases, such as where it is disputed whether the parties in fact arrived at an agreed settlement. In such a case the communications may be proven."[35]

7.31 Also, at common law where a plaintiff sues two defendants, and settles with one of them, the communications between the two parties entered into on a without prejudice basis are privileged against disclosure to the second defendant.[36]

7.32 A consideration of the "without prejudice" privilege is not within the Commission's terms of reference. It is a privilege quite distinct from professional privilege.

5. NURSES

7.33 The Commission received detailed submissions from the Nurses Board of Western Australia, the Royal College of Nursing and the Australian Nursing Federation as well as from a registered nurse. A number of other submissions were also relevant to the question of whether a privilege should be created for confidential communications between nurses and their patients.

"An Expedited List Judge may, on any terms he thinks fit, direct at any time that the parties confer on a `without prejudice' basis for the purpose of resolving or narrowing the points of difference between them."

33 *Field v Commissioner for Railways for New South Wales* (1955) 99 CLR 285, 291-292.

34 P Gillies *Law of Evidence in Australia* (2nd ed 1991) 427-428; *Field v Commissioner for Railways for New South Wales* (1955) 99 CLR 285, 291-292; *Bentley v Nelson* [1963] WAR 89; *Davies v Nyland* (1974) 10 SASR 76, 105 per Zelling J.

35 Gillies op cit n 34, 428.

36 Ibid.

7.34 No respondent was able to provide examples of cases where nurses have, against their will, been required by judicial proceedings to reveal confidential patient information. However, it is not difficult to imagine situations where nurses may be in that position.

7.35 The public interests in protecting confidential communications between nurses and their patients are similar, if not identical, to the public interests protected or maintained by protecting the confidentiality of communications between doctors and their patients.[37] Other medical professionals[38] and their patients would be in a similar position.

7.36 In the Commission's view there is no significant public interest to be promoted or maintained by the creation of a general right for nurses or other medical professionals to withhold confidential patient information from courts which outweighs the public interest in courts having all relevant evidence available to them. However, in particular cases such public interests may be present, and it will be for the courts to take those interests into account when exercising the judicial discretion recommended in Chapter 8.

6. HOSPITAL QUALITY ASSURANCE PROGRAMMES

7.37 In its submission to the Commission a major public hospital in Western Australia brought the Commission's attention to a particular consequence of the absence of a right to refuse to provide relevant information to courts which may have ramifications for the quality of medical services being provided to the community:

> "[T]here is a potential difficulty in relation to those activities which are described under the term `quality assurance' and which are emerging as important features of hospital management. Those activities are directed at reviewing the standard of work undertaken in order to assure the maintenance of proper standards and to identify any shortcomings so that corrective action can be taken. There is a growing concern among health professionals that evidence of suboptimal performance emerging from quality assurance reviews might be used against them if it was discoverable by potential litigants. There is therefore a strong wave of support by medical staff of Teaching Hospitals in Western Australia for the extension of statutory privilege to information gathered in this way. We believe that the protection afforded by such moves is important to the further development of quality assurance activities which we believe is very much in the public interest. Accordingly, we commend the concept for further consideration by the Commission."

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37 See Ch 6.

38 Such as dentists and physiotherapists - two professional groups which made submissions to the Commission.

7.38 The Royal Australian and New Zealand College of Psychiatrists (WA Branch) in a preliminary submission to the Commission prior to publication of the Discussion Paper also supported the creation of a professional privilege in the context of quality assurance programmes:

> "It is noted that the recent Zelestis Enquiry into the treatment of psychiatric patients in Graylands Hospital and in other psychiatric hospitals in Western Australia may not have been necessary if an effective quality assurance programme had been in place.
>
> The establishment of effective peer review systems is limited by the absence of qualified Legal Privilege concerning opinions and comments expressed either verbally or in written form.
>
> The RANZP (WA Branch) supports legislation to provide qualified privilege for quality assurance programmes in the public and private sector. Our experience suggests that effective quality assurance is not possible without such legislative control."[39]

7.39 There may be important public interests which would be promoted by protecting, for purposes of quality assurance programmes, the confidential nature of information passing between health institutions. Not only is there the public interest in the promotion of health but also the public interest in ensuring that health care facilities are run efficiently and effectively.

7.40 The Commission's review is restricted to confidential communications within professional relationships. This does not include institutional relationships. However, there may be circumstances in which the judicial discretion recommended in Chapter 8 could be exercised in favour of protecting quality assurance programme information passing between patients and doctors.

7. PRIVATE INVESTIGATORS, SOCIAL WORKERS, ARCHIVISTS, LIBRARIANS AND OTHERS

7.41 The reasons for rejecting the creation of a privilege for each of the professional relationships referred to in this Report apply to all professional relationships, other than that between lawyers and their clients,[40] which have been the subject of submissions to the Commission. In none of those relationships is there a public interest to be maintained or

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39 Letter to the Commission dated 5 December 1990.

40 See Ch 3.

promoted which, in every case, outweighs the need for judicial proceedings to have available to them all information relevant to the proper adjudication of issues.

7.42 Nevertheless the Commission believes that, in particular cases, the public interest in protecting a confidential communication might outweigh the public interest in courts having all relevant information available to them. In such cases the judicial discretion recommended by the Commission in Chapter 8 could be exercised in favour of allowing such information to be withheld.

8. CONCLUSIONS

7.43 No legal right to refuse to reveal information should be created in Western Australia in relation to confidential communications within any particular relationship. Nevertheless, in particular cases, the exercise of the judicial discretion recommended in chapter 8 may result in certain confidential information within a particular professional relationship being protected.

7.44 The Commission confirms the recommendation made in its Report on *Confidentiality of Medical Records and Medical Research* for a statutory scheme to ensure the maintenance of confidentiality of certain medical records while at the same time facilitating appropriate medical research, subject to the proviso that the matters to be considered by the prescribed Institutional Ethics Committees when considering approval of a research project for the purposes of the immunities and privilege referred to in the Commission's earlier Report should also include the competing public interests which are likely to be affected by the Committee's decision. To grant approval to a research project the Committee must be satisfied that the public interests to be promoted or maintained by the research project outweigh the need possible future judicial proceedings may have for information resulting from the research.

7.45 The Western Australian Parliament can protect confidential information generated by significant research projects by the creation of specific statutory privileges, as has been done in the Commonwealth and the Australian Capital Territory in the *Epidemiological Studies (Confidentiality) Act 1981* and the *Epidemiological Studies (Confidentiality) Act 1992* respectively. Before granting legislative protection to confidential information arising from any particular study, the public interests to be promoted or protected by the creation of a

privilege should be balanced against the need for that information to be revealed during possible subsequent judicial proceedings to enable a proper determination of issues.

Chapter 8

JUDICIAL DISCRETION

1. THE COMMON LAW

8.1 It appears that Australian courts do not have a discretion to disallow relevant and admissible evidence of confidential matters.[1] A witness refusing to answer a question the answer to which would be relevant evidence may be guilty of contempt of court.[2]

8.2 However, in the English case of *Attorney General v Mulholland*[3] Lord Denning MR foresaw situations in which a court might properly exercise its discretion not to require answers - namely, in cases in which professional persons were asked to betray confidences not protected by the law of privilege. In the same case, Donovan LJ stated:

> "There may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstances which a court encounters, which may

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1 Byrne & Heydon para 25340, referring to *McGuinness v Attorney General of Vi*ctoria (1940) 63 CLR 73, observe:
"It has been suggested that in exceptional circumstances the court should have some special discretion in admitting matters of this sort which cause embarrassment to the witness and violation of his code of ethics."
In *McGuinness's* case reference was made to an argument by the appellant that there is justification for extending a practice of courts to refuse to compel discovery of the name of a journalist's source in libel actions to enable withholding the names of contributers and sources of information at all stages of any legal proceeding. Dixon J responded (at 104-105):
"The answer is that it is not a rule of evidence but a practice of refusing in an action of libel against the publisher, &c, of a newspaper to compel discovery of the name of his informants. . . . In my opinion the existence of the practice and the reasons on which it is based can form no ground for holding that a lawful excuse existed for the appellant's refusal to answer as to his sources of information. Lawful excuse means a reason or excuse recognized by law as sufficient justification for a failure or refusal to produce documents or answer questions."
Against the existence of such a discretion in Australia is *Re Buchanan* (1964) 65 SR (NSW) 9, 11:
"It has never been suggested that if the question is relevant and proper any further discretion remains in the trial judge as to whether or not the witness should be compelled to answer, and if it did it is difficult to see upon what material it could be exercised."
Further, in *McAuliffe v McAuliffe* (1973) 4 ACTR 9, 10-11, Blackburn J ruled out the possibility of not requiring relevant evidence from a doctor on the basis of a possible conscientious objection by the doctor - that the doctor regarded his relationship with his patient as necessarily involving a moral obligation not to disclose to anybody what the patient has told him or what he decided about her or recorded about her.
According to P Gillies *Law of Evidence in Australia* (2nd ed 1991) 22:
"The judge probably does not have a general discretion to disallow questions, except as authorized by a specific common law or statutory rule (for example, one relating to the asking of vexatious questions, or those tending to scandalise)."

2 *Attorney General v Clough* [1963] 1 QB 773.

3 [1963] 2 QB 477, 489-490.

> lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer.
>
> For these reasons I think it would be wrong to hold that a judge is tied hand and foot in such a case."[4]

8.3 In the United Kingdom, the existence of this discretion has gained strength from *D v National Society for the Prevention of Cruelty to Children*[5] Lord Hailsham LC (Lord Kilbrandon agreeing) supported the existence of the discretion and accepted the view of the English Law Reform Committee Report on *Privilege in Civil Proceedings*[6] that a judge has a:

> "wide discretion to permit a witness . . . to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed".[7]

2. STATUTORY DISCRETIONARY SCHEMES

8.4 A number of jurisdictions have considered the introduction of a statutory scheme which would provide courts with a discretionary power to allow a witness to refuse to disclose confidential information in certain circumstances.[8] This would be in addition to the common law legal professional privilege and any other statutory privileges relating to confidential communications. A majority of respondents to the Discussion Paper also favoured adoption of such a scheme in Western Australia.

8.5 The adoption of a judicial discretion of this kind has been recommended by the Law Reform Commission of Canada[9] and the Australian Law Reform Commission,[10] and in New Zealand a discretionary scheme was enacted by a 1980 amendment to the Evidence Act.[11]

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4 Id 492, approved *in British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

5 [1978] AC 171.

6 *Sixteenth Report (Privilege in Civil Proceedings*) 1967 Cmnd 3472 para 1.

7 [1978] AC 171, 227. The House of Lords was evenly divided. In 1981 s 10 of the *Contempt of Court Act 1981* (UK) gave journalists a specific privilege to enable them to protect the confidential nature of their source of information: see Appendix IV para 2.

8 See DP paras 10.22-10.46.

9 *Report on Evidence* (1975) Draft Evidence Code cl 41.

10 ALRC *Evidence* Report, Appendix A: Draft Evidence Bill cl 109. The Evidence Bill 1991 (Cth) has not adopted the ALRC's recommendations relating to judicial discretion.

11 See paras 8.15-8.18 below.

(a) Canadian Law Reform Commission

8.6 The Law Reform Commission of Canada proposed a general statutory professional privilege along the following lines:

> "A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or who has been rendered such services by a professional person, has a privilege against disclosure of any confidential communication reasonably made in the course of the relationship if, in the circumstances, the public interest in the privacy of the relationship outweighs the public interest in the administration of justice."[12]

8.7 The Law Reform Commission of Canada did not specify or define the circumstances where maintenance of confidentiality in communications in professional relationships would outweigh the benefit of their disclosure. It was assumed that courts could develop a policy in relation to the application of this proposed discretion and that the implementing legislation would clearly show that the objective of the reform was directed to an extension of privileges.

8.8 The Law Reform Commission of Canada saw the primary advantage of such a discretion to be an egalitarian approach to confidential relationships:

> "By not focusing on the existence of a particular professional relationship but rather by insisting on the values to be preserved the law would not limit the protection of privileges to a specific segment of society. Moreover, no single profession can be said to enjoy an absolute presumption as guardian of the values that the right to secrecy is made to sanction and protect. It would be up to future courts to establish a judicial policy in this regard."[13]

(b) Australian Law Reform Commission

8.9 The ALRC's proposal is similar to the Canadian proposal except that criteria for the exercise of the court's discretion are listed. Clause 109 of the ALRC's draft Evidence Bill is as follows:

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[12] Draft Evidence Code cl 41. The Canadian proposal has not been adopted to date. Only cl 15 of the Commission's draft Evidence Code has been implemented. This clause played a major role in the shaping of s 24(2) of the Canadian Charter of Rights and Freedoms (1982), which requires a court to exclude evidence obtained in a manner that infringes a legal right or fundamental freedom granted by the Charter, because its admission would tend to bring the administration of justice into disrepute.

[13] Law Reform Commission of Canada *Evidence Project Study Paper No 12: Professional Privileges before the Courts* (1975) 21.

"(1) Where, on the application of a person who is an interested person in relation to a confidential communication or a confidential record, the court finds that, if evidence of the communication or record were to be adduced in the proceeding, the likelihood of

(a) harm to an interested person;

(b) harm to the relationship in the course of which the confidential communication was made or the confidential record prepared; or

(c) harm to relationships of the kind concerned,

together with the extent of that harm, outweigh the desirability of admitting the evidence, the court may direct that the evidence not be adduced.

(2) For the purpose of subsection (1), the matters that the court shall take into account include

(a) the importance of the evidence in the proceeding;

(b) if the proceeding is a criminal proceeding whether the evidence is adduced by the defendant or by the prosecutor;

(c) the extent, if any, to which the contents of the communication or document have been disclosed;

(d) whether an interested person has consented to the evidence being adduced;

(e) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(f) any means available to limit the publication of the evidence.

(3) Subsection (1) does not apply to a communication or document

(a) the making of which affects a right of a person;

(b) that was made or prepared in furtherance of the commission of

(i) a fraud;

(ii) an offence; or

(iii) an act that renders a person liable to a civil penalty; or

(c) that an interested person knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power conferred by or under an enactment, a State Act or an imperial Act in force in a State.

(4) For the purposes of subsection (3), where

(a) the commission of the fraud, offence or act, or the abuse of power, is a fact in issue; and

(b) there are reasonable grounds for finding that

(i) the fraud, offence or act, or the abuse of power, was committed; and

(ii) the communication was made or document prepared in furtherance of the commission of the fraud, offence or act or for that purpose,

the court may find that the communication was so made or the document so prepared, respectively.

(5) In this section, "interested person", in relation to a confidential communication or a confidential record, means a person by whom, to who, about whom or on whose behalf the communication was made or the record prepared."

8.10 Under the ALRC proposal when a party to the proceeding objects to giving evidence and the court is satisfied that, in the circumstances of the case, the undesirability of admitting evidence of a confidential communication or record outweighs the desirability of admitting it, the court may direct that the evidence not be given.[14]

8.11 This protection is broadly based but confined to circumstances of confidentiality. It allows a psychiatrist or social worker, for example, to object to testifying about words exchanged with a patient or to supplying notes of interviews with a patient and analyses made pursuant to such interviews. The ALRC has described this as allowing "what are generally regarded as socially important relationships to proceed without fear of the disclosure of communications made pursuant to the relationship".[15]

8.12 Under the ALRC's proposal courts would have to take into account matters such as:

(1) the desirability of having all the evidence relating to the proceeding before the court;

(2) the importance of the evidence in the proceedings;

(3) the public interest, if any, in the maintenance of relationships of the same kind as the relationship between the witness and person to whom the confidential information is entrusted;

(4) the importance, if any, to relationships of that kind of continued confidentiality of communications made in the course of those relationships; and

(5) the damage, if any, that is likely to occur to the relationship concerned if the evidence is given.[16]

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14 *Research Paper No 16 Evidence Reference: Privilege* (1983) para 172. A confidential communication is defined as a reference to a communication between the witness and some other person made in circumstances such that the witness or the other person is under an obligation not to disclose it, whether the obligation arose under law or not and whether it is express or implied. A confidential record is similarly defined, including a reference to a record prepared by the witness under like circumstances.

15 Ibid.

16 Ibid.

8.13 The ALRC proposal encourages courts in each case to focus on whether confidentiality is of the essence in the relationship, and on the deleterious consequences of breaching the privacy of relations between the witness and people the witness deals with in his professional capacity.

8.14 Courts would be under a duty to inform a person entitled to object to giving evidence that he may object. Therefore the onus is not on the court to determine on each occasion whether the desirability of admitting the evidence outweighs its undesirability. However, it would be the court's responsibility to raise the matter, thereby making the witness aware of his rights. Only when the witness objects to giving evidence does the balancing process begin.

(c) New Zealand

(i) Introduction

8.15 Section 35 of the *Evidence Amendment Act (No 2) 1980* (NZ) provides courts with a general discretion to permit a witness to refuse to answer a question or produce a document having regard to the confidential nature of the communication and to all other circumstances of the case.

8.16 Section 35 provides:

> "(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.
>
> (2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:
>
> (a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:

(b) The nature of the confidence and of the special relationship between the confidant and the witness:
(c) The likely effect of the disclosure on the confidant or any other person.

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section `Court' includes
(a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and
(b) Any other person acting judicially."

8.17 In addition to the statutory judicial discretion created by section 35, specific New Zealand provisions prohibit, in specified circumstances, clerics, doctors, clinical psychologists and patent attorneys from revealing confidential communications during judicial proceedings.[17] Even though in a particular case involving a relationship between one of these professionals and his client the requirements of the section in question may not be satisfied, so preventing privilege from arising, courts are able to exercise their discretion pursuant to section 35 to excuse the professional or any other witness from answering a question or producing a document.

8.18 The New Zealand statutory discretion sets out the relevant considerations to be taken into account in the balancing exercise, and does so in a much simpler manner than that proposed by the ALRC. In considering an application for the exercise of its discretion, the court must consider whether or not the public interest in having the evidence disclosed is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of confidant and witness and the encouragement of free communication between them. In that exercise, courts are to have regard to:

(1) The likely significance of the evidence to the resolution of the issues to be decided in the proceedings;

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17 *Evidence Amendment Act (No 2) 1980* (NZ) ss 31-34 as amended by *Evidence Amendment Act 1989* ss 4-5: see DP paras 3.37-3.42.

(2) The nature of the confidence and special relationship between the confidant and the witness;

(3) The likely effect of the disclosure on the confidant or any other person.

(ii) General support for section 35

8.19 There does not appear to have been any significant criticism of the operation of these provisions in New Zealand. The editor of the New Zealand edition of *Cross on Evidence*, Mr D L Mathieson QC, advised the Commission that he was unaware of any criticism of section 35.[18] The New Zealand Department of Justice told the Commission that section 35 had not given rise to any particular problems.[19]

(iii) Judicial consideration of section 35

8.20 The New Zealand Court of Appeal in *R v Secord*[20] confirmed that:

* section 35 is not to be read down in the light of common law rules; and

* in each case, whether or not privilege is conferred pursuant to section 35 will be a question of determining whether there is a confidence and a special relationship, and of balancing the competing public interest claims.

8.21 At the trial a probation officer declined to give evidence, stating that she wished to claim protection under section 35. The trial judge ruled that the probation officer did not have the right to withhold information from the court. The judge referred to the four conditions

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18 See DP para 3.45.

19 Letter to the Commission from the Secretary for Justice, 16 October 1992:
"As far as we are aware, the provisions in Part III dealing with privileged communications have not given rise to any particular problems. We receive representations from time to time from particular professions asking that they (or rather their clients) be given a specific statutory privilege. The medical privilege was extended to clinical psychologists in 1989 on the basis that their work was indistinguishable, in material respects, from that of doctors. But on the whole, we tend to think that Part III strikes the right balance with a few narrow privileges coupled with a general discretion in the courts to protect confidences where appropriate."

20 [1992] 3 NZLR 570. Note also the earlier case of *R v Neilson* (unreported) New Zealand High Court, 3 December 1987, T 13/87 where a doctor was denied a privilege from answering questions relating to statements made by an accused person to her in the course of medical treatment. The evidence was likely to be of considerable significance to the resolution of the issue of whether the accused person was present at the scene of the offence at the time it was committed. After considering that and all other matters referred to in section 35(2), the court concluded that the witness should not be excused from answering questions relating to communications made by her to the witness.

which Wigmore[21] identified as fundamental to the establishment of a privilege against disclosure, emphasising the first two:

(i) that the communication must originate in a confidence that it will not be disclosed;

(ii) that this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

The judge considered that these could not be satisfied because section 15 of the *Criminal Justice Act 1985* (NZ) required disclosure. Under that section the probation officer is to report to the court, and observations in the report may be referred to in open court and are then public. This ruling, if correct, would have meant that a probation officer can never claim confidentiality in respect of statements made to him in the course of preparation of reports under section 15.

8.22 The accused appealed to the Court of Appeal against this ruling. The Court of Appeal rejected the trial judge's arguments, allowed the appeal and remitted the matter to the trial court for further determination. Hardie Boys J, delivering the Court of Appeal judgment, stated:

> "There is no need to go beyond the plain meaning of s 35 itself. Subsection (1) requires no more than a confidence reposed in a person with whom the informant has a special relationship. In this respect it may be said to go further than the common law, certainly according to Wigmore's formulation. The Act does not define `special relationship', but what appears to be contemplated is a relationship of a kind that would encourage the imparting of confidences, and that has a public interest element in it. The relationship may arise by virtue of an office or duty reposed in the confidant, or even perhaps by the very imparting of the confidence. While recognising the dangers of generalisation, it may be said that the relationship between a probation officer and the person upon whom he or she is reporting, or whom he or she is supervising, is a special one, and that in that relationship communications may be made that are fairly to be described as confidences, notwithstanding the officer's duty to report to the Court or to take other action under the relevant provisions of the *Criminal Justice Act*. That the confidence may later become public is immaterial to its quality at the time it is made. . . .

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21 J H Wigmore *Evidence in Trials at Common Law* (McNaughton ed 1961) Vol 8 para 2285: see Ch 1 n 17.

> Furthermore, it is important to note that recognition that there may or will be disclosure for a limited purpose does not necessarily destroy confidentiality for all other purposes. Section 35 is directed to the proceeding in which disclosure is sought, and the question to be asked is whether disclosure in *that* proceeding would be a breach of confidence. . . .
>
> It therefore cannot be said that a probation officer is unable to lay claim to confidentiality under s 35. There is nothing in the nature of his or her office or duties to preclude the application of the section. In each case it will be a question of determining whether there was a confidence and a special relationship; and then of making the public interest assessment called for by subs (2) of s 35."[22]

8.23 The Court of Appeal also made general observations about when section 35 is likely to operate:

> "Section 35 is concerned with Court proceedings. If the evidence is important to the determination of the issue, then it is likely that the public interest will favour disclosure; the more serious or important the issue, the more likely that is. . . . [F]actors the Court will wish to take into account will include the manner and circumstances in which the information was given, the purpose for which it was given, the seriousness of the reasons for seeking disclosure, and whether there are other means of obtaining the evidence."[23]

3. ADVANTAGES OF DISCRETIONARY SCHEMES

(a) Flexibility

8.24 The primary advantage of a discretionary scheme over the current law would be the introduction of greater flexibility in allowing courts to assess the individual merits of each case. The judicial discretion would be available "to protect communications and records . . . made in circumstances where one of the parties is under an obligation (whether legal, ethical or moral) not to disclose them".[24] Also, it could be seen as preferable for the court to concentrate on the quality or nature of the whole relationship rather than simply on the nature of the precise obligation to preserve the confidence.[25]

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22 [1992] 3 NZLR 570, 574-575.
23 Id 575.
24 ALRC Interim *Evidence* Report Vol 1 para 909.
25 Ibid.

(b) All relationships on equal footing

8.25 Discretionary schemes of this kind have been praised on egalitarian grounds:[26]

> "The proposal of the Australian Law Reform Commission is a sensible one in that it treats all confidential relationships on an equal footing. Apart from the special protection conferred by the law upon the lawyer-client relationship, there is no stronger argument in favour of the protection of any one relationship (for example, accountant-client, journalists and their sources, anthropologists and their subjects) over any of the others. No doubt the creation of a common law privilege to protect a confidential relationship such as accountant and client or doctor and patient would safeguard the rights of the client/patient and encourage full and frank disclosure on her or his part to the respective accountant/doctor. However, it is submitted that the rationale and operation of the legal profession is distinct from that of other professions and hence the need for a privilege in one profession is not necessarily the same as the need for a privilege in another. . . . The claims of all the other professional relationships which proffer confidential advice are all meritorious and it is surely more equitable to deal with them on a discretionary basis. Having said this, however, it is submitted that the principles which guide the court in the exercise of its discretionary judgment should be made clear in advance. This would enable the parties to make fairly confident predictions about the success of their claim to withhold confidential communications and would also prevent a flood of claims which are undeserving or indefensible."

4. PROBLEMS WITH THE PROPOSALS IN OTHER JURISDICTIONS

(a) Balancing the harms

8.26 Under the ALRC proposal, judicial balancing of various harms against the desirability of admitting the evidence may be a daunting task. This is so, particularly when such non-specific criteria as "the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding"[27] have to be evaluated.

(b) Exceptions

8.27 The exceptions to the operation of the ALRC discretion[28] are also relatively non-specific and may lead to anomalous decisions. For example, the discretion would not apply to "the making of [a communication or document] which affects a right of a person". However,

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26 McNicol 6.

27 ALRC *Evidence* Report, Draft Evidence Bill cl 109(2)(e).

28 Id cl 109(3).

there is no definition of "right" and no indication of a test to be applied to determine the people who may be affected by the making of the communication. It is not clear whether "a right of a person" would include, for example:

* the "right" of a company to protect its trading secrets from competitors;

* the "right" of shareholders in a company to protect their investment which would include an interest in company/industrial secrets;

* any civilly actionable right, for example a tort.

(c) No guarantee of confidentiality

8.28 The ALRC, Canadian and New Zealand provisions also fail to satisfy the claim by some professionals, particularly journalists, that they are entitled to an absolute privilege in relation to protecting the identity of informers. A statutory judicial discretion provides no absolute guarantees as to the decision regarding disclosure which will be made by courts.

8.29 The lack of absolute certainty which would necessarily flow from a statutory discretion of this kind would be minimised by a requiring courts to have regard to specified matters when exercising their discretion. This will at least give potential witnesses an opportunity to assess the relevance of those matters to the confidential information in their knowledge or possession before claiming privilege.

(d) Relevant evidence

8.30 Exercise of a judicial discretion in favour of excusing a witness from answering questions or producing documents would result in relevant evidence being withheld from judicial proceedings. However, if one matter courts had to consider prior to exercising their discretion was the potential significance of the evidence to the resolution of the issues to be decided, then the more significant the evidence the less likely it would be that the discretion would be exercised in favour of excusing a witness from disclosing confidential communications.

(e) Journalists and sources of information

8.31 It has been suggested that the New Zealand provision will not enable a journalist to refuse to reveal the identity of his source of information:

> "Section 35 does not entitle a journalist to claim the Court's indulgence to permit him to refuse to name an informant: it is only the information passed, or the facts stated in the document, that may be withheld under s 35(1)."[29]

8.32 If a provision such as section 35 were enacted in Western Australia, the possibility should exist, in appropriate circumstances, for it to protect the confidential identity of a journalist's source of information. Such protection would only be given where the balance of the public interests referred to in section 35(2), after having regard to the matters referred to in this provision, is in favour of protection. The wording of the provision may have to be changed to enable protection of the source's identity.

8.33 The Commission's proposed provision[30] expressly alters section 35 as to enable the confidential identity of a source of information to be protected.

5. SUBMISSIONS ON DISCRETIONARY SCHEME

8.34 A large number of respondents to the Discussion Paper were in favour of a judicial discretion along the lines of the ALRC proposal or the New Zealand provision. Some comments in support of such a discretion include:

> "[T]his would enable the court to balance the public interest against needs and circumstances of the professional relationship."[31]

> "1. It avoids the potential difficulty of prescribing the professions to which privilege ought to apply;

> 2. It allows the principle of natural justice to be followed in all judicial proceedings without unnecessary limitations;

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29 D L Mathieson QC (ed) *Cross on Evidence* (4th NZ ed) 269.

30 See para 8.39 below.

31 Rev Peter Abetz (Minister, Willeton Reformed Church).

3. It extends protection to those confidential communications which when measured against the stated criteria are deemed to be privileged;

4. It does not limit the capacity of judicial officers to allow other protective measures aimed at avoiding full disclosure or protecting confidential communications."[32]

"The court should be in the best position to decide based on the facts in individual cases."[33]

8.35 Some concerns about such a discretion were also expressed in the submissions. For example:

> "Judicial discretion is only as good as the person making the decision. People who reach the status when they are required to make such decisions may well be older, educated in a conservative way, and be of middle or upper class. They may not therefore be in tune with the prevailing culture of youth/alternative lifestyles. Thus discretion may not be given where it should/could be thought proper or appropriate.[34]

> "It would seem reasonable to agree to this but I have some reservations as there have been cases where courts have seen things differently to those seeking the privilege and if the matter was to do with governments or a particular person, there could be pressure on the court to deny privilege. Therefore I think it is fairer to have one rule for all."[35]

8.36 Most respondents who were in favour of a judicial discretion were also in favour of having a set of criteria upon which the discretion should be exercised.[36] A number of respondents expressed specific support for the ALRC criteria although some reservations were noted. For example, one commentator said:

> "The Australian Law Reform criteria is [sic] typical of the problem encountered in trying to define where privilege should be extended. The multitude of definitions required for what is really a simple discernment reflects the problem one has when

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32 Australian Nursing Federation.
33 Dr D C Dawes (Royal Perth Hospital).
34 Dr Carol Deller (medical practitioner).
35 Mrs Rosemary Lorrimar (registered nurse).
36 Dr D C Dawes (Royal Perth Hospital), Dr Carol Deller (medical practitioner) and Mrs Rosemary Lorrimar (registered nurse) were the only respondents in support of an absolute discretion.

trying to legislate on emotional or spiritual relationship for a whole community with their priest or each other."[37]

6. COMMENTS ON DISCRETIONARY SCHEME IN LIGHT OF RECENT CASES

8.37 Recent instances in which journalists have been imprisoned or fined for refusing to disclose the identity of a confidential source inspired a number of comments advocating the introduction of a discretion based on the New Zealand system. The Queensland Attorney General, Mr Wells, made such a proposal[38] at the time of the Budd case.[39] More recently, Mr Stephen Halliday, President of the Australian Journalists' Association Section of South Australia's Media, Entertainment and Arts Alliance, commenting in the wake of the Hellaby[40] and Nicholls[41] cases, advocated the adoption of the New Zealand provision, so giving courts discretionary powers to excuse a witness from giving evidence that would disclose confidential communications.[42] Professor Alex Castles of Adelaide University Law School said that the media could not expect absolute privilege to protect sources and that a balance had to be struck between freedom of expression and the individual's right to protection under the law.[43]

6. THE COMMISSION'S RECOMMENDATION

8.38 The Commission *recommends* the enactment[44] of a judicial discretion to protect confidential information within any special relationship from disclosure provided that, in any particular case, the public interest in having the evidence disclosed to the judicial proceeding is outweighed by the public interest in preservation of confidences between persons in the relative positions of confidant and witness and the encouragement of free communication between such persons.

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37 Mr David Rossiter (Minister, Grace Christian Ministries Inc).

38 See "Judicial contempt for a free press" *The Australian* 21 April 1993.

39 See paras 4.27-4.32 above.

40 See paras 4.33-4.34 above.

41 See paras 4.35-4.36 above.

42 "Reporter jailed for four months" *The Australian* 20 April 1993, 1-2; "Source of discontent" *The Australian* 6 May 1993.

43 "Source of discontent" *The Australian* 6 May 1993.

44 The most appropriate location for the recommended provision would be the *Evidence Act 1906*.

8.39 The discretion provision should be based on that in section 35 of the *Evidence Amendment Act (No 2) 1980* (NZ), with a number of additions and amendments. The recommended provision (with the additions and amendments in italics) is as follows:

(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question *(including a question as to the identity of a source of information)* or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the *answer* or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:

(b) The nature of the confidence and of the special relationship between the confidant and the witness:

(c) The likely effect of the disclosure on the confidant, *any other person or the community, taking account of the ethical, moral or religious dictates of those professions or vocations which unequivocally demand non-disclosure, even in the face of the Court's order to disclose:*

(d) *Any means available to the Court to limit the adverse consequences of a required disclosure of confidential information or confidential sources of information and any alternative means of proving relevant facts.*

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section "Court" includes

(a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and

(b) Any other person acting judicially.

8. CONSIDERATIONS GUIDING THE COMMISSION'S RECOMMENDATION

8.40 The following considerations have guided the Commission's recommendation as formulated in the previous paragraph.

(a) The discretion should be exercised after consideration of certain matters

8.41 The Commission is not in favour of granting courts an unfettered discretion. It *recommends* setting out in a statute the relevant matters which the judicial officer must address when exercising the discretion. The proposed Canadian provision,[45] which does not list matters to be taken into account, relies too heavily on the ability or willingness of courts to develop their own guidelines over time. Setting out matters to be considered by the court when exercising the discretion ensures that the attention of the court will be focussed on important factors which may otherwise be overlooked.

8.42 Without inclusion of appropriate criteria and limitations, the exercise of a discretion could lead to inconsistent decisions. As a result, the public would have little idea when the discretion would be applied to protect information and would be unable to enter into confidential relationships with their professional advisers with a degree of certainty about the future disclosure of their identity or information revealed to them.[46]

8.43 In determining what matters courts should consider before exercising the recommended discretion, the Commission reviewed the matters listed in clause 109 of the ALRC draft Evidence Bill,[47] section 35 of the *Evidence Act 1980* (NZ)[48] and other matters which became apparent during the progress of the reference.

8.44 The only relevant matter which the court is to take into account under the ALRC draft Bill which is not covered by the New Zealand provision is "any means available to limit the publication of the evidence".[49]

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45 See para 8.6 above.

46 The Commission does not share the Law Reform Commission of Canada's view that future courts would establish a judicial policy in this regard.

47 See para 8.9 above.

48 See para 8.16 above.

49 Cl 109(2)(f).

8.45 Chapter 2 refers to methods available to courts to avoid having to force a breach of the confidential nature of a relationship between two people, or at least to reduce the adverse consequences of a forced breach of the confidence. By reminding courts, in the statutory provision for a judicial discretion, that other methods of achieving the same or similar results may be already available, there may be no need for the court to exercise its statutory discretion. Of course, procedures available to the court to reduce the adverse consequences of a forced breach of confidence may involve something other than limiting publication of the evidence. It could involve ordering non-publication of part only of the evidence, substitution of fictional names in the material to be published, etc. Therefore, the Commission *recommends* that courts take into account when exercising the discretion:

> "Any means available to limit the adverse consequences of a required disclosure of confidential information or confidential sources of information and any alternative means of proving relevant facts".

8.46 The Commission is concerned about the complexity of other matters in the ALRC provision. Inclusion in the judicial discretion of a number of the matters listed by the ALRC could result in greater uncertainty about the possible future use of confidential information in judicial proceedings. The matters listed in the New Zealand provision are more in line with expectations of the public in relation to the protection of confidential communications within professional relationships.

8.47 The first matter listed in the New Zealand provision is:

> "The likely significance of the evidence to the resolution of the issues to be decided in the proceeding".

Obviously, the more significant the evidence is to the resolution of issues to be resolved during judicial proceedings the less likely courts will be to grant a privilege in relation to the information in question. Conversely, if the information is only marginally relevant to the proceedings, courts may be more inclined to exercise their discretion in favour of disclosure of the information.

8.48 The second matter listed by the New Zealand provision is:

> "The nature of the confidence and of the special relationship between the confidant and the witness".

The more seriously the parties and the public regard the confidential communication the more likely it is that courts will protect it. Also, if the confidence is in the nature of a confession or otherwise goes to the strongly held beliefs of individuals or organisations, then courts may consider the confidence worthy of protection.

8.49 The Commission agrees with the New Zealand Court of Appeal's comments in *R v Secord*[50] that what is contemplated by "special relationship" is a relationship of a kind that would encourage the imparting of confidences, and which has a public interest element in it. As the court said, "[t]he relationship may arise by virtue of an office or duty reposed in the confidant, or even perhaps by the very imparting of the confidence."[51] It would be very difficult to confine use of a judicial discretion to the promotion and maintenance of relevant public interests without limiting the applicability of the discretion to "special relationships".

8.50 The third matter listed in the New Zealand provision is:

> "The likely effect of the disclosure on the confidant or any other person".

The Commission agrees that this is an important consideration for the court to take into account. A person might suffer physical harm, financial ruin, damaged reputation or any other type of damage as a result of disclosure of confidential information.

8.51 It is also important for courts to take into account that certain people will have such deeply held beliefs that they will never, even under threat of imprisonment, disclose certain information.

8.52 To clarify that this third matter takes into account such deeply held beliefs, the Commission *recommends* the following rewording:

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50 [1992] 3 NZLR 570.

51 Id 574.

> "The likely effect of the disclosure on the confidant, any other person *or the community, taking account of the ethical, moral or religious dictates of those professions or vocations which unequivocally demand non-disclosure, even in the face of the court's order to disclose".*

(b) The discretion should apply to confidential communications and to the confidential identity of sources of information

8.53 The public interests to be promoted by the protection of the identity of a journalist's source may, in a particular case, be more significant than the public interests to be promoted by the ability of courts to have before them all relevant evidence.[52] Therefore, in appropriate circumstances, courts should be able to protect the confidential identity of a witness's source of information,[53] and the Commission so *recommends*. The New Zealand provision as currently worded may not provide courts with the ability to exercise the discretion so as to permit a professional, such as a journalist, to withhold the identity of his source of information from the court. The provision recommended by this Commission has been drafted to enable courts to deal with this situation.

(c) The discretion should apply only to judicial proceedings

8.54 The recommended provision provides a discretion to be exercised in proccedings before courts. "Court" is defined widely to include any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses, and any other person acting judicially. Because of the inclusion of all statutory bodies having power to compel the attendance of witnesses, it will include bodies such as Royal Commissions and other bodies conducting inquiries which cannot be classified as judicial in the strict sense but which are capable of exercising the recommended discretion.[54] "Person acting judicially" means someone who has the opportunity of hearing both parties and making a determination.

8.55 "Court" as defined in the recommended provision therefore does not cover investigative agencies or those empowered to carry out search and seizure, for example by way of search warrant. Powers of search and seizure, such as a search warrant, could be used by investigative agencies to defeat the judicial discretion recommended above. An investigative agency could simply obtain a search warrant, for example in order to gather

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52 See paras 4.45-4.67 above.
53 See para 8.32 above.
54 See para 1.26 above.

information which might form a basis for the exercise of the statutory discretion if the person holding it were called as a witness.[55]

8.56 Although outside its terms of reference, powers of search and seizure by investigative agencies (such as the issue of search warrants addressed to the media or lawyers' offices) should in principle be subject to a suitably modified form of the statutory discretion recommended in paragraph 8.39 above.

M D PENDLETON, *Chairman*

C J McLURE

J A THOMSON

17 May 1993

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[55] See Australian Press Council General Press Release No 168, issued 2 March 1993, in which the Council expressed concern about the number of instances where investigators and law enforcement agencies have taken action to compel journalists and newspapers and other media to expose confidential sources. The Press Release resulted from an incident in which the Queensland Criminal Justice Commission issued a notice requiring the *Brisbane Courier-Mail* to produce certain telephone records following the publication of a leaked report into the Mafia. See "CJC `toothless without seizure powers'" *The Weekend Australian* 1-2 May 1993.

Appendix I

LIST OF THOSE WHO COMMENTED ON THE DISCUSSION PAPER

Rev Peter Abetz (Minister, Willeton Reformed Church)

Anglican Church of Australia (Most Rev Dr Peter Carnley, Archbishop of Perth)

Australian Association of Social Workers Ltd

Australian Dental Association Inc (WA Branch)

Australian Journalists' Association (West Australian Branch)

Australian Library and Information Association

Australian Nursing Federation (WA Branch)

Australian Physiotherapy Association (WA)

Australian Press Council

Baptist Churches of Western Australia (Mr Laurie Galloway, President)

Bodhinya Buddhist Monastery

Mr Sjirk Bojema (Minister, Canning Reformed Church)

Buddhist Society of Western Australia (Inc) (A Brahmavanso, Assistant Abbot)

Catholic Church (Most Rev Barry Hickey, Archbishop of Perth)

Chartered Institute of Management Accountants (Western Australia Branch)

Dr D C Dawes (Royal Perth Hospital)

Dr Carol Deller (medical practitioner)

Doctors' Reform Society of Western Australia

Mr Scott Ellis (solicitor)

Family Law Council

Family Planning Association of Western Australia

Dr David Formby (Princess Margaret Hospital for Children)

Mr James Goss (Minister, Kings City Church)

Dr G J L Hamilton (medical practitioner)

Mrs Margaret Hamilton (oral historian)

Professor David Hawks (National Centre for Research into Prevention of Drug Abuse)

Rev Mark Heath (Pastor, Bible Presbyterian Church of WA)

Mr Warren Ison (Minister, Church of the Foursquare Gospel in Australia)

Hon Justice Michael Kirby (President, New South Wales Court of Appeal)

Law Society of Western Australia

Legal Aid Commission of Western Australia

Mr Jens Linde (Danish Union of Journalists)

Mrs Rosemary Lorrimar (registered nurse)

Mr Robert Millhouse (former journalist, subsequently media liaison officer with Royal Commission)

Nurses Board of Western Australia

Ontario Law Reform Commission

Mr David Rossiter, (Minister, Grace Christian Ministries Inc)

Roya1 College of Nursing, Australia (Western Australian State Chapter)

Sir Charles Gairdner Hospital

Temple David Congregation (Inc) (Rabbi C D Wallach)

Mr M Thompson (inquiry agent)

Ms Mary-Louise Vermeuhlen (accountant)

Appendix II

LEGAL PROFESSIONAL PRIVILEGE: EXTRACT FROM COMMONWEALTH EVIDENCE BILL 1991

Division 7 - Privileges

Subdivision A - Client legal privilege

Privilege in respect of legal advice and litigation etc.

116. (1) Evidence is not to be adduced if, on objection by a person (in this Subdivision called the "**client**"), the court finds that adducing the evidence would involve the disclosure of:

(a) a confidential communication, between:

(i) the client, or a representative of the client, and a legal practitioner; or

(ii) 2 or more legal practitioners acting for the client; or

(iii) employees or agents of such legal practitioners;

that was made; or

(b) the contents of a document (whether delivered or not), prepared by:

(i) a legal practitioner; or

(ii) the client; or

(iii) a representative of the client;

that was prepared;

for the sole purpose of the legal practitioner or one of the legal practitioners, providing legal advice to the client.

(2) Evidence is not to be adduced if, on objection by a person (in this Subdivision also called the "**client**"), the court finds that adducing the evidence would result in the disclosure of:

(a) a confidential communication, between:

(i) 2 or more of the persons mentioned in subsection (1); or

(ii) a person mentioned in subsection (1) and a person not so mentioned; or

(iii) 2 or more persons each of whom is an employee or agent of the client;

that was made; or

(b) the contents of a document (whether delivered or not) that was prepared;

for the sole purpose of the client being provided with professional legal services in relation to a legal or administrative proceeding (including the proceeding before the court), or an anticipated or pending legal or administrative proceeding, in which he or she is or may be, or was or might have been, a party.

(3) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a legal practitioner, the court finds that adducing the evidence would involve the disclosure of:

(a) a confidential communication between the party, or a representative of the party, and another person; or

(b) the contents of a document (whether delivered or not) that was prepared, either by or at the direction or request of, the party or a representative of the party;

for the sole purpose of preparing for or conducting the proceeding.

(4) A reference in this section to a legal practitioner includes a reference to an employee or agent of a legal practitioner.

Loss of client legal privilege

117. (1) Section 116 does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Section 116 does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died.

(3) Section 116 does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of any Australian Court.

(4) In a criminal proceeding, section 116 does not prevent a defendant from adducing evidence that is not evidence of:

(a) a confidential communication between a person who is being prosecuted for a related offence, or an employee or agent of that person, and a legal practitioner acting for that person in connection with that prosecution; or

(b) the contents of a document prepared by a person who is being prosecuted for a related offence, or an employee or agent of that person, or by a legal practitioner acting for that person, being a document prepared in connection with that prosecution.

(5) Section 116 does not prevent the adducing of evidence of a communication or a document that affects a right of a person.

(6) Subject to subsection (7), section 116 does not prevent the adducing of evidence if:

(a) a client or party, a representative of the client or party, or a legal practitioner acting for the client or party, has knowingly and voluntarily disclosed the substance of the evidence; and

(b) the disclosure was not made:

(i) in the course of making a confidential communication or preparing a confidential record; or

(ii) as a result of duress or deception; or

(iii) under compulsion of law.

(7) Subsection (6) does not apply to a disclosure by a person who was, at the time, an employee or agent of a client or party or of a legal practitioner unless the employee or agent was authorised to make the disclosure.

(8) Section 116 does not prevent the adducing of evidence of a document that a witness has used, in the course of giving evidence, to refresh his or her memory about a fact.

(9) Subject to subsection (10), section 116 does not prevent the adducing of evidence if the substance of the evidence has been disclosed with the express or implied consent of the client or party to another person other than:

(a) a legal practitioner acting for the client or party; or

(b) a representative of the client or party; or

(c) if the client or party is a body established by, or a person holding an office under, a law of the Commonwealth, a State or a Territory - the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.

(10) Subsection (9) does not apply to a disclosure by a client, or a representative of a client, to another person if the disclosure concerns a matter in relation to which the same legal practitioner is providing, or is to provide, professional legal services to both the client and the other person.

(11) Where, in relation to a proceeding in connection with a matter, 2 or more of the parties have, before the commencement of the proceeding, jointly retained a legal practitioner in relation to the matter, section 116 does not prevent one of those parties who retained the legal practitioner from adducing evidence of:

(a) a communication made by any one of them, or a representative of any one of them, to the legal practitioner; or

(b) a document prepared by any one of them, or a representative of any one of them;

in connection with that matter.

(12) Section 116 does not prevent the adducing of evidence of:

(a) a communication made or a document prepared in furtherance of the commission of:

(i) a fraud; or
(ii) an offence; or
(iii) an act that renders a person liable to a civil penalty; or

(b) a communication or a document that the party knew or ought reasonably to have known was made or prepared by furtherance of a deliberate abuse of a

power conferred by or under an enactment, a law of a State or Territory or an Imperial Act in force in a State or Territory.

(13) For the purposes of subsection (12), where:

(a) the commission of the fraud, the offence or act, or the abuse of power, is a fact in issue; and

(b) there are reasonable grounds for finding that:

(i) the fraud, offence or act, or the abuse of power, was committed; and

(ii) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act, or the abuse of power;

the court may find that the communication was so made or the document was so prepared.

(14) Section 116 does not prevent the adducing of evidence if, were the evidence not adduced, a person would be reasonably likely to be at greater risk of physical harm than if the evidence were adduced.

(15) Where, because of the application of a preceding subsection of this section, section 116 does not prevent the adducing of evidence of a communication or document, that section does not prevent the adducing of evidence of another communication or document if:

(a) it is reasonably necessary to adduce evidence of the other communication or document to enable a proper understanding of the first-mentioned communication or document; or

(b) it would be unfair or misleading if that section prevented the adducing of evidence of the other communication or document.

(16) A reference in this section to a legal practitioner includes a reference to an employee or agent of a legal practitioner.

Representatives

118. In this Subdivision, unless the contrary intention appears:

"**representative**", in relation to a client or party, includes:

(a) an employee or agent of the client or party; or

(b) if, under a law of a State or Territory that relates to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of the client or party - a manager, committee or person so acting; or

(c) if the client or party has died - a personal representative of the client or party; or

(d) a successor to the rights and obligations of the client or party, being rights and obligations in respect of which a confidential communication was made.

Appendix III

JOURNALISTS: THE COMMISSION'S 1980 REPORT

1. The Commission first considered the issue of whether there should be a professional privilege for journalists in its Report on *Privilege for Journalists* in 1980.[1] It was asked to consider and report on the proposal that journalists should be given the right to refuse to disclose in court proceedings the source of their information. It recommended that there be no statutory privilege for journalists and that any development in this regard should continue to be for the common law.

2. In this Report the Commission considered and rejected a number of options for reform. It was not in favour of the creation of a general right for journalists to be able to refuse to reveal the identity of their sources of information. The Commission was concerned that such a right would enable a journalist called as a witness to refuse to disclose the identity of the person who had supplied him with information, irrespective of whether the proceedings were civil, criminal or investigatory and no matter how important disclosure would be for the correct resolution of the issues involved in the proceedings. The disadvantages flowing from a right to refuse to reveal such information were considered to outweigh any benefits which could reasonably be expected from granting it. The Commission made reference to the possible consequences of withholding relevant information from various judicial proceedings. In criminal proceedings, for example, the operation of such a right could result in the denial of relevant evidence essential for the acquittal or conviction of an accused person.

3. The Commission also rejected the option of a qualified right for journalists to refuse to reveal confidential information. In relation to the suggestion that any privilege only apply to certain classes of judicial proceedings (for example, only in relation to criminal proceedings of a serious nature, or only to civil proceedings) the Commission expressed the concern that:

> "A major difficulty with such an approach is that any division between those proceedings where the privilege applied as of right and those where it did not would be bound to be arbitrary. Wherever the line was drawn there would always be the possibility of serious injustice being done in proceedings where the privilege applied.

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[1] Project No 53. The terms of reference were "to consider and report on the proposal that journalists should be given the right to refuse to disclose in court proceedings the source of their information".

> The Commission does not in any event consider that the privilege should apply in criminal proceedings. Nor would it be desirable that it should apply in Royal Commission proceedings, yet this is one of the areas where journalists are most likely to be called upon to reveal the identity of their sources. A scheme which excluded one of the principal areas of concern to journalists would be unlikely to be regarded by them as a satisfactory compromise. For these reasons the Commission is not in favour of implementing this approach."[2]

4. Further, the Commission did not consider it appropriate in 1980 to recommend the creation of any form of discretion in the court to treat relevant evidence as privileged on a case-by-case basis:

> "[A]ny form of discretion which did not unduly hamper the court or tribunal in its quest for the truth would be unlikely to provide greater relief to journalists and their informants than the way in which judicial tribunals appear to operate at present. The Commission is of the view that it would be wise not to attempt to crystallize the practice of the courts in statutory form at this stage. . . . [T]he judicial discretion in this area is as yet unsettled and judicial attitudes appear to be changing fairly rapidly.[3] It would consequently seem desirable to await further judicial development."[4]

5. As stated in paragraph 4.4 of the present Report, in this review the Commission has not regarded itself as bound by its earlier recommendations, in view of developments in other jurisdictions and the fact that the absence of a journalists' privilege has continued to cause controversy.

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2 Id para 5.18.

3 It appears that the Commission was wrong in this prediction, at least in relation to developments in Australia: see DP Chs 2-3.

4 Op cit n 1, para 5.25.

Appendix IV

JOURNALISTS: THE LAW ON PRIVILEGE IN OTHER JURISDICTIONS

1. A number of jurisdictions reviewed by the Commission have introduced some form of statutory protection for the confidential identity of sources of journalists' information. These provisions are reviewed in the following paragraphs.[1] Most such provisions do not create an absolute privilege.[2] A number merely provide the court with a discretion to treat certain information as privileged.[3]

1. THE UNITED KINGDOM

2. Section 10 of the *Contempt of Court Act 1981* provides a limited privilege for journalists in the United Kingdom:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

3. The phrase "interests of justice" has been recently considered by the House of Lords in *X Ltd v Morgan-Grampian Ltd.*[4] The House of Lords concluded that section 10 required the court to balance competing public interests when determining whether the interests of justice predominate in any particular case. As Lord Oliver of Aylmerton stated:

> "The true question, in my opinion, is . . . `are the interests of justice in this case so pressing as to require the absolute ban on disclosure to be overridden?' This immediately raises the necessity of striking a balance between, on the one hand, the public importance attached to the preservation of the confidentiality of the source which is enshrined in the statutory prohibition and, on the other hand, the relative public importance of the interests of justice in the particular case."[5]

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1 See also DP Chs 3 and 7; DP Appendix 3.
2 Exceptions include New York and Austria: see paras 8 and 19 below.
3 Eg United Kingdom, Florida, Denmark: see paras 2, 9 and 24 below.
4 [1991] 1 AC 1.
5 Id 53.

The House of Lords ordered disclosure of the identity of a journalist's source.[6] Nevertheless, it appeared to take seriously the public interest in the free flow of information. For instance, the claim by the defendants to be protected by section 10 could have been dismissed at the outset for want of a "publication",[7] yet the court was prepared to overlook this point and treat the case as falling within section 10 because "the purpose underlying the statutory protection of sources of information is as much applicable before as after publication."[8]

4. Another indication that the court recognised the public interest in protecting the media is the finding that:

> "[S] 10 operates to protect the media not only where an order to disclose a source is sought, but also where the order is for the disclosure of material which will indirectly identify the source. A narrower view of the protection conferred by the section might have prevented the defendants relying upon s 10 where (as here) the plaintiff requested the disclosure of material only."[9]

The precise extent of media protection available under this interpretation of section 10 will turn on the factors deemed relevant to the balancing exercise and the weight accorded to them.[10] According to Lord Bridge,[11] two important factors are:

(1) the nature of the information obtained from the source. The greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater is the importance of protecting the source.

(2) the manner in which the information was obtained by the source. If the information was obtained illegally but a clear public interest existed in its

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6 The House of Lords held the balance of interest to be in favour of ordering disclosure. The threat of severe damage to the plaintiffs' business and their employees' livelihoods posed by revelations about a corporate refinancing plan while negotiations continued outweighed the importance of protecting the defendants' interest in protecting the source's identity. An order for disclosure was granted so that the plaintiffs could exercise their contractual rights against the source and thereby avert future illegalities. Factors which tipped the scales included the unlawful manner in which the material had been obtained and the lack of `legitimate interest' in publication: [1991] 1 AC 1, 45 per Lord Bridge, 49 per Lord Templeman, 54 per Lord Oliver.

7 All that had happened by the time the plaintiffs commenced their action for disclosure was merely preparatory to publication.

8 [1991] 1 AC 1, 40 per Lord Bridge.

9 I Cram "When the `Interests of Justice' Outweigh Freedom of Expression" (1992) 55 *MLR* 400, 401.

10 Id 403.

11 [1991] 1 AC 1, 43-44; see also 53-54 per Lord Oliver.

publication, as where the information revealed iniquity, the balance would favour protection from disclosure.

5. It has been suggested[12] that the obstacles in the way of disclosure under section 10 are not especially onerous, given the nature of the factors to be considered in the balance (particularly the emphasis on the manner in which the information is obtained and the threat to the financial position of the party seeking disclosure), allied to the fact that the latter need only show an ability to exercise a legal right against another.

6. Another writer[13] is of the view that section 10 of the UK Act at least indicates a presumption in favour of privilege rather than disclosure.[14] There is a presumption that the journalist need not reveal his source and that the burden is on the party seeking disclosure.[15] Moreover, this burden of establishing necessity for disclosure must be satisfied on the basis of adequate evidence. However, this writer suggests that in practice it is unlikely, given current judicial attitudes, that any of the common law cases would have been decided differently under section 10. In the meantime, any public-spirited person who discloses information to a journalist and who hopes to remain anonymous may have to rely on the willingness of journalists to suffer imprisonment.

2. THE UNITED STATES

7. A large number of United States jurisdictions have enacted statutory privileges for journalists (or "shield laws").[16] The laws are not uniform. Some only protect confidential sources, others protect confidential and non-confidential sources. Some provide absolute privilege, others a qualified privilege. The Oklahoma statute provides an example of a qualified privilege:

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12 Cram op cit n 9, 404-405.

13 S Palmer "Protecting Journalists' Sources: Section 10 *Contempt of Court Act 1981*" [1992] *Public Law* 61, 72.

14 Which, according to Lord Diplock, was the position at common law prior to the enactment of s 10: *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, at 345.

15 *Re an Inquiry under the Companies Securities (Insider Dealing) Act 1985* [1988] AC 660, 703 per Lord Griffiths.

16 See DP paras 3.89-3.93.

> "[The privilege] does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein the defendant asserts a defense based on the content or source of such information."[17]

8. In one of the most recently amended United States shield laws, that of New York, absolute protection against contempt proceedings is given to journalists refusing or failing to disclose information received in confidence or the identity of the source of such information.[18] The statute also provides a qualified privilege to journalists who refuse or fail to disclose any unpublished news obtained or prepared in the course of gathering or obtaining information received in confidence, or the source of any such information where the information was not obtained or received in confidence. Exceptions to the latter provision include where the party seeking such news has made clear and specific showing that the information:

(1) is highly material and relevant;
(2) is critical or necessary to the maintenance of a party's claim, defence or proof of an issue material thereto; and
(3) is not obtainable from any alternative source.

9. Courts in the United States frequently undertake a balancing of interests in cases where journalists are required to provide information during judicial proceedings. The balancing of interests may in fact be merely the application of tests or criteria.[19] In Florida, for example, courts have recognised the following tests for a defendant in a criminal case to meet before a journalist will be required to testify:[20]

(1) the information sought must be relevant and material;
(2) there must be a compelling need for the information;
(3) the information must be unavailable from other sources; and

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17 *Okla Stat Ann* Title 12 s 2506: see DP para 3.91.

18 *Civil Rights Law* (New York) S 79-H (as amended 1990): see DP para 3.92; DP Appendix 3.

19 W F Korthals Altes "The Journalistic Privilege: A Dutch Proposal for Legislation" [1992] *Public Law* 73, 81-82:
"[T]he wording of these conditions varies slightly, often depending on who asks for the information. Criminal defendants, for instance, are required to show that there must be a reasonable possibility that the information would affect the verdict. Federal prosecutors frequently have to show that they have complied with the Department of Justice *Guidelines for Subpoenas to the News Media*. In civil libel cases, the information sought by the party asking for the journalist's testimony (usually the person claiming to be defamed by the journalist) must go to the `heart of the claim'. Several of these tests are part of shield statute provisions."

20 See eg *United States v Blanton* 534 F Supp 295 (SD Fla 1982); Altes op cit n 86, 81 n 31.

(4) the person seeking the information must show that he has made all (or all reasonable) efforts to obtain the information from another source.

3. GERMANY

10. In 1975 a journalists' privilege was enacted in Germany which was to apply to all jurisdictions (including the civil, criminal and administrative jurisdictions):

> "Persons who professionally contribute or have contributed to the preparation, creation or publication of printed periodicals or broadcasting programmes, do not have to testify about the person of the creator, messenger or origin of contributions and documents or about communications imparted with a view to publication, insofar as contributions, documents and communications for the editorial section are concerned."[21]

In addition a provision dealing with the search and seizure of journalistic material was inserted in the *Code of Criminal Procedure*:

> "To the extent that the journalistic privilege of the persons mentioned in Art. 53 par 1 nr 5 applies, it is inadmissible to seize documents, tapes, photographs and other pictures which are in the possession of these persons or of the editor, the publisher, the printer or the broadcasting organization."[22]

11. Unlike a number of statutory privileges in other jurisdictions, the German privilege does not require the source to be confidential. The journalist is also able to withhold information "about the person" - that is, information other than the identity of the source which could lead to the disclosure of his identity.

12. The provision enabling journalists to withhold information concerning communications to them with a view to publication has been the subject of some controversy in Germany. By contrast, the first category of protected information - being able to remain silent about the person being the creator, messenger or origin of contributions or documents - has never caused serious debate. In relation to the former category, Altes observes:

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[21] Art. 53 para 1 of the *Code of Criminal Procedure* (StPO) and art 383 para 1 nr 5 of the *Code of Civil Procedure* (ZPO). See also the discussion of the German provision in Altes op cit n 19, 75-76.

[22] StPO art 97 para 5. These restrictions on the search and seizure of journalistic material do not apply if the person who could claim the privilege is under suspicion of having committed or contributed to a crime, or if it concerns objects which were produced in the commission of a crime or have been used or destined for a crime or are the product of a crime: StPO art 97 para 3.

> "In 1981, the *Bundesverfassungsgericht* (the German constitutional court) was called upon to recognise a journalistic privilege for photographs taken by a journalist during demonstrations at the soccer stadium of Niedersachsen. The court refused to do so.[23] The words `communications imparted to them' said the court, should be taken literally. They did not include material obtained through the journalist's own observations, but only information given to him (orally or laid down in some kind of transmitted information).
>
> The court reasoned that the statute was intended to protect the relationship of confidentiality between journalists and their informants. Such a relationship is not at stake if a photographer takes pictures at a location accessible to the general public, said the court. Some authors are of the opinion that this leaves open the possibility of recognising a journalistic privilege in case the observations are made at a place in which the journalist is admitted upon a promise of confidentiality."[24]

13. The German privilege has been criticised for not taking into account the interests of those needing the information. The privilege applies no matter whether the request for information concerns a serious crime, a criminal defendant who cannot obtain release without it, or a person who is defamed by a publication based on information provided by an anonymous source:

> "In other words, the privilege is absolute. The statute does not allow for a balancing of interests. This absolute character was heavily criticised when the government introduced the Bill, but amendments proposing some balancing were rejected. The government asserted that there had been no case in which a journalist's refusal to testify had prevented the solution of a serious crime."[25]

Another criticism is that the privilege is confined to the editorial section of periodicals and broadcast programmes. Letters to the editor are part of the editorial section, but advertisements are not. This has given rise to criticism from those who think that a confidential relationship can also exist between newspapers and their advertisers.

14. Another issue in relation to the German provision is the question of who can claim the journalistic privilege. The German statute covers anyone who in some way or other contributes or has contributed to the publication (such as, for example, the actual author, the editor, typesetters, printers, secretaries, telephone operators, publishers etc). Altes observes:

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23 Bundesverfassungsgericht 4 Mar 1981, BVerfGE 56, 247.

24 Op cit n 86, 76-77. Support for this is found in a 1978 decision of the Bundesgerichtshof (the German Supreme Court): see Bundesgerichtshof 28 Dec 1978, BGHSt 28, 240.

25 Altes op cit n 19, 77-78.

> "It would undermine the purpose of the statute if the authorities could question a telephone operator who happens to have taken the informant's call for the journalist. On the other hand, the statutory privilege is limited in that only someone who *professionally* contributes to a publication can claim privilege. He or she does not have to be employed by a newspaper or broadcasting organisation. He or she can also work on a freelance basis. Furthermore, journalism does not have to be the individual's sole or even main profession."[26]

15. A further criticism of the German provision is that it applies only to periodicals and excludes, for instance, books and pamphlets, even if published by professional journalists. Films shown in cinemas also fall outside the scope of the statute. However, press agencies and other institutions which do not always directly provide the public with information nevertheless contribute to the publication of news and can thus claim protection.

4. THE NETHERLANDS

16. There is no privilege for journalists and their sources of information in the Netherlands, either by way of judicial precedent or by statute. However in 1991 a Bill incorporating a proposed journalists' privilege was drafted by a member of Parliament and published in a monthly law review on media law. The publication invited comment on the Bill before it was to be drafted for official introduction into the Dutch Parliament. The Bill was inspired by the law in Germany and the United States of America.[27] The Dutch proposal attempts to cover the following categories of information:

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[26] Id 77.

[27] See paras 7-15 above. Altes op cit n 19, 90-91 sets out the text of the Draft Bill on Journalistic Privilege (published in *Mediaforum Bijlage* (2) 1991):

Code of Criminal Procedure proposed new article 218a:

"1. Those who are or have been involved in a publication in a form of public communication accessible to the general public do not have to testify about someone from whom they have confidentially obtained information with a view to publication or who in confidence has given them the opportunity to obtain information.

2. The first paragraph does not apply if the information sought is urgently needed:

(a) for the prevention of a crime listed in Article 160 or of serious bodily injury to one or more human beings,

(b) for an investigation into a crime as meant under (a), provided that the authority seeking the information has sufficiently shown that it cannot reasonably be obtained in another way.

3. The first paragraph also does not apply if the information sought can reasonably lead to:

(a) the immediate release of a person who has been deprived of his freedom by criminal punishment or any other measure,

(b) acquittal or the imposition of a less burdensome punishment or measure, provided that the person seeking the information has sufficiently shown that it cannot reasonably be obtained in another way."

Proposed new article 98a:

"1. To the extent that Article 218a applies, it is inadmissible to seize documents or any other material containing information in the possession of someone protected by Article 218a.

(1) the identity of the confidential sources, including all information which might lead to disclosure;

(2) confidentially obtained information about non-anonymous or non-confidential sources;

(3) information obtained through observation in a private place to which the journalist got access on a promise of confidentiality;

(4) information obtained through observation in a semi-public place at which the journalist acted openly and in confidence;

(5) material containing published information that could lead to the disclosure of more information than could be observed through the publication;

(6) material containing unpublished information, insofar as the information was not published because of the protection of the free flow of information.

17. Altes observes in relation to the Dutch proposal:

"Unlike the position in common law countries, those dealing with these problems in civil law countries usually prefer giving the courts some guidance in the form of a statutory provision. The proposal presently under review in the Netherlands seeks to create a more or less equal balance between all competing interests. Commentators have raised the question whether the provisions on the journalistic privilege should be as detailed as proposed by the draft Bill. They are afraid that courts may be inclined to deny the privilege in cases which by some coincidence fall outside the scope of the statute, even though they belong to the class of cases meant to be covered by it.

The result of these comments may be that the second draft Bill . . . will be of a more general nature, instructing the court to recognise the journalistic privilege unless one or more countervailing interests out-balance those served by the privilege. In order to give the court proper guidance, the explanatory memorandum to the Bill would then contain the details set forth in the first draft. Under Dutch law, courts are obliged to consult the explanatory memorandum if a statutory provision provides only general instructions. This procedure would give the courts more flexibility without taking away the underlying principles of the privilege. . . .

Without some statutory guidance . . . courts are too often bound to balance interests to an extent exceeding the capacity which can be required from them. The issue of

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2. It is inadmissible to seize material containing information gathered in a public place with a view to publication, if:

(a) a decision to publish the information has not yet been made, or

(b) it has been sufficiently shown that the information has not been published in the interest of the free flow of information, or

(c) the material could disclose more information than the information which was actually published."

> journalistic privilege is certainly not one of the most urgent societal problems requiring a solution. Watergate is a rare bird. But it is important enough because it involves those gathering and publishing information for the benefit of us all."[28]

5. AUSTRIA

18. Austria has been referred to as the most advanced jurisdiction for the recognition of journalists' privilege. It has what appears to be one of the very few absolute privileges reviewed by the Commission.

19. Journalists have had a statutory professional privilege for over sixty years. Until 1982, however, the privilege only extended to court proceedings on press offences, that is, cases relating to a publication. Since then the right of journalists as witnesses in judicial proceedings to refuse to give evidence relating to confidential information and the confidential sources of information has been extended to the owner of the media (publishers), the editors-in-chief and all other non-jounalistic workers in media enterprises or information services.[29] The owner, the publisher and workers in a media enterprise who are not involved in the shaping of the contents also have the right to refuse to answer questions. In this way, it is not considered possible to undermine editorial secrecy by questioning people other than the journalists and the editor who might be likely to know about confidential information and informants. All the media are covered by this law, including the electronic media and agencies and services.

6. SWEDEN

20. Sweden has had a *Freedom of the Press Act* since 1776. The current statutory provisions (which date from 1949) prohibit journalists and others involved in the print media from revealing the identity of a confidential source of information. They also prohibit investigation or disclosure of the identity of journalists' sources, and the identity of confidential sources of information is inadmissible as evidence. The rationale for this apparently wide privilege has been stated as follows:

> "The mass media - the `Third Estate' - need the fullest possible insight into the operations of society and thus should have the conduct of the other two estates Parliament and Government - under surveillance.

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28 Op cit n 19, 89.

29 *Press and Other Publication Media Act 1981* (Austria).

> That the impunity of informants might induce some of them to `leak' irresponsible, harmful or even untruthful statements to the media is not considered too damaging. The law may protect the informant but does not exonerate the crime."

21. There are, however, a number of exceptions to the privilege. If State employees inform the media of matters that could be detrimental to State security, legal action could be taken against them (assuming of course that their identity can be ascertained). The same exception applies in special cases where an official violates a professional secret.

22. The protection of confidential sources of information can also be overruled in criminal cases which do not involve freedom of the press, and where the court finds that the disclosure of the identity of a source is required because of an overriding public or private interest. Protection of the anonymity of sources is also withheld in cases where the gathering or divulging of information constitutes or involves high treason, espionage or other related serious crimes.

7. DENMARK

23. In 1991 a new *Media Law Act 1991* was enacted in Denmark. It provided that the conduct and content of the mass media must be in conformity with "sound press ethics".[30] It also amended the *Administration of Justice Act 1972* to provide a limited privilege for journalists.[31]

24. A significant exception to the operation of the privilege is in cases where the subject matter is a serious offence and the calling of the witness is essential to unravelling the case. Also, the privilege does not apply where it is evident that a publication has not served any purpose from a social point of view and where the subject matter concerns:

(1) breach of professional secrecy or

(2) another kind of offence, and significant public or private interests call for the unravelling of the case.[32]

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30 S 34.

31 S 56, amending s 172 of the *Administration of Justice Act*, quoted in DP para 3.97.

32 *Administration of Justice Act* s 172(6).

25. In any important case it is apparent that Danish journalists will still be required to give evidence in court relating to the otherwise confidential identity of sources of information.

Appendix V

CLERICS: CONFIDENTIAL INFORMATION REVEALED OTHERWISE THAN DURING A RITUALISED CONFESSION

1. In the Catholic religion information revealed during "confession" or the sacrament of penance will not be revealed by the priest, even if he is required to reveal the information during judicial proceedings. Most statutory privileges relating to clerics in other jurisdictions reviewed by the Commission do not cover the communication of information outside the confines of the confession.[1] The New South Wales provision[2] extends the privilege to the fact of whether or not a confession actually took place. The Commonwealth Evidence Bill[3] seeks to extend the privilege even further - to confidential communications in which the client simply sought "spiritual advice or spiritual comfort".[4]

2. Clerics are often the repository of secrets of trust apart from the sacrament of penance. Canon law, for example, acknowledges that priests will receive such extra-sacramental secrets.[5] The Catholic Archbishop of Perth referred the Commission to Canon 220 which explicitly states:

> "No-one may unlawfully . . . violate the right of every person to protect his or her privacy."

The Archbishop suggests that:

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1 Eg *Evidence Act 1910* (Tas) s 96; *Evidence Act 1939* (NT) s 12; *Evidence Act 1958* (Vic) s 28 (quoted in Ch 5 n 3 above).

2 *Evidence Act 1898* (NSW) s 10 (quoted in Ch 5 n 3 above).

3 Evidence Bill 1991 (Cth) cl 119(1).

4 The Commonwealth Bill does, however, have a number of quite significant exceptions to its clerics' privilege most of which may be hard to justify on philosophical grounds given the principal assumption that confidentiality of certain communications is inviolable. For example, cl 119(1) does not apply:
(1) if the person consents;
(2) if the communication is made in furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty;
(3) if, were the evidence not adduced, a person would be reasonably likely to be at greater risk of physical harm than if the evidence were adduced.
It is widely acknowledged that a Catholic priest would not reveal the contents of a confessional even if a person would thereby be subject to civil penalty and even if a person would thereby be reasonably likely to be at greater risk of physical harm than if the evidence were adduced.

5 Eg Canon 1755 para 2 no 1 exempts pastors and other priests from testifying in ecclesiastical trials with reference to those matters given to them in confidence by reason of their sacred ministry "outside sacramental confession". Canon 1105 provides that a priest who assists at a marriage is obliged to secrecy in the matter.

> "Part of such privacy is assuredly the right to keep private those matters of conscience which one has manifested to the priest, even in a non-confessional context, in order to obtain spiritual help. In fact in a later part of the Code, there are penalties able to be exacted for unlawful violation of a person's privacy. . . . Only for the very gravest of reasons (eg to prevent a person committing suicide or murder) could a priest ever approach another person on the basis of what the one seeking counselling has revealed to that priest."

3. One theologian has described three types of confidential information held by Catholic priests: the sacramental secret; the quasi-sacramental secret and the extra-sacramental secret:

> "The **sacramental secret** is that which arises from sacramental confession, and includes *directly* all the sins of the penitent manifested with reference to obtaining sacramental absolution, while *indirectly* it includes all other things manifested for the purpose of declaring one's sins, whether these other things are necessary, useful, or superfluous to the declaration of the sins themselves." The **quasi-sacramental secret** denotes the obligation of secrecy that must surround those matters which have a connection with the sacrament of Penance but which do not formally become matter of confession such as the manifestation of conscience made in compliance with the rule of a religious institute (now proscribed by the Canon Law) or for the necessary direction of one's conscience. The **extra-sacramental secret** denotes the obligation of secrecy incumbent on the priest with reference to those confidences entrusted to him precisely in view of his sacred priestly character (but entirely apart from the Sacrament of Penance) for the purpose of obtaining some service which by reason of his sacred ministry he is prepared to give."[6]

4. In relation to "extra-sacramental" secrets, the theologian noted:

> "The ministry of the priest is essentially a spiritual one. He acts as an intermediary between God and man, being ordained for men in the things that appertain to God. He is the physician of the soul with reference to its moral and supernatural life. In spiritual matters, and in all that pertains to external salvation in general, the priest is the counsellor par excellence. To instruct the spiritually ignorant, to console the sick, to strengthen the wavering, to pacify the quarrelsome, to counsel the spiritually doubtful, to support the tempted and discouraged, to assist the dying - all these constitute part of the sacred ministry of the priest, though which, as through so many channels, he may become the recipient of the confidences of others entirely apart from the sacrament of Penance.
>
> "That his extra-sacramental services are *necessary* for the well-ordering of the lives of men (and thus ultimately at least for the good of the community) does not need demonstration; but if it did, one would only have to recount the litigation avoided, the

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6 R E Regan *Professional Secrecy in the Light of Moral Principles* (1943) 171-172.

> families kept intact, the quarrels terminated, the ill-gotten goods restored to rightful owners, the renewed efforts towards virtuous living, to secure the point."[7]

5. The nature of the obligation of extra-sacramental secrecy has been further described as follows:

> "The priest has the serious moral obligation to preserve inviolate the secrets of those persons who confide in him by reason of his sacred ministry. This duty of secrecy is owed by the priest both to the person who confides in him (in commutative justice) and to society (in legal justice). The duty to the person seeking help takes the form of an onerous contract, or at least that of a quasi-contract, implicitly entered upon by the assumption of the confidential relationship. The revelation or other use of such secret knowledge by the priest contrary to the reasonable will of the client is a sin, grave or slight, depending on the nature of the matter revealed or used, against both commutative and legal justice. Such a violation would carry with it the obligation of restitution for the harm caused to the client to the extent that such harm was foreseen at least in a confused manner."[8]

6. There may be situations where a priest is placed in a personal dilemma - whether or not to reveal an extra-sacramental secret during judicial proceedings. It appears that if a just law requires the priest to reveal such a secret the priest may obey the law even though hardship might thereby befall the other person. If, however, "grave scandal" would result from the priest's action, he would be obliged to maintain the secret.[9] The only likely conflict between the civil law and the priest's obligation of extra-sacramental secrecy will be the case where the law unjustly demands the revelation of such a secret:

> "The priest is obliged *per se* to refuse to make the revelation. *Per accidens*, however, like any other professional person, the priest is free to comply with the unjust law in order to protect himself from at least very grave harm, except in cases where the preservation of the secret would be gravely necessary for the common welfare. Because of the peculiar danger that grave scandal might arise from such a revelation on the part of the priest, his case would demand special weighing and consideration. It could easily come about that a priest would be obliged to forego protecting himself in a case where a member of a lay profession would be permitted to act to protect himself."[10]

7. When the revelation or other use of a person's secret is necessary in order to prevent some grave harm from befalling the community, it is theoretically both lawful and obligatory for the Catholic priest to reveal or use the person's extra-sacramental secret in order to

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7 Id 172-173.
8 Id 173.
9 Id 175.
10 Id 175-176.

forestall the threatening evil. However, because of the danger of scandal, such as the revelation being misinterpreted as a violation of the seal of the confessional, or the danger of bringing the church or her ministers into disrespect, the priest might conceivably be obliged to maintain secrecy where a member of a lay profession would be obliged to reveal a professional secret. It should be noted that the grave evil must be actually impending or at least constitute a serious future threat. When there is a definite obligation for the priest to reveal such a secret, the obligation is said to be one in legal justice.[11]

[11] Id 176.

Appendix VI

RESEARCHERS: CONCERNS ABOUT LACK OF PRIVILEGE IN RELATION TO RESEARCH PROJECTS

The following are extracts from correspondence recently provided to the Commission expressing concern about the lack of privilege for researchers in relation to research projects:

(1) Letter from Department of Public Health, Queen Elizabeth Medical Centre, to Minister of Justice, 13 February 1992

> "My concern follows an incident last week when I was served with a subpoena which would have required me to present information in the Supreme Court relating to a former Wittenoom asbestos worker which had been provided in confidence during the course of research. The subpoena was served by the lawyers acting for . . . who were defending a claim for damages by the estate of the subject who died recently of lung cancer. The case was fortunately settled out of court and the problem that we faced was thus averted. I am however deeply concerned that this should have happened and may well happen again in future actions against . . . by former asbestos workers who have participated in our research into the health effects of blue asbestos. . . .
>
> My colleagues and I are concerned about the above incident for several reasons. Obviously we would be deeply concerned if any participant in a research study should be harmed as the result of information given and collected in good faith. Our second reason for concern is that we are currently conducting an intervention study in former Wittenoom workers to determine whether their high cancer risk may be reduced by taking vitamin A or its precursor, betacarotene. To evaluate any possible benefit of these substances, accurate information about both asbestos exposure and smoking are essential. If it is established that this information could be used to the detriment of the participants, we would have to give serious thought to abandoning the study. This could result in the loss of potentially important information about cancer prevention but more importantly could result in loss of an important benefit to the workers themselves if these drugs do have a protective effect. Finally we believe that if the above case had come before the court and we had been forced to provide the evidence sought, the resultant publicity would have had an extremely detrimental effect on all Public Health research in which information (regardless of its nature) is sought from participants."

(2) Letter from the Public Health Association of Australia (WA Branch) to the Minister for Justice, 16 April 1992

"Without this protection [ie that recommended by the Commission in its Report on *Confidentiality of Medical Records and Medical Research*], in an increasingly litigation prone society, we see a time in the future when public health and medical researchers will be placed in the position of deciding whether or not to proceed with studies, having important health implications for our community, merely on the basis of `legal risk' to the study participants. The Curtin University Centre for Research into the Prevention of Drug Abuse, for example, is involved in studies on the prevention of abuse of illicit substances, and the WA Research Institute for Child Health has research programs concerned with improving the outcomes of antenatal care and obstetric practice. Any significant legal risks to participants in such studies would place the researchers in an untenable ethical position, especially because all responsible researchers observe a code of behaviour which requires, above all, that they must first do no harm.

It will only be a matter of time before one of the problems identified by the Law Reform Commission precipitates a crisis. We fear that the result will be distressing to members of the public who have been involved in our research projects, damaging to the future of academic public health and academic medicine in this State, and embarrassing for the Government."