



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 90

**Professional Privilege
for
Confidential Communications**

DISCUSSION PAPER

DECEMBER 1991

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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Byrne and Heydon

D Byrne and J D Heydon *Cross on Evidence*
(Australian Edition) 1991

ALRC

Australian Law Reform Commission

Chapter 1

INTRODUCTION

1. SUBMISSIONS AND QUESTIONNAIRE

1.1 The Commission invites your submissions on the issues raised in this discussion paper. A separate questionnaire is attached to this paper. Please forward the completed questionnaire and any other written submissions to:

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Executive Officer & Director of Research
Law Reform Commission of Western Australia
11th Floor, KPMG House
214 St. George's Terrace
Perth WA 6000

or by Fax on (09) 481-4197

1.2 Oral submissions are also welcome. The Director of Research can be contacted by telephone on (09) 481-3711.

1.3 All submissions should be received by the Commission by no later than 28 February 1991.

2. TERMS OF REFERENCE

1.4 The WA Attorney-General has asked the Law Reform Commission to enquire into the law relating to the obligation of professionals to disclose in judicial proceedings, information obtained during confidential communications, or information included in confidential records.¹ The terms of reference are:

"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

¹ Terms of reference 19 December 1989.

Appendix A to the 38th Report of the Australian Law Reform Commission, or any variation thereto, should be adopted in Western Australia."²

1.5 For the purposes of the terms of reference, the term "privilege" refers to the ability of a person to lawfully insist on there being withheld from a judicial body, information which might assist that body to ascertain facts relevant to an issue upon which it is adjudicating.³ Such an ability, when exercised, is an exemption from the normal legal obligation of a person to provide the information and documents which are required for the determination of litigation.⁴

3. BACKGROUND TO THE REFERENCE

1.6 The terms of reference were received after a case in Perth concerning a newspaper journalist who refused to disclose to a court the source of information which was the subject of newspaper articles on the leaking of confidential Australian Taxation Office information.⁵ It is clear from the terms of reference issued to the Commission, as well as from a Press Release of the Attorney-General a few days earlier, that the review is 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, such as, for example, the relationships of doctor-patient and cleric-penitent.⁶

4. THE ISSUES

(a) Evidence required by the court

1.7 To do justice in any judicial proceeding, whether civil or criminal, it is preferable that as much relevant information as possible be before the judicial body. Hence, all people are

² Clause 109 is set out in Appendix 1 to this paper. Clause 109 has not been adopted in any Australian jurisdiction to date.

³ Byrne and Heydon para 25005.

⁴ There has been a tendency in the last decade to restrict the ambit of this exemption, but "also, however, with regard to the privilege against self-incrimination, and legal professional privilege, to extend it to enquiries and investigations which are executive in nature, rather than judicial": *id* para 25005.

⁵ *DPP v Luders* (unreported) Court of Petty Sessions (WA) No 27602 1989 (committal proceedings) *DPP v Luders* (unreported) District Court of Western Australia 1990, no 177 of 1990. See discussion at paras 1.28 - 1.37 below, setting out the facts and circumstances of this case.

⁶ Media statement of the Attorney-General, 13 December 1989.

generally obliged to provide judicial bodies with whatever relevant information is requested of them.⁷

1.8 Where limitations are put on the admissibility of relevant evidence, or if 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 an unjust result would be increased. Without evidence that only the uncooperative witness could provide, a case may fail to proceed. The guilt or innocence of a defendant or of another person may very well depend on such evidence. The consequences to the individual witness of a failure or refusal to provide such information may also be significant. Uncooperative witnesses could face contempt of court proceedings and may as a consequence be fined or imprisoned.⁸

(b) Exemptions

1.9 Notwithstanding the strong arguments in favour of requiring all relevant evidence to be made available during litigation, the common law and statute law have created a number of exemptions. These can be divided into two broad categories.

1.10 First, there are a number of rules of evidence designed to improve the quality of the evidence. For example, there are rules excluding the admissibility of evidence because its quality is such that it cannot be relied on to strengthen the probabilities of the court justly adjudicating a matter. Examples are hearsay evidence and involuntary confessions.

1.11 Second, there are certain exclusionary rules which actually prevent relevant evidence coming before the courts. The justification for the existence of such rules is that in some cases the circumstances will be such that the adverse consequences of disclosing particular evidence would outweigh the interests of justice involved in its disclosure. There are three general classes of exclusionary rules which fall within this second exemption: those based on national security, on competence and on privilege.

⁷ Byrne and Heydon para 25005.

⁸ Note 34 below refers to the statutory provisions in Western Australia which impose penalties for failure to provide information to a court upon request. Those provisions were applied by the Court of Petty Sessions and by the District Court to penalise a witness in the case of *DPP v Luders* referred to in paras 1.28-1.37 below.

1.12 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 the people they deal with in their professional capacity.

(c) Professional confidentiality and the requirement to provide evidence

1.13 In Western Australia the only professional relationship which attracts a privilege relating to confidential communications is that between a lawyer and her clients. That privilege exists at common law.⁹

1.14 Other professionals and the people they deal with in their professional capacity may assume that they are exempt from revealing the content of communications between them, simply on the basis that those communications were expressly or impliedly made on a confidential basis - or because of perceived public or personal benefits derived from the maintenance of that confidentiality. As a matter of law, such an assumption is wrong.¹⁰ Despite a popular belief to the contrary, courts in Western Australia could, for example, require a Catholic priest, against his wishes and without the permission of the penitent, to reveal as evidence what was said during a confessional. If the priest refuses to reveal the information requested, he may be in contempt of court and would be liable to suffer the consequences, which may mean a term of imprisonment.

1.15 Accountants, bankers, doctors, journalists, clerics and many other professionals¹¹ are in the possession of information provided to them by clients upon the stated or implied understanding that the information would remain confidential. The law in Western Australia will not necessarily protect that confidentiality if the information is relevant to judicial proceedings.

1.16 In addition to any personal undertaking not to reveal certain information obtained from their clients, many professionals in possession of such information are bound by the

⁹ This privilege has been subjected to statutory and judicial restrictions - see chapter 4 below. There have been proposals in other jurisdictions to put the lawyer-client privilege on a statutory base, for example, by the ALRC in its Report 38 on *Evidence* 1987 (see clauses 106-108 of the draft bill in Appendix A to that Report) and by clauses 116-118 of the Evidence Bill 1991 (Cth).

¹⁰ 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, for example, notes 12-15 below).

¹¹ These terms are considered in subsequent chapters.

ethics of their profession or by their own moral beliefs not to breach the confidence of their clients. For example, the Australian Journalists' Association Code of Ethics,¹² the Australian Society of Accountants' Code of Professional Conduct,¹³ the Australian Medical Association Code of Ethics,¹⁴ and the *Code of Canon Law*¹⁵ all to varying degrees, restrain their respective professionals from revealing confidential information obtained by them during their professional relationships.

1.17 People seeking assistance or advice from professionals often reveal information during the course of their relationship with the professional which they assume, because of the nature of the relationship or of the information, will remain confidential. Any breach of that confidence by the professional would obviously be distressing to most people concerned. It could also have serious consequences for the health and mental well-being of the individual. The disclosure of confidential information may result in damage to the individual ranging from embarrassment to harassment and financial ruin. The reputation of the professional who reveals the confidential information may also be seriously compromised. Professionals may be subjected to formal or informal sanctions for breaching their profession's Code of Ethics. Breach of confidence may also result in a civil action against the professional.¹⁶ Alternatively, the professional may be faced with the prospect of being punished for contempt of court should she refuse to reveal the information to the court when required.¹⁷

(d) Judicial proceedings

1.18 The terms of reference restrict the Commission to a consideration of professional privilege in "judicial proceedings".¹⁸ That term covers all manner of tribunals where the

¹² Rule 7(a) "In all circumstances they shall respect all confidences received in the course of their calling".
¹³ 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 professional advantage or that of a third party."

¹⁴ Principle 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 learnt in his professional relationship with the patient."

¹⁵ Canon 983 "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."

¹⁶ See paras 1.40-1.56 below for discussion on the civil action for breach of confidence.

¹⁷ It should be noted that the Commission is concerned with the rules as to the circumstances in which a witness should have a privilege of refusal to answer, not with the law of contempt, which is concerned with the consequences of defying an order of the court. See paras 1.22-1.27 below for a discussion on the law of contempt.

¹⁸ Because the Commission is primarily concerned with Western Australian law it can be assumed that the terms of reference do not cover Commonwealth judicial proceedings. The ALRC in its Report No 38 on

tribunal has been empowered by inherent or expressly conferred jurisdiction to compel parties and witnesses to produce documents, to answer questions and to perform other acts.¹⁹ Such tribunals operate pursuant to a governing statute, and it will be for that statute to stipulate whether, and to what extent, the law of evidence is applicable to the tribunal's proceedings. In the absence of such a provision the tribunal does not have to apply the laws of evidence though it must conduct itself in conformity with the doctrine of natural justice, and according to other doctrines which, although they are of evidential significance, are more than mere evidential principles, such as the privilege against self incrimination and lawyer-client privilege.²⁰

1.19 An example of a "judicial proceeding" which is not a traditional court proceeding for the purposes of the Law Reform Commission's terms of reference is a Royal Commission. The West Australian *Royal Commissions Act 1968* empowers the Governor to authorise an inquiry into any matter.²¹ Witnesses may be summoned to appear before a Royal Commission and be required to give evidence and/or to produce documents.²²

1.20 A Royal Commission has the power to administer oaths or affirmations to witnesses.²³ If witnesses fail to attend or produce documents in accordance with a summons, they may be dealt with as if in contempt of the Supreme Court.²⁴ If witnesses refuse to be sworn or refuse to answer any relevant question, they may also be dealt with as if in contempt of the Supreme Court.²⁵

1.21 Section 31(2) of the *Royal Commissions Act 1968* provides that a witness before a Royal Commission has the same protection as a witness in any civil or criminal proceeding tried in the Supreme Court.²⁶ The Act does not refer to the lawyer-client privilege. The

Evidence should be consulted for discussion on the law relating to privilege before Commonwealth judicial proceedings.

¹⁹ Byrne and Heydon para 25085.

²⁰ P Gillies *Law of Evidence in Australia* (1987) 1.

²¹ *Royal Commissions Act 1968* s 5.

²² Id s 9.

²³ Id ss 11,12.

²⁴ Id s 13.

²⁵ Id s 14.

²⁶ However, the Act does abrogate the privilege against self-incrimination for the purposes of Royal Commission proceedings. S14(2) provides: "...when any question relevant to the inquiry is put to a person by the Commissioner the person is not entitled to refuse to answer the question on the ground that the answer might incriminate or tend to incriminate the person or render the person liable to a penalty."

common law would therefore apply and lawyer-client privilege would exist.²⁷ A Royal Commission is otherwise able, through the threat of contempt proceedings, to compel a professional who is a witness before it to divulge all relevant information in her possession or knowledge whether or not that information is confidential to the witness.

(e) Contempt and the absence of privilege

1.22 One possible consequence of a person refusing to provide evidence to a court, after the court has compelled the giving of such evidence and where no legal privilege exists in support of the person's refusal, is punishment of that person for contempt of court.

1.23 The Commission's terms of reference do not refer to the law of contempt. However, where it is relevant in this discussion paper, the Commission refers to contempt as a sanction for non-disclosure of information in judicial proceedings. The current penalties for contempt are a significant concern for the professional who is in the position of having to defend her ethical or other obligation to maintain confidentiality in the face of a requirement of the court to breach that confidentiality.

1.24 Generally, any act or omission which was intended to interfere with the administration of justice by the courts, or which has a tendency to do so, may constitute contempt of court.²⁸ Contempt of court is a common law offence in Western Australia, not a statutory crime.²⁹ When the offence is alleged to have been committed it is tried in a summary manner.³⁰ There are a number of forms of contempt. For example:³¹

²⁷ Byrne and Heydon para 25250. The privilege is a right generally conferred by law. The Royal Commission into Commercial Activities of Government (WA) has recognised the existence of lawyer-client privilege. For example, in relation to an application to produce certain documents (see Transcript 25 October 1991 before Wilson C, W138-W143). In England, however, it is merely a rule of evidence, and applied only to prevent compulsory disclosure either by way of pre-trial discovery, or in the actual course of judicial or quasi-judicial proceedings [C Tapper, *Cross on Evidence*, 7th ed, 1990 at 434].

²⁸ *In re Dunn; In re Aspinall* [1906] VLR 493 at 497-498.

²⁹ See *R v Loveday; 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 also that a person cannot be so punished, and also punished under the provisions of the Code for the same act or omission".

³⁰ *R v Loveday; Ex parte Attorney General* [1982] WAR 65 at 66.

³¹ For discussion see S. Walker *The Law of Journalism in Australia* (1989) 35.

- (a) sub judice contempt, that is, 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;
- (b) 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;
- (c) improper behaviour in court;
- (d) breaching an undertaking to a court or disobeying a court order.

1.25 The third category, which includes disrupting court proceedings and refusing to answer a question or produce a document, is a criminal contempt. The sanctions for criminal contempt range from ordering a person who has disturbed court proceedings to leave the courtroom to the imposition of fines and, if the offender is an individual, imprisonment for a fixed period.³² Imprisonment for contempt is rare.³³

1.26 There are a number of statutory provisions in Western Australia which seek to enforce the common law requirement that witnesses give particular evidence, either orally or by way of a document, when compelled to do so by a court.³⁴

³² *Attorney-General v James* [1962] 2 QB 637 at 640.

³³ But see, for example: *Hinch v Attorney-General* [1987] VR 721 - an 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; *DPP v Luders*, WA Court of Petty Sessions Unreported no 27602 1989 - where a journalist was sentenced to 7 days imprisonment for refusing to reveal the identity of the source of information, see para.s 1.28-1.37 below; *R v Bolam* (1949) 93 Sol Jo 220 - an 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 for failure to answer questions; *The State v Lawrence*, Johannesburg Magistrate's Court, Unreported no 8/588/91, 4 March 1991 - journalist jailed for 10 days for refusing to answer questions; Libby Averyt, Corpus Christi, Texas journalist jailed for 2 days for failure to answer questions relating to communications she had with a criminal defendant charged with murder, *New York Times* Dec 8 1990 1,11:1 also see J C Goodale et al *Reporter's Privilege Cases* November 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, *New York Times* June 30 1990, 1,6:4 also see J C Goodale et al *Reporter's Privilege Cases* November 1991, 1-2; James Campbell and Felix Sanchez, Houston journalists sentenced to 30 days for not revealing the identity of witnesses to a murder but released on appeal to District Court for the South District of Texas - *Campbell v Klevenhagen* see J C Goodale et al *Reporter's Privilege Cases* November 1991, 2-3 and telex report to the *Sunday Times* from Michelangelo Rucci, New York 6 February 1991.

³⁴ s 77 of the *Justices Act 1902* states:

1.27 The ALRC in its Report on *Contempt*³⁵ 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 that Commission'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 (for example, a journalist wanting to protect a confidential source of information) from the obligation to answer questions and where the presiding judge or magistrate insists upon an answer and where the answer may reasonably be expected to be of substantial importance for the proceedings in question.

(f) Failure to answer: DPP v Luders

1.28 The consequences of a failure to answer relevant questions, in the absence of a recognised privilege against the need to do so, were illustrated in the 1989 Court of Petty Sessions preliminary hearing and 1990 District Court trial in the case of *DPP v Luders*.³⁶ The defendant, an employee of the Australian Taxation Office, was charged under section 70(1) of the Commonwealth *Crimes Act* with official corruption for publishing Commonwealth documents without authorisation. Proceedings were commenced by the Commonwealth Director of Public Prosecutions.

"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 seven days, unless in the meantime he consents to be examined and to answer concerning the matter."

s 63(1)(d) of the *District Court Act 1969* states:

"If a person ... 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 question . . . 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."

³⁵ Report no 35 (1987) recommendation 3. Also note the Law Reform Commission of Ireland Consultation Paper on *Contempt of Court* (1991).

³⁶ *DPP v Luders* (unreported) Court of Petty Sessions (WA) no 27602 1989 (committal proceedings); *DPP v Luders* (unreported) District Court of WA no 177 of 1990 (trial).

1.29 Committal proceedings were held in the Perth Magistrates Court and a trial held in the District Court. Both courts were exercising federal jurisdiction. The law which applied was federal law.³⁷ That was a result of section 80 of the Commonwealth *Judiciary Act 1903*.³⁸ That is, the law applied in exercising federal jurisdiction was Western Australian common law. The relevance of this to the Commission's terms of reference is that, although Western Australian law may apply to federal proceedings in this State, that position can be altered by the Commonwealth Parliament. For example:

- (1) if the State Parliament enacts a privilege for journalists, but the Commonwealth does not, then via section 80 the State privilege would apply in federal proceedings in Western Australia (unless inconsistent with Commonwealth law).
- (2) If the Commonwealth 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's.

A privilege created by State legislation will therefore not necessarily protect a person subject to Commonwealth law.

1.30 During the committal proceedings a Sunday Times journalist, Mr Tony Barrass, was requested by the prosecution³⁹ to reveal the identity of the source of the Australian Taxation Office information which had been leaked from that Office and which had formed the basis of a number of media stories. It was apparent that the answer would have been highly relevant to the prosecution, be it for the purpose of establishing the guilt of the defendant, or to pursue others, be they independent of the defendant or accomplices.⁴⁰

³⁷ *Judiciary Act (Cth) s 79:*

"The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases in which they are applicable."

³⁸ Section 80 reads:

"So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

³⁹ Committal proceedings transcript 27/11/89 10. The defendant's counsel did not object to the question and in fact considered it relevant and necessary in the interests of justice (transcript 13-14).

⁴⁰ Id 18 per the magistrate, Mr P G Thobaven.

1.31 Mr Barrass refused to reveal the source of his information on the basis of his profession's ethical duty to maintain the confidentiality of the source of information.⁴¹ 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.

1.32 The magistrate, Mr PG Thobaven, acknowledged that some matters of refusal to answer questions in court are not as serious as others.⁴² 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 directly to the defendant's ability to be able to properly present a case if it went to the District Court.

1.33 It was not apparent to the magistrate that the question could be reworded so as to avoid the dilemma that Mr Barrass found himself in - that is, either to breach his ethical obligations as a journalist, or to face punishment for contempt of court.⁴³ 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 achieve this. 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*.⁴⁴ During that period it would have been possible for the witness to answer the question and so be released.

⁴¹ Committal proceedings transcript 27/11/1990, 10. The prosecutor asked Mr Barrass: "How did [print-outs from the Taxation Department computer] come into 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 am not going to answer that question." Defence counsel also considered the question relevant and necessary in the interest of justice (13-14) and indicated that he also wished to ask the same question (transcript 11/12/89 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..." (transcript 11/12/89 3) To which Mr Barrass replied: "With all due respect, sir; no."

⁴² Committal proceedings transcript 27/11/89 21-22.

⁴³ Committal proceedings transcript 11/12/89, 3.

⁴⁴ See note 34 above for text of section 77. The media's attention focused on the magistrate's decision. For example: *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 protect journalists from judicial coercion when the criteria of authenticity, accuracy and public interest can be demonstrated - as they have been in the Barrass case."

1.34 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.⁴⁵ Judge Kennedy warned Barrass in the following terms:⁴⁶

"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."

1.35 Mr Barrass maintained his refusal,⁴⁷ referring to his profession's ethical obligation to protect the confidential identity of sources of information. Judge Kennedy gave very little weight to this argument:⁴⁸

"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 wrongly 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."⁴⁹

1.36 The judge went on to observe:⁵⁰

"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

⁴⁵ 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 6/8/90, 70).

⁴⁶ Id 76.

⁴⁷ For example, trial transcript 6/8/90, 77.

⁴⁸ Trial transcript 8/8/90, 64.

⁴⁹ Judge Kennedy referred to the "gravamen" of his offence in the terms that "it strikes the heart of the administration of justice." (transcript 8/8/90, 30).

⁵⁰ Trial transcript 8/8/90, 64.

are likely to do to individuals outweighs any supposed benefits to the entire community."

1.37 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 borne by Barrass then he would have to be imprisoned. Mr Barrass was fined \$10,000.⁵¹

(g) Options for reform

1.38 The primary options for reform are considered in Chapter 10. One option referred to there and in the terms of reference, is for the courts to be given a discretion to grant a privilege in a variety of circumstances. This was the basis of a recommendation made by the ALRC in its Report on *Evidence*.⁵²

⁵¹ The \$10,000 fine was paid by the *Sunday Times* (*Sunday Times* 9 August 1990 p 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 Aug 9 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 tax records . . . Something is drastically wrong with contempt laws when Luders (the defendant) is fined \$6000 for official corruption, but Barrass - a witness in the case who simply obeyed the code of ethics binding his profession - is fined \$4000 more than that for contempt of court . . . the 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 Aug 12 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 . . . there 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 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 own 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 \$3000 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 . . . ? The purpose of the penalty in the context of this case, was to deter others".

⁵² Report No 38 (1987).

1.39 Clause 109 of the ALRC's Draft Evidence Bill is a general provision giving a discretion to the judge to direct that evidence relating to a confidential communication or confidential record is not to be adduced under certain circumstances.⁵³ This Commission has acted on the premise that mention of clause 109 of the ALRC's draft bill in the terms of reference does not indicate that the Attorney-General has a particular preference for that reform option.

5. CONFIDENTIALITY CONSIDERATIONS

1.40 The terms of reference focus the Commission's attention on "confidential communications" within professional relationships. The Commission therefore needs to consider the nature of confidentiality in relation to information passing between people in a professional relationship as well as the nature of the obligation to maintain such confidentiality.⁵⁴

1.41 The social practice of designating certain information as confidential has a twofold aim. First, it seeks to facilitate communication relating to intimate or other sensitive matters between persons standing in special relationships to each other. Second, the practice is designed to exclude unauthorised persons from access to such information. Confidentiality is therefore linked to control over the disclosure of and access to certain information.⁵⁵

1.42 Three aspects of confidentiality can be distinguished: subject matter, special relationships, and procedures. Each aspect has been briefly described as follows:⁵⁶

"Sometimes attention is focussed upon the subject matter - the informational content - which is confidential. For example, the use of the label "confidential" on certain documents is one familiar method to identify sensitive information. At other times the persons who respectively receive, transmit, or have access to such confidential information are the target of concern. Whether such persons stand in a special relationship which includes the authority to disclose or obtain confidential information is often at issue....A third important aspect of confidentiality is that of the procedures

⁵³ Clause 109 is set out in full in Appendix 1, and is discussed in more detail in Chapter 10 below.

⁵⁴ Confidentiality and the related concept of privacy have been the subject of a number of reports in Australia and overseas. For example: The ALRC *Report on Privacy* (Report No 22 1983), The English Law Commission *Report on Breach of Confidence* (Report No 110 1981); *The Committee on Privacy and Data Banks in Western Australia* (1976) the "Mann Committee"; New South Wales Privacy Committee *Research and Confidential Data: Guidelines for Access* (1985). See also Privacy Bill 1991 (S.A.) and Report of the Select Committee of the House of Assembly on Privacy 1991 (South Australia).

⁵⁵ *Encyclopedia of Bioethics* (1978) 195.

⁵⁶ *Ibid.*

for protecting or limiting its scope. For example, locked files and soundproof rooms preserve confidentiality, while unregulated computerized computer records and hidden microphones violate it. These three aspects of confidentiality deal with what information is confidential, who has control over such information, and how confidentiality is affected by communication procedures."

1.43 Confidentiality may arise as a result of a contract between the parties or as a result of equitable obligations. The law concerning the obligation to maintain confidentiality in relation to both circumstances is described below.⁵⁷

(a) Contract

1.44 An obligation to maintain confidentiality as a term of a contract may be express or implied. Where there is a contract between a professional and her client the courts will imply a term in that contract that the professional will maintain confidentiality as regards the client's affairs.⁵⁸

1.45 Where the right of confidentiality is contractual and the professional breaches the confidentiality the client may seek damages resulting from the breach. Damages may extend to mental distress caused by the breach, provided that the possibility of such damage was contemplated by the parties.⁵⁹ An injunction may lie to restrain a threatened breach of confidence where the breach would amount to a breach of contract. If the breach of contract was induced by a third party an action in tort may also lie against that party.

⁵⁷ The Commission has previously summarized the law in this area in its Report on *Confidentiality of Medical Records and Medical Research* (Project No 65 Part II 1990) Appendix II.

⁵⁸ *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461; *Parry-Jones v Law Society* [1969] 1 Ch 1. In the latter case Lord Denning MR stated at 7: "The law implies a term into the contract whereby a professional man is to keep his client's affairs secret." A claim based on promissory estoppel might also be appropriate. In the case of *Cohen v Cowles Media* 111 S.Ct 2513 (1991) (U.S. Supreme Court) it was held that a claim based upon promissory estoppel could be brought against reporters for failing to keep promises of confidentiality (the Minnesota Supreme Court had earlier found that a contract claim would be inappropriate in the circumstances, and raised the promissory estoppel theory). In that case Dan Cohen, a campaign worker in Minnesota's 1982 gubernatorial race, offered to provide two newspaper reporters with information about a candidate in an election. The reporters promised him confidentiality. The editorial staff of the newspapers decided that the fact that Mr Cohen provided the information was more newsworthy than the news itself. Mr Cohen was dismissed from his job (for further discussion see J C Goodale et al *Reporter's Privilege Cases* November 1991, 4-5). Cohen's case was referred to in *Ruzicka v Conde Nast Publications* by the Eighth Circuit Court. That case involved an understanding between a source and a journalist writing an article on therapist-patient sexual abuse. The source consented to an interview provided she would not be identified or identifiable in any resulting article. The article used the source's first name as well as stating her profession and city of residence. The source sued, alleging that her identity was insufficiently protected. The Eighth Circuit remanded her promissory estoppel claim (for further discussion see J C Goodale et al 5).

⁵⁹ *Heywood v Wellers* [1976] QB 446, 461 per James LJ.

1.46 If, in a contractual situation, it is the professional's employee or agent and not the professional who breached the confidence, the client may be able to take proceedings against the professional under an implied warranty that her employee or agent would maintain secrecy. The client may also be able to proceed directly against the employee or agent for breach of the fiduciary duty that person owes the client.⁶⁰

(b) Equitable obligations

1.47 There will be situations where there is no contractual relationship between the professional and her client - for example, where a doctor employed by a public hospital provides medical services to a patient admitted to the hospital. In such cases the client may be able to look to equity for protection.

1.48 Certain relationships are characterised by an equitable duty of confidentiality.⁶¹ Doctor-patient, lawyer-client and banker-customer are some of the relationships giving rise to such a duty.⁶²

1.49 Since such a duty is equitable, the normal equitable remedies apply. The court may grant an injunction to prevent anticipated breaches of confidentiality. Where an injunction is not appropriate, for example after disclosure has already occurred, damages may lie. Although the law is not settled in this area, it appears that these remedies would be available even where the patient could not point to any positive detriment suffered by the disclosure,⁶³ though in the absence of such detriment any damages awarded would be nominal.

⁶⁰ A person who has acquired personal information and who knows or ought to have known the confidential nature of the information is subject to the same obligation of confidence as the original confidant (The English Law Commission *Breach of Confidence* (Report No 110 1981) paras 4.11-4.12). S 92 of the *Privacy Act 1988* (Cth) gives a confider a statutory right of action in such circumstances as against the persons to whom the Act applies - Commonwealth officers and agencies and persons subject to the law of the Australian Capital Territory.

⁶¹ The scope of equitable obligations of confidentiality has been considered in the Federal Court case of *Smith Kline and French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health*, (1991) 99 ALR 679. It was there held that the scope of such an obligation, where one exists, could not be determined by reference solely to the confider's purpose but turns on a consideration of all the circumstances. There can be no breach of the equitable obligation unless the court concludes that a confidence has been abused - that unconscientious use has been made of the information.

⁶² *AG v Guardian Newspapers* (No 2) [1988] 3 WLR 776, 781 per Lord Keith.

⁶³ *F Gurry Breach of Confidence, Essays in Equity* (1985 ed P D Finn) 110,112. *AG v Guardian Newspapers* (No 2) [1988] 3 WLR 776, 782 per Lord Keith. For a contrary view see that of Lord Griffiths in the same case at 795.

1.50 A professional may need to consult other professionals in her field in order to better serve the client's needs. For example, as part of the investigation and treatment of a patient's condition a doctor may need to consult other health professionals. In such situations confidential information regarding the client may have to be passed on. The law would regard disclosure to such persons as being implicitly authorised by the patient. However, those people would be subject to an equitable duty of confidence as regards the information entrusted to them. The duty cannot be legally overridden merely on the instructions of the confidant's superior.⁶⁴

(c) Exceptions to the duty of confidence

1.51 The duty of confidence is not absolute. There are circumstances in which confidential information may, or even must, be disclosed.⁶⁵ A professional may disclose confidential information where her interests require disclosure - for example, in order to defend a legal action brought by the client or to enforce a debt against the client.⁶⁶ Sometimes the professional *must* disclose confidential information - for example, where a doctor is a witness in court proceedings and is asked a question about the patient's condition. There are a number of provisions in the *Health Act 1911*, and in regulations made thereunder, which impose mandatory reporting requirements for certain diseases or conditions.⁶⁷

1.52 The law of confidentiality also recognises the defence of disclosure "in the public interest". The cases where disclosure has been held to be so justified concern criminal or illegal activity or the prevention of harm to innocent people.⁶⁸

⁶⁴ *Slater v Bissett and Another* (1986) 85 FLR 118, a decision of the Supreme Court of the Australian Capital Territory.

⁶⁵ Such information may be disclosed with the consent of the client. Disclosure with consent is not an exception to the duty of confidence since the quality of confidentiality no longer applies to the information.

⁶⁶ See ALRC *Privacy* (Report No 22 1983) Vol 1 para 915.

⁶⁷ For example, ss 300 and 301 of the *Health Act 1911* (venereal diseases). The *Health (Notification of Cancer) Regulations 1981* require notification to the Health Department, in patient identifiable form, of a patient's cancer. See also, Ch 5 below.

⁶⁸ See also M Neave "AIDS - Confidentiality and the Duty to Warn" (1987) 9 *Uni of Tas L R* 1 on whether there is a duty to disclose in certain circumstances, for example where the patient's condition poses a threat to the community.

(d) Disciplinary proceedings

1.53 In addition to the possibility of being the subject of legal proceedings, a professional may also be the subject of disciplinary proceedings for breach of confidence. For example, a complaint may be made to the Medical Board which has the authority to discipline or deregister a medical practitioner for "infamous or improper conduct in a professional respect."⁶⁹ The Board would need to determine whether the disclosure of information in the circumstances constituted such conduct.⁷⁰

1.54 A successful complainant before a disciplinary board would derive no direct benefit from the Board's decision. In any event there may be a tension between the general law of confidentiality as laid down by the courts and the rules of "professional ethics" as laid down by professional or other organisations. A topical example of this is the conflict between the rule of law requiring all people to provide courts with information relevant to proceedings when required, and the Australian Journalists' Association ethical obligation imposed upon its members never to disclose the confidential identity of the source of information.⁷¹

(e) Who benefits from confidentiality?

1.55 The maintenance of confidentiality might be seen in many cases as an aspect of privacy - something belonging to the client of the professional. For example, the protection of the identity of the journalist's source of information may be seen as a recognition of the personal distress the source might experience should her identity be revealed to the public. Similarly, the beneficiary of the cleric's maintenance of the confidentiality of the confessional could be seen to be the penitent who, if her identity and the information communicated during the confessional were to be revealed, might suffer in many ways.

1.56 Confidentiality could also be seen from a broader perspective, as an essential element of the community in which we live. It could, for example, be seen as an essential element of an effective health care system, without which patients might be less inclined to expose themselves to the scrutiny of health care professionals. Fears of disclosure could

⁶⁹ *Medical Act 1894* s 13(1)(a). See also *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513, 521-522.

⁷⁰ Other examples are the Nurses Board established under the *Nurses Act 1968*, and the Psychologists Board established under the *Psychologists Registration Act 1976*.

⁷¹ Ch 7 below.

fundamentally undermine the doctor-patient relationship. It is also argued that the maintenance of the confidentiality of the confessional assists in the spiritual well-being of the community and that the maintenance of the confidential identity of a journalist's source of information contributes to the free flow of information in the community as well as underpinning the democratic nature of particular societies. The maintenance of confidentiality between a lawyer and her client is said to promote the administration of justice.

Chapter 2

THE LAW IN WESTERN AUSTRALIA

1. INTRODUCTION

2.1 There is no statutory professional privilege in Western Australia which attaches to confidential communications. The only professional privilege recognised at common law in Western Australia is the privilege attaching to the relationship between lawyer and client.

2. PREVIOUS LAW REFORM PROPOSALS IN WESTERN AUSTRALIA

2.2 In 1980 the Law Reform Commission of Western Australia submitted a report on *Privilege for Journalists* to the Attorney-General.¹ In that report the Commission was concerned with the claim by journalists and journalists' associations for legal recognition of journalists' ethical obligation to refuse to disclose, even in judicial proceedings, the identities of confidential sources of information.

2.3 In its Report the Commission did not recommend a statutory formulation of a privilege for journalists, taking the view that it was preferable for the matter to be developed, if at all, by the courts as part of the common law process:²

"it would not be wise to crystallize the practice of the courts in statutory form at this stage...the judicial discretion in this area is as yet unsettled and judicial attitudes appear to be changing fairly rapidly. It would consequently seem desirable to await further judicial development."

2.4 The recommendations made by the Commission in its report on *Privilege for Journalists* are set out in Appendix 2 of this Paper.

¹ Project No 53. The terms of reference for that project 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."

² Para 5.25. The Commission had earlier referred to dicta in English cases (*Attorney General v Mulholland and Foster* [1963] 1 All ER 767; *Attorney General v Clough* [1963] 1 All ER 420 and *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589) concerning the existence of a limited common law discretion in a judge to authorise journalists and possibly others not to disclose confidential information. The Commission noted at para 3.4 that "the precise scope of the discretion is yet to be determined."

2.5 The Commission also has an ongoing reference on Privacy. Within the original terms of reference of the Privacy project the Commission was to review the question of disclosure in judicial proceedings of all kinds of confidential information, including confidential information from communications between all types of professionals and their clients.³

2.6 Because of the vast number of important areas of the law coming within the Privacy reference the Commission, with the approval of the Attorney-General, is approaching the reference under a number of different project headings. For example, the Commission has submitted a Discussion Paper and a Report on *Confidentiality of Medical Records and Medical Research*⁴ and is considering police powers of entry and search in its current review of *Police Act Offences*⁵. The Western Australian Government has also recently introduced a Freedom of Information Bill.⁶

³ The terms of reference for the Privacy project asked the Commission: "to inquire into and report upon ... what changes are required in the law in force in the State to provide protection against, or redress for, undue intrusions into or interference with privacy arising, inter alia, from the obtaining, recording, storage or communication of information in relation to individuals, or from entry onto private property with particular reference to but not confined to ... confidential relationships such as lawyer and client and doctor and patient." The ALRC has reported on *Privacy* (Report No 22 1983).

⁴ Discussion Paper on *Confidentiality of Medical Records and Medical Research* (Project No 65 part II 1989); *Report on Confidentiality of Medical Records and Medical Research* (Project No 65 part II 1991), Working Paper and Survey on *Privacy and Statutory Powers of Intrusion* (Project No 65 1981).

⁵ Discussion Paper on *Police Act Offences* (Project No 85 1989).

⁶ Freedom of Information Bill 1991, introduced 27 November 1991, second reading 28 November 1991.

Chapter 3

THE LAW AND PROPOSALS FOR REFORM IN OTHER JURISDICTIONS

1. AUSTRALIAN JURISDICTIONS

(a) Common law

3.1 The common law in all Australian jurisdictions recognises a professional privilege in relation to confidential communications between lawyers and their clients. No other professional relationship has yet been recognised by the common law as having such a privilege.

(b) Statutory law

3.2 In Tasmania, Victoria, New South Wales and the Northern Territory professional privileges for confidential communications have been created by statutes with respect to the relationships of clerics and penitents and/or doctors and patients. These privileges either prohibit individuals from revealing confidential information or enable individuals to refuse to reveal such information. The various provisions are not uniform although there are a number of similarities between them.

(i) Tasmania

3.3 Section 96 of the *Evidence Act 1910* establishes a privilege for clerics¹ and doctors ("physician or surgeon"²).³ The privilege for clerics created by this provision does not extend

¹ Referred to in the legislation as "clergyman of any church or religious denomination".

² The terms "physician" and "surgeon" are not defined in the *Evidence Act* (Tas). "Physician" is defined in *Stroud's Judicial Dictionary* (5th Ed Vol 4 1986, 1935) in the following terms: "Physician in its technical sense, denotes a person in the highest grade of medical practitioners". The dictionary defines "surgeon" as follows: "In the strictest sense, to act as a surgeon something must be done by hand." *Words and Phrases Legally Defined* 2nd Ed, Vol 3 1969 includes the terms "surgeon" and "physician" along with the term "general medical practitioner" within its definition of "medical practitioner". There may be a distinction between general medical practitioner and "physician" as defined above. However, the Commission is not aware of any judicial concern with the possibility of such a distinction. In Chapter 5 the Commission defines "doctors" by reference to those registered under the *Medical Act 1894*.

to all confidential discussions between clerics and the people they communicate with during the course of their profession. The provision was considered in *R v Lynch*,⁴ one of the rare cases to have dealt with the nature of the privilege for clerics.⁵ *Lynch's* case concerned an objection to the admission of evidence of a priest during the trial of a case of unlawful sexual intercourse with a young girl.⁶ The Crown called a Church of England priest to prove that on a date subsequent to the alleged crimes the accused asked the priest to see the girl's father and ask the father's permission for his daughter to marry the accused.

3.4 The accused made statements to the priest which amounted in substance to a confession that he had had sexual intercourse with the girl. Counsel for the accused objected to the evidence on the basis of section 96 of the *Evidence Act*. It was asserted that the accused approached the priest as a clergyman and that the confession was made to him in his professional character - that is, "confession" in section 96 was used in a legal, not a religious, sense.

3.5 The Crown asserted, and Crisp J agreed, that the term "confession" was restricted to a confession by a penitent in need of spiritual assistance, which was the sense in which the term "confession" is used at common law - that is, confined to a ritual confession made according to the discipline of the particular faith.

³ (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.
 (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 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 any insurance on the life of himself or any other person."

⁴ [1954] Tas S R 47 (Supreme Court of Tasmania).

⁵ See *R v Howse* [1983] NZLR 246 which followed *R v Lynch*. Also *R v Hay* (1860) 2 F & F 4; 175 ER 933 in which a prisoner was charged with larceny of a watch. A priest handed the watch to the police and was subsequently asked in court from whom he had received the watch. He was compelled to answer the question. The judgment stressed that the priest was being asked about a fact as distinct from a communication and, as Byrne and Heydon observe (para 25315): "it is perhaps just arguable that the case impliedly recognises a privilege in the case of communications but it can hardly displace the bulk of authority which, though inconclusive, is undoubtedly against the existence of the privilege."

⁶ Referred to at the time of *Lynch's* case as the crime of "defilement". S 124 of the (Tas) *Criminal Code* which defined "defilement" was repealed and a new offence was introduced by the *Criminal Code Amendment (Sexual Offences) Act 1987* s 7 which re-enacts the old defilement provision with a number of refinements.

3.6 In *Lynch's* case the communication between the defendant and the priest was not a confession.⁷ It was not made for any spiritual purpose. The priest was simply asked to intercede for the purpose of getting approval for the marriage - and this was not an act unequivocally referable to his priestly character. The judge held the evidence admissible.⁸ The privilege therefore only protects those statements which are confessional, in the spiritual sense, and only if they have been made to the cleric in the cleric's professional character.

3.7 The Tasmanian privilege for clerics extends to the clergy of any church or religious denomination. It has been drafted so as to forbid clerics from revealing confessional information. The cleric is given no choice. Even if the cleric's religious denomination would have permitted the cleric to breach the confidentiality of a confession if so required by a judicial proceeding, the cleric will not be permitted to do so at law.

3.8 Tasmanian doctors are also prohibited from revealing confidential communications, rather than being given a choice whether or not to do so.⁹ Their privilege is restricted to civil proceedings, except where the sanity of the patient is the matter in dispute.¹⁰ In such cases doctors would be required to provide the judicial proceedings with otherwise confidential information.

(ii) *The Northern Territory*

3.9 Section 12 of the Northern Territory *Evidence Act 1939* is in almost identical terms to the Tasmanian provision and also applies to clerics ("clergyman or any church or religious denomination") and doctors ("medical practitioner").¹¹

⁷ "Confession" has been defined as "The sorrow for the consequences of sin which divines call attrition, is distinct from the sorrow for the sin itself which they call contrition. This latter penitence naturally leads to confession and thence or thereby to reconciliation with God, which reconciliation the church pronounces by the sentence called 'absolution' (Phillimore's *Ecclesiastical Law* 538 - see *Stroud's Judicial Dictionary* 5th Ed Vol 1 (1986) 504).

⁸ *Lynch's* case was followed in the New Zealand Court of Appeal case *R v Howse* [1983] NZLR 246. *Howse's* case concerned the interpretation of a statutory privilege (*Evidence Act* (NZ) s 31) similar to the Tasmanian provision. The Court was of the opinion that the most natural meaning of the provision was that it refers to a confession in the religious sense: "That is the most natural meaning of the confession made to a minister in his professional capacity."

⁹ As is any one else in possession of such confidential communications (Subs (2) am Act 25 of 1988 s4)

¹⁰ There are also exceptions where the communication was made for a criminal purpose or in relation to a life insurance policy.

¹¹ "(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.

(iii) *Victoria*

3.10 Section 28 of the *Evidence Act 1958*¹² also provides a privilege for clerics ("clergyman of any church or religious denomination") and doctors ("physician or surgeon") in the same manner as the Tasmanian and Northern Territory provisions - that is, by forbidding such professionals from divulging confidential information. However, the Victorian provision differs in a number of respects from the Tasmanian and Northern Territory provisions.

3.11 The Victorian provision extends the operation of the doctor-patient privilege beyond the death of the patient.¹³ Consent of the deceased's personal representatives or child would be required before such information could be revealed during judicial proceedings. Further, unlike the Tasmanian and Northern Territory provisions, the Victorian provision permits the possibility of the cleric-penitent and the doctor-patient privileges being used to suppress communications made for criminal purposes. Not even the common law lawyer-client privilege is available to protect communications made for criminal purposes.¹⁴

-
- (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.
 - (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 any insurance on the life of himself or any other person."

- ¹² "(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.
- (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."

¹³ S 28(3), but note the exceptions referred to in 28(5).

¹⁴ Byrne and Heydon para 25290.

3.12 The Victorian doctor-patient privilege does not have the insurance exception found in the Tasmanian and Northern Territory provisions. Unlike the latter provisions, however, the Victorian provision includes an exception in cases where the patient's testamentary capacity is in issue in civil proceedings.

3.13 The 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.¹⁵

3.14 The relatively wide scope of the doctor-patient privilege in Victoria¹⁶ has been criticised as a potentially serious hindrance to the administration of justice and the court's ability to determine the truth.¹⁷ A significant concern with the provision has been the possibility that it will exclude evidence of great importance - placing a party in a position of being unjustly dealt with or of obtaining an inappropriate result. Cases cited in criticism of the Victorian provision include:

- (1) *Warnecke v The Equitable Life Assurance Society of the United States*¹⁸ in which the court excluded admission of a doctor's evidence tending to show that a deceased patient had suffered from a disease which he had concealed to obtain a policy of life assurance. The case involved an action under the policy pursuant to section 55 of the Victorian *Evidence Act 1890*.¹⁹ A'Becket ACJ stated:²⁰

"The object of the enactment being to enable a sufferer to seek medical aid without fear of disclosure, it would not be attained if the physician might give evidence of what he had seen, and merely prohibited from giving evidence of what he had been told. It would, moreover, be difficult for the physician to separate conclusions formed from his own observations from those formed from the statements made to him.

Speaking for myself as to the effect of our decision, I think that the point successfully raised for the first time in this case gives new and dangerous effect to the section as an obstruction to the administration of justice. No

¹⁵ [1906] VLR 482.

¹⁶ Which could also be said of the provisions in Tasmania and the Northern Territory.

¹⁷ ALRC *Evidence* (Interim Report No 26 1985) paras 453-458.

¹⁸ [1906] VLR 482 (Victorian Supreme Court).

¹⁹ Which is identical in terms to the current s 28 of the *Evidence Act 1928* (Vic).

²⁰ Id at 486.

such construction exists in England or, so far as I can ascertain, in any other State of Australia."

A'Becket ACJ referred to the possibility of fraudulent misrepresentation remaining unexposed as a result of such an interpretation.

- (2) *F (otherwise M) v F*²¹ in which a doctor's evidence of bodily characteristics observed during consultation or treatment and not apparent to the world was excluded in a suit for nullity of marriage on the ground of impotence of a husband, despite the fact that such evidence would have corroborated the petitioner's evidence.

3.15 Under the Tasmanian, Northern Territory and Victorian provisions doctors and clerics, rather than their respective patients and penitents, are prevented from revealing confidential information concerning the patients and penitents. It may therefore be possible for a patient to give evidence²² 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 ALRC has observed of this situation:²³

"There is authority that disclosure by the patient in cross-examination does not amount to consent (to break the confidentiality). But the result is then that the court receives only part of the available evidence and is deprived of that which would be most valuable. A more appropriate approach would be to treat the voluntary disclosure by the patient in court as a waiver."

3.16 The privilege relating to the doctor-patient relationship in Tasmania, Northern Territory and Victoria only applies to civil trials. This could be explained by the very real community interest in the enforcement of the criminal law. However, it is not readily apparent why the privilege relating to the cleric-penitent relationship is not limited in the same way. Nor does it 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 privilege may be vitally important to the resolution of disputes.

²¹ [1950] VLR 352.

²² In some cases patients will be able to refuse to provide the court with certain information pursuant to the privilege against self-incrimination.

²³ *Evidence* (Interim Report No 26 1985) para 456.

(iv) *Queensland*

3.17 There is no statutory professional privilege in Queensland.²⁴

(v) *New South Wales*

3.18 Section 10(1) of the *Evidence Act 1898*²⁵ provides a privilege for clerics which varies in a number of significant respects from the privilege for clerics in Tasmania, the Northern Territory and Victoria.

3.19 The catalyst for the introduction of the New South Wales provision was the case of *R v Young*.²⁶ In that case a woman had been charged with the murder of her husband. A Catholic priest was subpoenaed to appear before the woman's committal hearing to provide evidence relating to whether the woman had made a confession to the priest following the death of her husband. The priest refused during the hearing to answer any questions relating to discussions he had had with the woman. The court took no action against the priest. However, the media gave the incident wide coverage. The headline in the *Daily Mirror* on 17

²⁴ The Queensland Law Reform Commission has recently recommended that a statutory privilege should not be created for clerics ("religiously ordained officials"). Queensland Law Reform Commission *The Protection of Statements Made to Religiously Ordained Officials* (Report No 41 1991).

²⁵ "(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

(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 Commissions Act 1923*, the *Special Commission 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."

²⁶ New South Wales Committal Hearing T347-H/1 CM 16 August 1988 (Transcript provided by NSW Attorney-General's Department). Reported in the New South Wales *Daily Mirror* 17 August 1988, *Sydney Morning Herald* 3 April 1989. See discussion at para 6.14 below.

August 1988 read "Murder Case Witness: Priest who refuses to tell". The headline in the *Daily Telegraph* on the same day read "Murder case priest refuses to tell all".

3.20 The New South Wales provision is unique in that it permits a cleric to refuse to divulge the fact of a religious confession in addition to the contents of the confession. The justification for this latter is not readily apparent.²⁷

3.21 The New South Wales legislation specifically states that the privilege can be taken in any hearing or proceedings before a Royal Commission, the Independent Commission Against Corruption, special commissions of inquiry, and parliamentary committees. By contrast, the Tasmanian and Northern Territory legislation applies the privilege to "any proceedings". In Victoria, the privilege can be taken in "any suit, action or proceeding whether civil or criminal". In effect, however, there appears to be little difference between those jurisdictions as to which proceedings the privilege can be claimed.

3.22 The New South Wales legislation allows the privilege to be claimed by a past or present member of the clergy. Other jurisdictions referred to above with statutory privileges place the duty to claim the privilege on present, not past, members of the clergy.

3.23 The New South Wales legislation leaves to the cleric the decision whether or not to divulge confidential information relating to the confessional. By implication, whether the protection of a religious confession should be claimed would appear to be the decision of the member of the clergy to whom it was made, not the person who made it. By contrast, the legislation in the Northern Territory, Tasmania and Victoria place upon members of the clergy a duty not to divulge confessions made to them in legal proceedings unless the confessor consents. A cleric can claim the privilege. Also, a person who made the confession to the cleric could obtain declaratory relief if the cleric failed to take the privilege when duty-bound to do so.

3.24 The New South Wales provision is similar to those in Tasmania and the Northern Territory in that it does not protect communications made for criminal purposes. This

²⁷ See Chapter 6 below for a discussion of the arguments in favour of granting clerics a privilege in relation to confidential information obtained during a confessional. In *Young's* case (see n 26 above) the priest also refused to reveal whether or not his conversation with the defendant was in the nature of a confession. It is not readily apparent that the Code of Canon Law forbids disclosure of the fact that a confession had taken place.

translates into statutory form the principle of the common law that lawyer-client privilege does not exist where the communication between a lawyer and his client is for a criminal purpose or for the purpose of committing a fraud. The Commission would be interested to receive any submissions on whether or not such a provision would be required with respect to a statutory privilege for clerics in Western Australia.

3.25 The Victorian and New South Wales provisions restrict the privilege to formal or ritual confessions which are unequivocally referable to the priestly character of the clergy.²⁸ "Religious confession" is defined in the New South Wales Act in section 10(6) as follows:

"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."

3.26 A statutory provision which is restricted to formal or ritual confessions only affords protection to those denominations with an institutionalised system of confession. Protection may not be available to those denominations or religions where spiritual advisers give assistance simply on a personal and private basis.²⁹

3.27 In many respects the New South Wales Evidence Bill 1991³⁰ closely follows the recommendations of the ALRC's *Evidence* Report.³¹ However, the ALRC's recommendation for the adoption of a general discretion in the court to grant a privilege to protect confidential communications on a case by case basis was not included in the Bill. Instead, the New South Wales Bill follows changes made in 1989 to New South Wales law - simply preserving the statutory privilege for clerics in the confessional.

(vi) *Commonwealth law*

3.28 The Commonwealth *Evidence Act 1905* creates no evidentiary privileges. The only common law professional privilege which operates in the Commonwealth jurisdiction is the lawyer-client privilege.

²⁸ But note the interpretation given to the Tasmanian provision in *Lynch's* case, para 3.5 above.

²⁹ See ALRC *Evidence* (Report No 38 1987) para 210 where reference is made to s 116 of the *Australian Constitution* which prohibits Commonwealth laws establishing or denying the freedom of religion.

³⁰ Introduced into Parliament on 20 March 1991.

³¹ ALRC *Evidence* (Report No 38 1987) Clause 109 Draft Bill.

3.29 The Commonwealth Evidence Bill 1991³² partially implements the ALRC's recommendations in its report on *Evidence*.³³

3.30 The lawyer-client privilege ("client legal privilege") is codified³⁴ but is subject to a number of restrictions not currently imposed by the common law. For example, clause 117(5)³⁵ provides that the existence of the privilege does not prevent the adducing of evidence of a communication or a document that "affects a right of a person." Further, clause 117(14) states:

"[The existence of the privilege] 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."

3.31 Clause 119 of the Bill introduces a relatively wide privilege for clerics.³⁶ The ALRC Report recommended that no such privilege be enacted. The proposed privilege for clerics varies significantly from its counterparts in the various State jurisdictions referred to above. The Commonwealth privilege would apply to communications outside the setting of a formal confession. "[S]pecified advice or spiritual comfort" could cover a wide range of circumstances in addition to a "confession" by a penitent to his God or cleric. It may, for example, cover situations where clerics provide non-spiritual assistance to individuals which doctors or psychologists would be better qualified to provide. The cleric in such a situation

³² Tabled in the House of Representatives 15 October 1991.

³³ Report No. 38 1987.

³⁴ Clauses 116-118. Clause 116 entitled "Privilege in respect of legal advice and litigation etc" is basically the same as the ALRC clause 116 Draft Evidence Bill and clause 106 of the New South Wales Bill except that the sole purpose test replaces the "dominant purpose" test.

³⁵ Clause 117 is basically the same as the ALRC Draft Bill clauses 107 and 108.

³⁶ This provision differs from the ALRC recommendations and the New South Wales provisions. S 119(1) and (2) are based on the dissenting view in the ALRC report. Clause 119(3) is similar to the ALRC Draft Bill clause 109(3)(b). Clause 119(4) has no equivalents in the ALRC Draft Bill or in the New South Wales Bill. The Commonwealth provision reads:

- "(1) Evidence is not to be adduced of a confidential communication that was made:
- (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) Sub-s (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.

would enjoy the privilege conferred by clause 119 although there is no equivalent privilege created for other professionals such as doctors and psychologists.

3.32 Clause 119 provides for an exception to the proposed privilege for clerics where the person communicating with the cleric would be in greater danger of physical harm than if the evidence were adduced. Such an exception has not been proposed in any legislation or report reviewed by the Commission. Although its intent is obvious, it may be difficult to justify such an exception on philosophical grounds given that the principal justification for a privilege for clerics appears to be the assumption that confidentiality of certain communications is inviolable.

3.33 Clause 127 of the Commonwealth Bill proposes to give the court a general discretion to exclude evidence if its probative value is "substantially outweighed" by the danger that the evidence might:

- (a) be unfairly prejudicial; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

3.34 There may be circumstances in which confidential communications arising from professional relationships will be protected under clause 127. However, confidentiality need not be a factor in its operation.

3.35 A principal recommendation of the ALRC in its Report on *Evidence* was for a general discretion to be placed in the court to grant a privilege to any witness.³⁷ The ALRC made this recommendation after rejecting the reform option of creating statutory privileges for particular professions. The ALRC recommended that the court have a general discretion 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. Matters to be taken into account in exercising the discretion would include the need for the evidence, the damage which would occur to the particular relationship by the enforced disclosure of confidential communications and the deterrent effect on similar relationships. The onus of proof would be on the person seeking the protection of the provision. The ALRC provision is set out in

³⁷ Report No 38 1987, Draft Bill clause 109. See Appendix 1.

Appendix 1 to this discussion paper. The provision has not been implemented in any jurisdiction in Australia to date.

2. OVERSEAS JURISDICTIONS

(a) New Zealand

3.36 The statutory law relating to privilege for confidential communications in New Zealand has recently been amended, in part as a result of the recommendations of the Report of the Torts and General Law Reform Committee in 1977 on *Professional Privilege in the Law of Evidence*.³⁸ In New Zealand clerics, doctors, clinical psychologists and patent attorneys are now prohibited³⁹ from disclosing confidential communications. In addition there is a discretion in the court to excuse any witness from giving such evidence. Section 35 of the New Zealand *Evidence Amendment Act (No 2) 1980* reads:

- "(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 who 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.

³⁸ The Torts and General Law Reform Committee was one of a number of law reform committees which existed prior to the establishment of the New Zealand Law Commission in 1985.

³⁹ Compare the New South Wales provision referred to para 3.18-3.27 above, where clerics are given a discretion whether or not to refuse to disclose confidential information.

- (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."

3.37 Section 31 of the New Zealand *Evidence Amendment Act (No 2) 1980* creates a privilege for clerics and their penitents:

- "(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."

3.38 Under section 32 of the Act medical practitioners and clinical psychologists giving evidence in civil proceedings are prohibited from disclosing confidential information obtained from patients.

3.39 Under section 33 of the Act medical practitioners and clinical psychologists are also prohibited from disclosing certain confidential information when giving evidence in criminal proceedings.

3.40 The extent of non disclosure by medical practitioners, and others, pursuant to sections 32 and 33, depends on whether the proceedings are civil or criminal. In the latter case, the prohibited area is small:⁴⁰

⁴⁰ *Pallin v Department of Social Welfare* [1983] NZLR 266, 275 per Somers J. In that case the court noted that s 2 imposed a duty on a medical practitioner not to disclose a protected communication without the patient's consent. It was held that the prohibition in that section could not be overcome by the exercise of the discretion contained in s 29(1) of the *Children and Young Persons Act 1974* (a discretion in the court to receive evidence such as hearsay which would not be admissible under the strict rules of evidence). It

"The evident object of the two sections is to balance the desirability that a patient may consult a medical practitioner with frankness and without fear of disclosure against another public interest namely that in judicial proceedings the truth should be ascertained. In civil proceedings the legislature has put the first as the dominant interest but in criminal proceedings it is the second which is more important."

3.41 Patent attorneys are also prohibited from disclosing confidential information in court proceedings.⁴¹

3.42 Even though a professional relationship referred to in sections 31, 32, 33 or 34 of the New Zealand Act may fail to satisfy the respective requirements in those sections for privilege to operate, a court might nevertheless be able to grant a privilege to the professional, or to any other witness pursuant to section 35.⁴²

3.43 Section 35 has resulted in only one case to date.⁴³ There, 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 of the offence. 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 to her by the accused.

3.44 On the use of section 35, Mr D L Mathieson QC has observed:

"I am not certain that the existence of s.35 is well known to New Zealand practitioners. I think the more likely explanation is that there is a reasonable level of knowledge among practitioners of its existence, and that it is invoked comparatively infrequently, and that when it is invoked it is applied without any particular difficulty, and hence no ruling or formal judgment explaining how the section is applied ever appears."⁴⁴

did not give power to override rights or duties to withhold evidence (id 268). It had not been established on the evidence that there had been any protected communication for which the appellant could claim privilege. The medical evidence had therefore been properly admitted (evidence of physical examinations of an allegedly abused child, X-rays and blood tests were not "communications" within the meaning of s 32).

⁴¹ *Evidence Amendment Act (No.2) 1980* s 34.

⁴² See para 3.36 above.

⁴³ *R v Neilson*, before Tompkins J (unreported) 3 December 1990 (High Court of New Zealand T 13/87).

⁴⁴ Mr D C Mathieson QC, editor *Cross on Evidence* (4th ed NZ), letter to the Commission 11 July 1991.

3.45 Mr Mathieson was also unaware of any criticism of section 35. He did, however, note one interesting question still to be resolved - whether the term "special relationship" refers to the particular relationship between the two persons (that is, what their relationship was in the particular circumstances rather than what category their relationship falls within), or whether the expression has some other meaning. The question has not been dealt with by the courts. The question might arise when a court is in the position of having to decide whether the relationship between a journalist and his source of information is an appropriate relationship to be covered by section 35.

(b) The United Kingdom

3.46 Prior to 1981, the only professional privilege recognised by the common law or by statute law in the United Kingdom was the common law privilege attaching to the lawyer-client relationship. In 1972 the United Kingdom Criminal Law Revision Committee⁴⁵ recommended that there be no statutory change to that situation.

3.47 The Criminal Law Revision Committee considered that the professional relationships of cleric-penitent and doctor-patient were the only ones in which there was any valid case for conferring a privilege. But, even in respect of those relationships, the Committee concluded that no privilege should be conferred by statute. This had also been the general conclusion of the English Law Reform Committee in its 16th Report, *Privilege in Civil Proceedings* in 1967.⁴⁶

3.48 The *Report of the Committee on Contempt of Court* in 1974⁴⁷ considered that the right of witnesses, and particularly journalists, to refuse to answer questions about their sources of information formed part of the law of evidence rather than the law of contempt. The Committee therefore adopted the 1972 recommendation of the Law Reform Committee that there be no change in the law.

⁴⁵ Eleventh Report *Evidence (General)* (1972), Cmnd 3472.

⁴⁶ See the Report paras 46-47 (priest and penitent); 48-52 (doctor and patient); 54 (other confidential relationships). The Committee did however, recommend that a privilege analogous to the solicitor-client privilege be conferred by statute on communications between a client, his patent agent and third parties made for the purpose of pending or contemplated proceedings in the Patent Office or before the Patents Appeal Tribunal.

⁴⁷ *Report of the Committee on Contempt of Court* 1974 Cmnd 5794 (Phillimore Report) paras 39,40.

3.49 Nevertheless, a limited privilege for journalists was created by statute in 1981. Section 10 of the United Kingdom *Contempt of Court Act 1981* states:

"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."

3.50 But the most recent reported case to consider section 10, *X Ltd v Morgan-Grampian (Publishers) Ltd*⁴⁸ confirmed that it will be extremely difficult for journalists to rely on that provision to protect the identity of sources of information if another's legal rights would thereby be adversely affected.⁴⁹

3.51 Apart from the privilege relating to the lawyer-client relationship⁵⁰ and possibly the relationship between clerics and penitents, there are no common law professional privileges for confidential communications in Scotland.

3.52 The courts in Scotland do not lightly insist upon violation of professional confidences.⁵¹ Scottish courts have a residual power to excuse a witness from answering a question which may lead to the betrayal of such a confidence where the evidence is not considered necessary or useful and where such an excusal will not offend the interests of justice.⁵² Thus, it is quite proper for a witness to decline to answer such a question until ordered to do so by a court.

3.53 The authorities in Scotland appear inconclusive as to whether or not any common law privilege is conferred on confidential communications to clergymen. Textbook writers are not agreed on the matter. Judicial authorities are very rare and inconclusive. Cases in which the point has been raised appear to have been decided on other grounds. However, "it is clear that the fact that the statement was made to a clergyman is not in itself enough to attract confidential status. It is thought that if the communication is to be protected at all, it must be of a penitential character and made to the clergyman in his capacity as spiritual adviser."⁵³

⁴⁸ [1991] 1 A.C. 1.

⁴⁹ For further discussion on privilege for journalists, see Chapter 7 below.

⁵⁰ See D M Walker *The Scottish Legal System* (4th ed 1976) 293.

⁵¹ *The Laws of Scotland, Stair Memorial Encyclopedia* (1990) Vol 10, 686.

⁵² *H M Advocate v Airs*, 1975 JC 64 at 70, 1975 SLT 177 at 180.

⁵³ *The Laws of Scotland, Stair Memorial Encyclopedia* Vol 10 1990, 685.

3.54 Given the problems associated with creating such a privilege (for example, formulating a generally acceptable definition of the communications to which the privilege attaches) and identifying the clerics to whom the privilege applied "having regard to the increasing number of movements of religious or supposedly religious characters which exist in modern Scotland", the author of the Scottish Law Commission's *Research Paper on the Law of Evidence* was of the mind that no statutory privilege for clerics be created and that any problems which might arise in practice would be most suitably resolved by existing judicial discretion.⁵⁴

3.55 There is also some doubt whether a privilege exists for doctors in Scotland.⁵⁵ Although it is clear that a doctor is bound to give evidence regarding any matters which he has observed from an examination of a patient, there is some uncertainty about whether the doctor is also bound to disclose the substance of any written or oral communications made to the doctor by the patient.

3.56 Doctors and clerics might be entitled to claim a privilege if they act as a conciliator of spousal disputes under a proposal currently being considered by the Scottish Law Commission.⁵⁶

3.57 The development in the United Kingdom of the public interest immunity exception to the general rule that all relevant evidence must be available to a court of law in determining a dispute may provide protection to confidential communications arising in a variety of professional relationships. This exception was only ever available in cases where central government could establish a compelling interest in non-disclosure in the bounds of what was known as "Crown privilege."⁵⁷ Courts in the United Kingdom now appear to have accepted that the public interest may extend beyond the interests of the central government and may arise in cases where there is no involvement of government.⁵⁸

⁵⁴ Scottish Law Commission *Research Paper on the Law of Evidence* (1979) para 18.44.

⁵⁵ A G Walker & N L Walker *The Law of Evidence in Scotland* 419; Scottish Law Commission *Research Paper on the Law of Evidence of Scotland* (1979) para 18.45; Scottish Law Commission Discussion Paper *The Evidence of Children and Other Potentially Vulnerable Witnesses* (No 75 1988) para 4.50.

⁵⁶ Discussion Paper *Confidentiality in Family Mediation* (sic) (No. 75 1991).

⁵⁷ *Duncan v Cammell Laird & Co* [1942] AC 624.

⁵⁸ *D v National Society for the Protection of Cruelty to Children* [1977] 1 All ER 589.

3.58 The confidential nature of information by itself would not justify public interest immunity.⁵⁹ Nevertheless, a court may take account of the confidential nature of the information if this supports some other underlying argument justifying non-disclosure in the public interest. Lord Edmund-Davies in *D v National Society for the Protection of Cruelty to Children* stated:⁶⁰

"...where the subject matter is clearly of public interest, the *additional* fact (if such it be) that to break the seal of confidentiality would endanger that interest will in most (if not all) cases probably lead to the conclusion that disclosure should be withheld."

3.59 In *D v National Society for the Protection of Cruelty to Children* D was investigated by the NSPCC for alleged physical abuse of her child. The allegations were subsequently totally discredited. D sued the NSPCC for the physical and emotional harm she suffered. She claimed that the NSPCC had negligently proceeded to investigate her without first assuring themselves by proper enquiries that the individual who had provided them with information was acting bona fide and not maliciously. D sought discovery of the identity of the informant in order to help establish her claim.

3.60 The House of Lords denied D's application for discovery. The judges unanimously accepted that the functions of the NSPCC in protecting the interests of children by, for example, investigating and prosecuting cases of abuse led to the view that non-disclosure of informants' identities is in the public interest, otherwise the NSPCC would suffer a drastic reduction in the flow of information available to it.⁶¹ The House of Lords emphasised the importance of the functions of the NSPCC and that if confidentiality of informants was not assured, these functions might be compromised.

3.61 To what other situations the common law in the United Kingdom will extend the public interest immunity is yet to be seen.

⁵⁹ *Crompton (Alfred) Amusement Machines v Customs and Excise Commissioners* (No. 2) [1974] AC 405; *D v National Society for the Protection of Cruelty to Children*, above; *Science Research Council v Nasse* [1980] AC 1028. Each of these cases confirmed that confidentiality is not a separate branch of privilege.

⁶⁰ [1977] 1 All ER 589 at 619.

⁶¹ Id at 604 per Lord Hailsham LC.

(c) **Canada**⁶²

3.62 The lawyer-client privilege exists at common law in all Canadian jurisdictions.⁶³ It is the only common law professional privilege in Canada. The federal laws of evidence recognise no professional privilege other than the common law lawyer-client privilege.⁶⁴

3.63 In Newfoundland a cleric ("clergyman or priest") is not compellable to give evidence as to any confession made to him in his professional character.⁶⁵

3.64 Quebec is the only other province in Canada with a privilege covering clerics. In Quebec the doctrine of privilege has also been extended to other relationships. Quebec's Charter of Human Rights and Freedoms Article 9 states:⁶⁶

"No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law."

3.65 A number of professions in Quebec have specific statutory obligations to maintain confidentiality, including lawyers,⁶⁷ notaries,⁶⁸ physicians and dentists,⁶⁹ pharmacists,⁷⁰ and veterinary surgeons.⁷¹

⁶² The Commission acknowledges the kind assistance of the Law Reform Commission of Canada in providing information for the summary of the law of professional privilege in Canada.

⁶³ *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982), 417.

⁶⁴ *Evidence Act R.S.C. 1970* (Can), C.E.-10,ss 5(1). All witnesses are required to answer even when such answer may tend to criminate them or render them liable in a civil action.

⁶⁵ R.S.N. 1970 C.115 s 6.

⁶⁶ 31 December 1990 R.S.Q. C-12, Article 9, paragraph 2.

⁶⁷ Article 131 of the Act respecting the Barreau du Quebec (R.S.Q., C.B-1) states:

"(1) An advocate must keep absolutely secret the confidences made to him by reason of his profession.

(2) Such obligation, however, shall not apply when the advocate is expressly or implicitly relieved therefrom by the person who made such confidences to him."

⁶⁸ A limited type of privilege is created by Article 6(1) of the *Notarial Act* (R.S.Q. C.N - 2):

"A notary who executes a deed shall not be obliged to inform the contracting parties of any fact within his knowledge; he shall not even be bound to declare debts of which he has knowledge."

⁶⁹ Identical provisions exist for physicians and dentists in their respective acts:

"No [physician/dentist/] may be compelled to declare what has been revealed to him in his professional character." (*Physicians Act*, R.S.Q. c. M-9, article 42; *Dentists Act*, R.S.Q. c. D-3, article 37).

⁷⁰ Article 34 of the *Pharmacists Act* (R.S.Q. c. P-10) states:

"No pharmacist may be compelled to declare what has been revealed to him in his professional capacity."

⁷¹ The provision is identical to that governing pharmacists (*Veterinary Surgeons Act*, R.S.Q. c. M-8, article 31).

3.66 Quebec's Professional Code⁷² which regulates all professions requires that each professional corporation adopt a code of ethics. The codes must include, inter alia, provisions to preserve confidentiality of information received in the exercise of the profession.⁷³ The confidentiality provisions of all such codes of ethics are therefore protected by Article 9 of the Quebec Charter.⁷⁴

3.67 Article 308 of Quebec's *Code of Civil Procedure* which previously protected confidential communications with priests, advocates, notaries and dentists, was amended in 1975 as a result of the enactment of Quebec's Charter. The Article now covers only government officials.⁷⁵

3.68 The Law Reform Commission of Canada in its 1975 *Report on Evidence* recommended the codification of the lawyer-client privilege.⁷⁶ It also recommended the statutory creation of a general professional privilege. The draft provision for a general professional privilege reads:⁷⁷

"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."

3.69 The Canadian Commission considered that it would be unrealistic to attempt to define the circumstances where the maintenance of confidentiality for communications made in the course of professional relationships outweighs the benefit of their disclosure - therefore the judge should weigh the competing interests whenever such a privilege is claimed. The Canadian Commission's recommendations have yet to be implemented.

⁷² R.S.Q. c. C-26.

⁷³ Id article 87(3).

⁷⁴ See para 3.64 above.

⁷⁵ "...government officials cannot be obliged to divulge what has been revealed to them in the exercise of their functions provided that the judge is of the opinion...that the disclosure would be contrary to public order."

⁷⁶ Draft Evidence Code C1 41.

⁷⁷ Draft Evidence Code C1 42.

3.70 A Federal/Provincial Task Force on Uniform Rules of Evidence⁷⁸ recommended that a privilege be enacted only for communications made between an accused and an assessing physician during remand for observation - such communications would be inadmissible against the accused in any criminal proceeding other than a fitness hearing, except where the accused waives the privilege by putting his mental state in issue. A Bill which included a provision to that effect was subsequently introduced in the Senate but did not pass in the House of Commons.⁷⁹

3.71 The Ontario Law Reform Commission has considered whether a professional privilege of the type enjoyed by lawyers and their clients should be made available to other professional relationships - such as accountants and their clients, clerics and members of their congregations, journalists and their sources of information, doctors and their patients.⁸⁰ The Ontario Commission concluded that none of those relationships are fundamentally or historically the same as that which exists between the lawyer and his client and therefore should not be the subject of privilege.⁸¹ The Commission was also concerned that the extension of a statutory privilege to relationships other than the lawyer-client relationship would result in closing to the judicial process wide areas in its search for the truth. Unlike any other professional relationship the lawyer-client relationship was considered to be fundamental to the right of a fair hearing, the right to retain counsel and the right "in full equality to a fair and public hearing by an independent and impartial tribunal (as expressed in the Universal Declaration Human Rights)".⁸²

3.72 The Ontario Royal Commission Inquiry into Civil Rights also recommended that there should be no changes made in the law concerning privileged communications.⁸³ The Royal Commission believed that the injury that would be done to the administration of justice in the search for truth by an extension of the law of privilege far outweighs any benefits that would be derived therefrom.⁸⁴

⁷⁸ Report prepared for the Uniform Law Conference of Canada, 1982.

⁷⁹ Law Reform Commission of Canada, letter to Law Reform Commission of Western Australia, 4 October 1991.

⁸⁰ Ontario Law Reform Commission *Report on the Law of Evidence* 1976.

⁸¹ Id 145.

⁸² Ibid.

⁸³ Royal Commission of Inquiry into Civil Rights 1968.

⁸⁴ Report No. 1 Vol 2 828.

(d) South Africa

3.73 The South African Law Commission has recommended that no extension of the professional privilege enjoyed by the legal profession and their clients be made to other professional relationships.⁸⁵ The underlying reason for the existence of the lawyer-client privilege was seen as the belief that the lawyer cannot perform his duty as an adviser and spokesperson properly if communications with his client are not frank and confidential. The object of the privilege is to promote the administration of justice and not simply to preserve the secrecy of confidential communications in general.

3.74 The South African Commission cautioned against creating new privileges lightly. To do so, claimed the Commission, would result in serious consequences for the administration of justice. The Commission referred to four conditions listed in an authoritative United States legal text⁸⁶ which it considered should be present before the law recognises a communication as privileged:

The communications must originate in confidence that they will not be disclosed;

This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

The relation must be one which in the opinion of the community ought to be sedulously fostered;

The injury which would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Only the lawyer-client relationship was seen to generate communications which would satisfy each of the above conditions.

3.75 In conjunction with the four conditions referred to above, the South African Commission emphasised that the court must, as far as possible, be unfettered in its search for the truth and that it is entitled to all evidence which would assist it to discover the truth.

⁸⁵ *Report on the Review of the Law of Evidence* (Project 6, 1986).

⁸⁶ J H Wigmore *A Treatise on the Anglo-American System of Evidence at Trials in Common Law* (3rd ed) para 2285.

Further, the Commission emphasised that every person who is in possession of evidence has a duty to assist the court.⁸⁷

3.76 The absence of a recognized privilege for journalists has been the subject of recent debate in South Africa following the case of *The State v Patrick Lawrence*.⁸⁸ In that case a Johannesburg journalist, Patrick Lawrence, was subpoenaed, pursuant to section 205 of the South African *Criminal Procedure Act 1977*⁸⁹ as it then stood,⁹⁰ to reveal the source of information contained in a newspaper report concerning the disappearance of a witness in the trial of Winnie Mandela.⁹¹ Mr Lawrence refused to reveal the source of his information on ethical grounds. Section 205, read with section 189⁹² of the same Act is, like their West Australian counterpart in section 77 of the *Justices Act 1902*, intended to coerce people into revealing relevant information. The primary distinction between the South African provisions and the Western Australian provision is that section 205 can operate at the behest of someone other than a court - the public prosecutor (effectively the police) - whereas section 77 operates at the behest of the court. Mr Lawrence was imprisoned for 10 days for refusing to provide the information requested of him.

⁸⁷ Para 20.4.

⁸⁸ Johannesburg Magistrate's Court No. 8/588/91, 4 March 1991. Transcript kindly provided by the South African Law Commission.

⁸⁹ Section 205 read:

"(1) A magistrate may, upon the request of a public prosecutor, require the attendance before him or any other magistrate, for examination by the public prosecutor, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed...

(3) The examination of any person under subsection (1) may be conducted in private at any place designated by the magistrate."

⁹⁰ The provision was amended in March 1991. It now reads:

"(1) A magistrate may, upon the request of a [public prosecutor or] an attorney-general, require the attendance before him or any other magistrate, for examination by the attorney-general or a public prosecutor authorized thereto by the attorney-general, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the attorney-general or public prosecutor concerned, prior to the date on which he was required to appear before such magistrate, he shall be under no further obligation to appear before a magistrate."

⁹¹ Ms Mandela was facing charges of assault and kidnapping.

⁹² S 189 reads: "If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make affirmation as a witness or having been sworn or having made an affirmation as a witness refuses to answer any question put to him or refuses or fails to produce any book or document required to be produced by him the court may in a summary manner enquire into such refusal and/or failure and unless the person so refusing or failing has a just excuse for his refusal or failure sentence him to imprisonment for a period not exceeding two years or where the criminal proceedings in question relate to an offence referred to in...*Internal Security Act 1974*...to imprisonment for a period not exceeding five years."

3.77 As was the case in Western Australia in relation to the *Luders* case⁹³ the media reaction to the *Lawrence* case in South Africa was intense - but perhaps with more justification. For quite some time it was believed that section 205 was being used by police to harass journalists. Yet the principle supposedly being protected by the provisions in South Africa and in Western Australia is the same - all citizens must assist in the administration of justice if justice is to be served.

3.78 Not all calls for reform demanded the repeal of section 205. Some recognised that journalists who refuse to disclose sources must expect punishment, if only to prevent the law from falling into disrespect. Also, punishment may separate the truly ethical journalist from the charlatan who uses "professional" ethics as a cover to make up quotes, to invent sources and to embroider facts. A punitive sentence for refusing to assist the administration of justice would not deter the truly ethical journalist from protecting his sources, but it might persuade the dishonest journalist that the price of lying had become too high. As one journalist wrote:⁹⁴

"given such a clear conflict between the law and the ethical convictions of journalists, one might expect the government to be circumspect in using section 205. In South Africa, the contrary is true: the law is used so often as to be seen as an instrument of intimidation...My own experience, in fact, suggests it is most likely to be used when the police feel themselves to have been criticised."

3.79 A recent amendment to section 205, possibly in response to the *Lawrence* case and other similar decisions, transfers the decision to use section 205 from public prosecutors to attorneys-general. It also opens the possibility of the information being given to an attorney-general, presumably in confidence, without the need to appear before a magistrate. That may address some concerns regarding the police's motives in utilising the section. It would not guarantee that the police had exhausted all other avenues of inquiry and that the information they sought was available in no other way,⁹⁵ nor would it deter the truly ethical journalist from refusing to tell even an attorney-general that which he has vowed to keep confidential.

⁹³ See paras 1.28-1.37 above.

⁹⁴ Ken Owen *Sunday Times* (South Africa) 10 March 1991.

⁹⁵ The Minister for Justice, during Parliamentary debate upon the introduction of the 1991 amendment to section 205, stated that the dual purposes of the provision are "on the one hand to allow justice to triumph and on the other hand to apply a discretion when it comes to revealing of sources. We must not gloss or smear over crime merely because an element of the media doesn't have evidence at their disposal; but on the other hand our media have a duty as watchdog which needs not so much to be protected by us as our legal system needs protection." (Raadsaal Van Die Parlement 10 May 1991. Translation kindly provided by Ms M Dixon).

(e) The United States of America

3.80 The common law of all United States jurisdictions recognizes the lawyer-client privilege.⁹⁶ In addition, many States have created a statutory privilege in relation to certain professional relationships, principally lawyer-client, doctor-patient, cleric-penitent and journalist-source.

(i) Lawyer-client

3.81 The lawyer-client privilege has been codified in the United States *Uniform Rules of Evidence*.⁹⁷ Rule 502 of the Uniform Rules reads in part:

"(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client (i) between the client or a representative of the client and the lawyer and a representative of the lawyer, (ii) between the lawyer and a representative of the lawyer, (iii) by the client or a client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (iv) between representatives of the client or between the client and a representative of the client, or (v) among lawyers and their representatives and the same client."⁹⁸

(ii) Doctor-patient; psychotherapist-patient

3.82 Rule 503 of the *Uniform Rules of Evidence* sets out a draft provision which can be used to create a doctor-patient and or a psychotherapist-patient privilege. The rule reads, in part:

"(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made

⁹⁶ The Supreme Judicial Court of Massachusetts has recently recognised a privilege for journalists under Massachusetts common law. In the matter of a John Doe Grand Jury Investigation, 1991 Mass. LEXIS 353 (July 9, 1991) that case involved desire of a grand jury to learn the identity of a confidential source of information published by a journalist. The Washington (State) Supreme Court created a qualified journalist's privilege based on its authority to re-evaluate the Common Law (*Senear v Daily Journal-American* 97 Wash. 2d 148, 641 P. 2d 1180 (1982), on remand 8 Med. L. Repr. 2489 - see discussion in J C Goodale, et al *Reporters Privilege Cases* November 1991, 21 1985.

⁹⁷ *Uniform Laws Annotated* Vol 13A, Civil Procedural and Remedial Laws, Uniform Rules of Evidence 1974 as amended 1986 and updated by 1990 Cumulative Annual Pocket Part, Rule 502.

⁹⁸ Subject to a number of exceptions listed in Rule 502(d).

for the purpose of diagnosis or treatment of his [physical] mental or emotional condition, including alcohol or drug addiction, among himself, his [physician or] psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the [physician or] psychotherapist, including members of the patient's family.⁹⁹

- (c) Who may claim the privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the [physician or] psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient."

3.83 The provision in Rule 503 has been adopted by twenty States and two Territories (Puerto Rico and Guam). Thirteen of those States have varied the provision. A number of the States which have not adopted the *Uniform Rules of Evidence* or a variation thereof have nevertheless legislated for a doctor-patient privilege. Such a privilege was first enacted in the United States in New York in 1828 and is now present in approximately three quarters of the States.¹⁰⁰

3.84 United States courts have read a number of limitations into statutory doctor-patient privileges. For example, the privilege does not apply when the public interest supporting disclosure in criminal cases outweighs the interest in enforcing the privilege.¹⁰¹ Further, a trial court may require disclosure of "privileged" information if deemed necessary to the proper administration of justice.¹⁰² The privilege is not absolute. The doctor-patient privilege may be waived if a mental health professional learns of a mental patient's threat of serious harm to an identified victim.¹⁰³

(iii) *Cleric-penitent*

3.85 Rule 505 of the *Uniform Rules of Evidence* sets out a privilege for clerics which reads, in part:

⁹⁹ A number of exceptions are listed in Rule 503(d). For example, the privilege does not exist for communications relevant to an issue in proceedings to hospitalise the patient for mental illness.

¹⁰⁰ ALRC Research Paper 16 *Privilege* para 216.

¹⁰¹ *In re Brink* (1989) 536 N E 2d 1202, 42 Ohio Misc. 2d.5.

¹⁰² *Shelton v Morehead Memorial Hospital* (1986) 347 S E 2d 824, 318 N.C.76.

¹⁰³ Per Hill J, with one other Judge concurring in *Peak v Counseling Service of Addison County, Inc* (1985) 499 A 2d 422 146 Ut 61.

- "(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the person and a clergyman in his professional character as spiritual adviser.
- "(c) Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant."¹⁰⁴

3.86 A "clergyman" is defined as "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."¹⁰⁵

3.87 The draft privilege in Rule 505 has been adopted by twenty States and two Territories (in nine States, with some variation). In all, forty-nine States and the District of Columbia now have some form of statutory privilege for clerics.¹⁰⁶

3.88 In contrast to the more general cleric-penitent provision in the *Uniform Rules of Evidence*, the American Law Institute's *Model Code of Evidence* accords privilege only to a "penitential communication" which is defined as:

"A confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of the discipline or practice of the church or religious denomination or organisation of which the witness is a member."¹⁰⁷

(iv) *Other relationships*

3.89 A number of jurisdictions have adopted statutory professional privileges in addition to the ones referred to above. For example, Idaho has enacted privileges for accountant-client, school counsellor-student, licensed counsellor-client, licensed social worker-client, hospital - in-hospital medical staff committee and medical society, and medical malpractice

¹⁰⁴ The privilege belongs to the penitent, and the cleric cannot disclose the penitent's confidences without the penitent's consent - *Church of Jesus Christ of Latter-Day Saints v Superior Court In and For Maricopa Country* (1988) 764 P 2d 729 (Ariz).

¹⁰⁵ Rule 505 (a)(1).

¹⁰⁶ "Developments - Privileged Communications" (1985) 98*Harvard Law Review* 1450 at 1556

¹⁰⁷ The various statutory privileges for clerics in the United States vary greatly. See "Developments-Privileged Communications" (1985) 98*Harvard Law Review* 1450 at 1556-1559.

screening.¹⁰⁸ Wisconsin has adopted a privilege relating to communications in mediation.¹⁰⁹ Oregon has enacted a privilege relating to the nurse-patient relationship,¹¹⁰ the school employee-student relationship,¹¹¹ the clinical social worker-client relationship¹¹² and the stenographer-employer relationship.¹¹³

¹⁰⁸ New Rules 515,516,517,518,519,520 incorporated into Idaho's adoption of the *Uniform Rules of Evidence*. See *Uniform Laws Amended* Vol 13A, 1990 Supplement.

¹⁰⁹ New Rule 905.035 incorporated into Wisconsin's adoption of the *Uniform Rules of Evidence*.

¹¹⁰ New Rule 504-2 incorporated into Oregon's adoption of the *Uniform Rules of Evidence*.

¹¹¹ New Rule 504-3.

¹¹² New Rule 504-4.

¹¹³ New Rule 508a.

(v) *Journalist-statutory privilege*

3.90 As of October 1991, twenty-eight States have created a statutory privilege relating to confidential communications with journalists, and/or to the confidential identity of the source of a journalist's information.¹¹⁴ These privileges are commonly referred to as "shield" laws.¹¹⁵ The shield laws are not uniform. Some shield laws protect only confidential sources, while others protect confidential and non-confidential sources of information. Some shield laws provide an absolute privilege, others only a qualified privilege, and others (for example, California) only an immunity from contempt. One commentator has noted that (as at 1988):

"Among the 26 states which have adopted a shield law, 15 offer an absolute privilege in protecting sources while 11 offer a qualified privilege....As to the protection against disclosure of information itself, 11 shield laws do not specify this issue, 9 give an absolute privilege and 6 a qualified privilege (5 laws limiting the scope of the privilege to unpublished matter only)."¹¹⁶

3.91 An example of a United States' shield law is the Oklahoma provision for "newsman's privilege." The provision reads:

"(b) No newsman shall be required to disclose in a state proceeding either:

- "(1) The source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or
- (2) Any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public; unless the court finds that the party seeking the information or identity as established by clear and convincing evidence that such information or identity is relevant to a significant issue in the action and could not with due diligence be obtained by alternative means.

"This subsection does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein the

¹¹⁴ There are no shield laws in 22 States and the District of Columbia. The most recent States to enact shield laws were Colorado and Georgia (both in 1990). See Appendix 3 for a summary and analysis of shield laws on a State-by-State basis.

¹¹⁵ The Commission acknowledges the kind assistance of the following for up-to-date information on U.S. Shield Laws:

Mr James C. Goodale, Debevoise & Plimpton, Attorneys-at-Law, New York;

The Association of the Bar of the City of New York;

The Libel Defense Resource Center, New York.

¹¹⁶ P Wilhelm *Protection of Sources: An International Review of Journalistic and Legal Practice* Norwegian Institute of Journalism & International Federation of Journalists (1988) 72.

defendant asserts a defense based on the content or source of such information."

A "newsman" is defined so as to include: "a reporter, photographer, editor, commentator, journalists correspondent, announcer or other individual regularly engaged in obtaining, writing, receiving, editing, or otherwise preparing news for any newspaper, periodical, press and newspaper syndicate, wire service, radio or television station or other news services."

3.92 New York State has recently amended its shield law.¹¹⁷ It provides absolute protection against contempt proceedings to journalists refusing or failing to disclose information received in confidence or the identity of the source of such information. The New York law also provides a qualified privilege to journalists who refuse or fail to disclose any unpublished news obtained or prepared by a journalist 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 second provision include where the party seeking such news has made clear and specific showing that the information:

- "(i) is highly material and relevant;
- (ii) is critical or necessary to the maintenance of a party's claim defense or proof of an issue material thereto; and
- (iii) is not obtainable from any alternative source."

(vi) *Journalist-constitutional privilege*

3.93 The situation regarding journalists' privilege in the United States has been complicated by divergent interpretations of the seminal Supreme Court Case, *Branzburg v Hayes*.¹¹⁸ Some courts have held that *Branzburg* created a constitutionally-based journalist's privilege. Other

¹¹⁷ *New York Civil Rights Law* s79-h. See Appendix 3.

¹¹⁸ (1972) 408 U.S. 665 In that case the U S Supreme Court held by a 5 to 4 majority that the First Amendment to the U S Constitution gave no relief to a newspaper reporter from having to respond to a Grand Jury Subpoena and to answer questions in a criminal trial. The first Amendment to the U S Constitution states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Although the First Amendment may not provide a journalist with an absolute privilege, it has been argued that it may permit a journalist to refuse to disclose the source of her information in civil trials in certain circumstances: S J Irvin Jr "In Pursuit of a Press Privilege" (1974) 11 *Harvard Journal on Legislation* 233. For a recent discussion of the various judicial views on the effect of the *Branzburg* decision, see J C Goodale et al *Reporter's Privilege Cases* November 1991 from p 6 et seq.

courts, however, have held that no constitutionally-based journalist's privilege exists. Further complicating the picture, Massachusetts, which has no shield law, has recently recognized a journalist's privilege based on "common law principles."¹¹⁹

(f) Austria¹²⁰

3.94 Austria has had a statutory professional privilege for journalists for over 60 years. Until 1982 however, the privilege only extended to court proceedings on press offences, that is, cases relating to a publication. The privilege appears to be an absolute one.

3.95 Since 1982 the right of journalists, as witnesses in judicial and administrative proceedings, to refuse to give evidence relating to confidential information and to the confidential identity of sources of information has been extended to the owner of the media (publishers), the editors-in-chief and all other non-journalistic workers in media enterprises or information services.¹²¹ 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 or informants. All the media are covered by this law - including the electronic media and agencies and services.

¹¹⁹ *In re John Doe Grand Jury Investigation*, 1991 Mass. LEXIS 353, July 9 1991 see note 96 above.

¹²⁰ The relevant law has been kindly translated and provided to the Commission by the Australian Embassy in Vienna, Austria.

¹²¹ Section 31 of the *Press and Other Publication Media Act 1981* (Media Act) states:
"Protection of Editorial Secrecy.

- (1) In court or before administrative authorities publishers, editors and staff of a media company or media service shall have the right to refuse answering questions that relate to the author, sender or source of articles and data, or to the information supplied.
- (2) The right outlined above may not be circumvented by ordering the authorised holder of relevant documents, print material, audio, video and data carriers, graphic and other reproductions to release his material or by confiscating the material;
- (3) Monitoring of telephone and telecommunication equipment of a media company in accordance with Section 149 *Penal Code* shall be permissible only when the penal procedure relates to a criminal offence punishable with life imprisonment or with prison sentences of a minimum of five and a maximum of over ten years."

(g) Denmark

3.96 In 1991 a new *Media Law Act* was enacted in Denmark.¹²² The legislation provides that the conduct and content of the mass media must be in conformity with "sound press ethics."¹²³ It also amends the *Administration of Justice Act* to provide a limited privilege for journalists.¹²⁴

3.97 The privilege for journalists is set out in section 172 of the *Administration of Justice Act*:

"Subsection 1. The editor and the editorial staff of a publication to whom section 1, 1) in the *Media Liability Act* extends¹²⁵ shall not be under an obligation to give evidence as to the source of a piece of information or the author of an article in the publication where the name of the source or the author has not been stated. Nor do they have to give evidence as to who has taken a photograph or made another graphic representation where the name of the photographer or the creator of the graphic representation has not been stated, or to give evidence as to whom the photo represents, or who is the subject of comment where this does not appear from the text.

"Subsection 2. The editor and the editorial staff at a radio or television broadcasting undertaking to which section 1, 2) of the *Media Liability Act* extends shall not be under an obligation to give evidence as to who is the source of a piece of information or the author of a work broadcast in a programme where the name of the source or the author of a work has not been stated. Nor do they have to give evidence as to the identity of anonymous persons taking part in a programme where these persons have been promised that their participation would not reveal their identity and reasonable steps have been taken to conceal the identity.

"Subsection 3. Exemption from the obligation to give evidence as referred to in subsections 1 and 2 of this section shall also apply to others who by virtue of their association with the publication or its production or their association with the radio or television broadcasting undertaking or the production of the programme concerned have learnt about the identity of the source, the author or the person taking part in a programme.

¹²² Unauthorised translation kindly provided to the Commission by the Danish Ministry of Foreign Affairs, July 4, 1991.

¹²³ S 34.

¹²⁴ Id s 56 amending s 172 of the *Administration of Justice Act*.

¹²⁵ S 1 of the *Media Liability Act* states that the Act is to apply to the following mass media:

- (1) National, periodical publications, including pictures and similar representations printed or in any other way duplicated.
- (2) Sound and picture programmes broadcast or distributed by Denmark's Radio (the Danish Broadcasting Corporation), TV 2 Denmark, TV 2's regional enterprises and undertakings authorized to broadcast local radio or television programmes.
- (3) Texts, pictures and sound programmes periodically imparted to the public, provided that they have the form of news presentation which can be equated with the kind of presentation to which (1) or (2) of this section extends..."

"Subsection 4. The provisions of subsections 1-3 of this section shall apply by analogy to the mass media to which section 1, 3) of the *Media Liability Act* extends.

"Subsection 5. However, where the subject matter is a serious offence, and the calling of witnesses is essential to the unravelling of the case, the court may direct the persons referred to in subsections 1-4 of this section to give evidence, provided that due to the seriousness of the crime or to other special public or private interests the regard for unravelling of the crime clearly outweighs (sic) the regard for the protection of the source as related to the social importance of the article or programme.

"Subsection 6. This shall apply by analogy where it is evident that a publication has not served any purpose from a social point of view, and where the subject matter of the case 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.

The editor and editorial staff of a publication are not required to give evidence as to the source of information or as to "who has taken a photograph or made another graphic representation." The editor and editorial staff at a radio or television broadcasting undertaking are not obliged to give evidence of a similar nature. The exemption from the obligation to give evidence applies to others by virtue of their association with the publication or with the radio or television broadcasting undertaking.

3.98 A significant exception to the privilege exists where the subject matter of the case is a serious offence and the calling of the witness is essential to the "unravelling of the case."¹²⁶

3.99 An exception to the privilege also exists where it is evident that a publication has "not served any purpose from a social point of view, and where the subject matter of the case 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."¹²⁷

3.100 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.

¹²⁶ Id sub-s 172(5).

¹²⁷ Id sub-s 172(6).

(h) Sweden

3.101 In 1776 the Swedish Parliament adopted a *Freedom of the Press Act* as part of its Constitution.¹²⁸ The current legislation dates from 1949. Chapter 3 of the Act prohibits journalists and others involved in the print media from revealing the identity of a confidential source of information. The law explicitly prohibits the investigation or disclosure of the identity of journalists' sources and the identity of confidential sources of information is inadmissible as a part of law.

3.102 The privilege created by the *Freedom of the Press Act* extends to state and municipal employees. Such people are therefore free to provide information to newspapers and other media without fear of legal repercussions or extra-legal pressures and intimidation.

3.103 The rationale for the apparently wide Swedish privilege has been stated in the following terms:¹²⁹

"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.

"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."

3.104 There are a number of exceptions to the general rule of impunity and anonymity of sources of information. If state employees inform the media of matters that could be detrimental to state security, legal action could be taken against informants (assuming, of course, that their identity can be ascertained). The same exception applies in special cases where an official violates a professional secret (in special cases prescribed by law).

3.105 The protection of the confidential identity of 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

¹²⁸ Sweden has three organic or constitutional laws - one of which is the *Freedom of the Press Act*. Chapter 2 of the *Instrument of Government* makes reference to the *Freedom of the Press Act*. Fact Sheets on Sweden: Mass Media in Sweden, and Constitutional Protection of Rights and Freedom in Sweden, (1990).

¹²⁹ *Facts Sheets on Sweden*, Mass Media in Sweden, 1990.

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.

(i) Japan¹³⁰

3.106 In relation to civil proceedings, Article 281(2) of Japan's *Code of Civil Procedure*¹³¹ provides that a witness may refuse to testify:

"In case a doctor, dentist, pharmacist, druggist, mid-wife, lawyer, patent attorney, advocate, notary public or an occupant of a post connected with religion or worship or a person who was once in such profession is questioned regarding the facts which came to his knowledge in the course of performance of his duties and which should be kept secret."

3.107 Any witness is also able to refuse to testify if questioned with respect to "matters relating to a technical or professional secret."¹³² Professionals such as journalists, who are not included in the list of professionals referred to in 281(2) may be able to claim a privilege under this provision.¹³³ There is some question whether the privilege is subject to the requirements of a fair trial being met in a civil suit.¹³⁴ In relation to journalists, such a limitation would be decided on the basis of the relative balance between the benefits of disclosure to the conduct of a fair trial and the benefits to be achieved by not divulging the identity of the source of information.

3.108 The professional privilege under the *Code of Civil Procedure* does not apply where the witness has been released from his duty to maintain the confidentiality.¹³⁵ Furthermore, the ground for refusal to testify must be explained to the court and there will be an adjudication on the propriety of the refusal.¹³⁶

¹³⁰ The Commission acknowledges the kind assistance of the Australian Embassy in Tokyo, and Mr Ohe of Sly and Weigall, Solicitors, Canberra for up-to-date information on professional privilege in Japan.

¹³¹ *Code of Civil Procedure* 21 April 1890 No. 29 (as amended), 10 July 1948 No. 131 (as amended).

¹³² Article 281(3).

¹³³ R Wilhelm *The Protection of Sources: An International Review of Journalistic and Legal Practice*, (1988) 56, refers to a case in the Sapporo High Court on August 3 1979 involving a reporter who was able to treat confidential information (the identity of a source) as privileged under this provision. The reporter wrote in the Hokkaido Shimbun of a child being maltreated in a nursery. The nurse sued for libel. The reporter refused to identify the source of his information.

¹³⁴ Ibid.

¹³⁵ Article 281-2.

¹³⁶ Articles 282,283.

3.109 Under Japan's *Penal Code* it is an offence for certain professionals to disclose confidential information obtained during the course of their profession:¹³⁷

"A person who is or has been a doctor, pharmacist, druggist, midwife, lawyer, defence counsel, or notary and who without due cause discloses a secret which has come to his knowledge in the performance of his profession, shall be punished with penal servitude for not more than six months or a fine of not more than twenty thousand yen."

3.110 Clerics are subject to a similar provision to the professionals referred to above.¹³⁸

3.111 A similar list of professionals is entitled to refuse to disclose confidential professional communications in criminal matters:¹³⁹

"A doctor, dentist, midwife, nurse, lawyer (including a foreign solicitor), patent agent, notary public, religious functionary, or any person who is or was in these positions may refuse to give testimony of such facts as have come into his knowledge in the course of his business because of the entrustment and as have related to the secrecy of another person: Provided, that this shall not apply if the person who had made entrustment has consented, if the refusal of testimony is deemed to be the abuse of right intended only for the accused (excluding such cases as the accused is the person who has made entrustment), or if there exist such causes as specified by the rules of the courts."¹⁴⁰

¹³⁷ The Penal Code, 24 April 1907 No. 45 (as amended), Article 134.

¹³⁸ Article 134(2) states:

"The same shall apply to a person who is or has been engaged in a calling relating to religion or worship and who without due cause discloses a secret which has come to his knowledge in the performance of his calling."

¹³⁹ Article 149.

¹⁴⁰ Journalists are not included in the list of professionals in Article 149. P Wilhelm in *The Protection of Sources: An International Review of Journalistic and Legal Practice*, 1988 at 55 makes reference to an August 6, 1952 Japanese Supreme Court case in which it was confirmed that the provision cannot be applied to a journalist. Pharmacists and druggists are also excluded from this list although they are included in Article 134 of the *Penal Code*, and Article 281 of the *Code of Civil Procedure* (see above).

Chapter 4

CONFIDENTIAL COMMUNICATIONS WITH LAWYERS

4.1 The common law in all relevant jurisdictions reviewed by the Commission recognises a professional privilege for the lawyer-client relationship and, in the vast majority of those jurisdictions, that is the only privilege recognised by the common law.¹ In Australia, in both civil and criminal cases, the privilege enables confidential communications between a lawyer and her client not to be given in evidence or otherwise disclosed by the client. Further, without the client's consent such communications may not be given in evidence or otherwise disclosed by the lawyer if the communication was made either to enable the client to obtain, or the lawyer to give, legal advice,² or with reference to litigation that is actually taking place or was in the contemplation of the client.³ Where the communication is oral it must have been solely for one of these purposes. Where it is in writing, the writing must have been brought into existence for one or other of these purposes.⁴

4.2 The privilege extends to communications between the lawyer and an agent of the client and a report to the client from her agent.⁵ In relation to communications between third parties and the lawyer or the client, where the third party is not an agent of either, privilege will not be available unless the claimant can show that the document was brought into existence or the communication was otherwise made at a time when litigation was in existence or contemplated *and* that the document or communication was brought into

¹ Possible exception in Scotland (see para 3.53 and 3.55 above), Massachusetts (see para 3.80 note 96 above), and Washington (see para 3.80 note 96 above).

² *Grant v Downs* (1976) 135 CLR 674.

³ *Minet v Morgan* (1873) LR 8 Ch App 361.

⁴ "The privilege does not protect documents which constitute or evidence transactions, such as contracts or conveyances, which are not themselves the giving or receiving of advice or part of the actual or anticipated litigation. Likewise, where the client delivers documents to his solicitor for one or other of the stipulated purposes, these documents do not thereby acquire privilege, for the relevant purpose is that for which they were brought into existence, not that for which they were delivered to the legal adviser. If a document is discoverable in the hands of the client it enjoys no immunity in the hands of his solicitor." (Byrne & Heydon para 25225 with reference to *Baker v Campbell* (1983) 153 CLR 52 at 86-7, 122-3; *Smorgon v FCT* (1979) 53 ALJR 336 at 339)

⁵ *Grant v Downs* (1976) 135 CLR 674 was a case involving a report to a party by its employee. In the United Kingdom, lawyer-client privilege has been extended by statute to patent attorneys (*Copyright, Designs and Patents Act 1988* s 280); to trademark attorneys (id s 284), to agents in respect of civil proceedings and to licensed conveyancers (*Administration of Justice Act 1985* s 33). The privilege also covers employee's representatives at industrial tribunals for the purpose of litigation in hand (*M and Grazebrook Ltd v Walters* [1973] 2 All ER 868).

existence or made for the sole purpose of obtaining advice for that litigation or otherwise for the sole purpose of the litigation.⁶

4.3 The privilege is not confined to judicial and quasi-judicial proceedings - it is a right generally conferred by law to protect from compulsory disclosure confidential communications falling within the privilege.⁷ A statute should be construed as preserving a right to lawyer-client privilege unless the privilege is abrogated by express words or necessary intent.⁸ Further, the communication must be a confidential one - thus the privilege may not be available if, for example, the communication takes place in the presence of a third party.⁹

4.4 The privilege is the client's¹⁰ and continues for the benefit of her successors in title - "once privileged, always privileged."¹¹

4.5 Whether or not a privilege exists, a lawyer might be liable to her client for breach of contract or of a duty of confidentiality, if she reveals confidential information without the client's permission and in the absence of a legal requirement to do so.¹²

4.6 There are a number of exceptions or restrictions to the lawyer-client privilege. For example:

- * The privilege can always be abrogated by statute.¹³
- * It may be waived by the client.
- * Communications made in order to facilitate the perpetration of a crime or fraud are not privileged.¹⁴

⁶ Byrne & Heydon para 25235.

⁷ *Baker v Campbell* (1983) 153 CLR 52 at 90,96-97,117-118,123.

⁸ Byrne and Heydon para 25280.

⁹ *Re Griffin* (1887) 8 LR (NSW) 132 per Innes J at 134.

¹⁰ A lawyer cannot claim the privilege on her own behalf. See, for example, *Fraser v Hinch* (unreported) Supreme Court of Victoria, O'Bryan J, 12 April 1991 referred to in *Cross on Evidence Bulletin* No. 2 August 1991.

¹¹ *Calcraft v Guest* [1898] 1 QB 759 per Lindley M R.

¹² See paras 1.40 - 1.55 above.

¹³ See *Corporate Affairs Commission (NSW) v Yuill* (1991) 65 ALJR 8 (High Court) for consideration of the effect of statutory provisions on lawyer-client privilege. The most recent example of an attempt to statutorily define and restrict the privilege is the Evidence Bill 1991 (Cth), Cl 116 - 118, see para 3.28 above. In the United Kingdom it has become increasingly common to actually preserve the privilege by express statutory provision [C Tapper, *Cross on Evidence* 7th ed, 1990 (UK) 443]. In criminal cases the *Police and Criminal Evidence Act 1984* (UK) has not only insulated material covered by the privilege from search warrants, but has also invalidated all previous legislation to the extent of any inconsistency [s 9(2)].

- * It may have to 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.¹⁵ Whether in any given case the privilege will be overridden by the interests of an accused person will depend upon the circumstances of the case, including the materiality of the document to the issues raised bona fide by the defence.¹⁶
- * 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 under the *Family Law Act 1975*¹⁷ or who is a ward of the court.¹⁸

4.7 Because the privilege is granted in the public interest, the privilege may not be available to the detriment of the public interest.¹⁹ Thus, by examining the underlying policy behind the common law rule which denies privilege to communications made in furtherance of a crime or fraud, the High Court of Australia in *Attorney-General (Northern Territory) v Kearney*²⁰ was able to extend that policy to cover that which is illegal. In *Kearney's* case, the High Court denied a claim to privilege in relation to documents which came into existence in the furtherance of illicit conduct by government officials:²¹

¹⁴ *R v Cox and Railton* (1884) 14 QBD 153, in which the court decided that, if a client applies to a lawyer for advice intended to guide her in the commission of a crime or fraud, the lawyer being ignorant of the purpose for which her advice is wanted, the communication is not privileged. Thus, a lawyer was compelled to disclose what passed between the prisoners and himself when they consulted him with reference to drawing up a bill of sale alleged to be fraudulent. The party seeking to displace the privilege will have to demonstrate more than a mere allegation of fraud or crime. There must be "something to give colour to the charge. The statement must be made in clear and definite terms and there must further be some prima facie evidence that it has some foundation in fact." It has to be shown that the communication was brought into existence in preparation for or in furtherance or as a party of the crime or fraud. *Plumb v Monck & Bohm* (1974) 4 ALR 405 (NT).

¹⁵ Byrne and Heydon 25300.

¹⁶ *Cain v Glass* (1985) 3 NSWLR 39.

¹⁷ *R v Bell, Ex Parte Lees* (1980) 146 CLR 141. Stephen J stressed that the privilege is one granted by the law to the client. A client who by *his or her* conduct is guilty of great impropriety in concealing the court's ward thereby becomes disentitled to the privilege.

¹⁸ *Ramsbotham v Senior* (1869) LR 8 Eq 575.

¹⁹ There is some question whether Parliament can demand the tabling of documents which would otherwise be subject to legal professional privilege. This situation occurred in October 1991 when the Legislative Council of Western Australia's Parliament ordered that the Attorney-General table a document containing a legal opinion relating to the State Government Insurance Commission's purchase of certain shares. A compromise was reached whereby the documents were tabled with the Clerk of the Council rather than the more common tabling in the House. The latter procedure would have made the documents public. The rarity and seriousness of this situation were noted by the Attorney-General in a Media Statement on 17 October 1991:

"I have been unable to find a single case, at least in this century, where a House of Parliament has insisted on the tabling of a document subject to legal professional privilege in the face of objections. That applies not only to the Western Australian Parliament, but to every Parliament in Australia and the United Kingdom. Until yesterday, Parliament normally refrained from even asking for such documents and the departure from this practice poses a very great threat to basic individual legal rights." Also see: Legislative Council Standing Order No. 30; Western Australian *Parliamentary Debates*, Legislative Council, 17 September 1991, 4737-4648; 1891 s 4.

²⁰ (1985) 158 CLR 500.

²¹ Id 515.

"It would be contrary to the public interest which the privilege is designed to secure - the better administration of justice - to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law. It would shake public confidence in the law if there was reasonable ground for believing that a regulation had been enacted for an unauthorized purpose and with the intent of frustrating legitimate claims, and yet the law protected from disclosure the communications made to seek and give advice in carrying out that purpose. The law strikes a balance between securing proper representation by encouraging full disclosure on the one hand, and requiring the production of all relevant evidence on the other, but the balance more readily inclines in favour of disclosure where privilege from disclosure might conceal an abuse of delegated powers to enact legislation, and thus obstruct a proper challenge to the validity of part of the law itself. The basis of the privilege is not endangered if it is held that it does not protect communications made by a public authority for the purpose of obtaining advice or assistance to exceed its statutory powers."

4.8 The object of the adversary system of administering justice is that the rights of all persons are to be submitted with equal force to the courts. It has been argued that without the lawyer-client privilege, the whole structure of the adversary system would collapse. The only way that the imbalance between learned and unlearned litigants or wise and foolish litigants can be redressed is if every person's case is brought before the courts with as nearly equal ability as possible. If a lawyer is to give useful service to her client the lawyer must be free to learn the whole of the client's case. The basis of the lawyer-client privilege is not therefore that the relationship is confidential but rather that the confidentiality is necessary to ensure that individuals may confidently substitute lawyers in their place instead of having to conduct their own cases and advise themselves. Unlike other confidential relationships, the lawyer is the agent, the alter ego, of her client in everything said by the client to the lawyer as if the client had said it to herself. That is the fundamental reason why the lawyer, without the consent of the client, cannot disclose the communications made to her.

4.9 The rationale for the privilege has been stated by the Courts with different emphasis according to the circumstances of the case. For example, in the case of *Grant v Down*²² the Australian High Court stated the rationale as follows:²³

"The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a

²² (1976) 135 CLR 674.

²³ Id per Stephen, Mason & Murphy JJ at 685 (Jacobs J in separate judgment concurring and Barwick C J contra).

complex and complicated discipline. 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. The existence of the privilege reflects to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interest of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege, legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision."

4.10 The rationale was also explained in the more recent High Court case of *Baker v Campbell*²⁴ as follows:

"The restriction of the privilege to the legal profession serves to emphasise that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships."

4.11 The High Court has in recent years been very vocal in its defence of the privilege on the basis of human rights and freedom.²⁵ For example, Deane J in *Attorney-General (Northern Territory) v Maurice* stated:²⁶

"That general principle is of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law in that it advances and safeguards the availability of full and unreserved communication between the citizen and his or her lawyer and in that it is a precondition of the informed and competent representation of the interests of the ordinary person before the courts and tribunals of the land. Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials. The right of confidentiality which the principle enshrines has recently, and correctly, been described in the European Court of Justice as a "practical guarantee" and "a necessary corollary" of "fundamental constitutional or human rights"...Indeed, the plain basis of the decision of the majority of this court in *Baker v Campbell* was the acceptance of the principle as a fundamental principle of our judicial system. Like other traditional common law rights, it is not to be abolished or cut down otherwise

²⁴ (1983) 153 CLR 52 per Dawson J.

²⁵ A recent discussion on the significance of the privilege is found in *Australian Law News* Vol 26 No 8 September 1991, "Privilege is Misunderstood" 35.

²⁶ (1986) 161 CLR 473 at 490-491.

then by clear statutory provision. Nor should it be narrowly construed or artificially confined."

4.12 In *Baker v Campbell* Deane J emphasised the importance of the privilege for the protection of the citizen:²⁷

"That general principle represents some protection of the citizen - particularly the weak, the unintelligent and the ill-informed citizen - against the leviathan of the modern State. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general authority to obtain information or seize documents."

4.13 Wilson J in *Baker v Campbell* emphasised the importance of the doctrine to a free society:²⁸

"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 their protection."

²⁷ (1983) 153 CLR 52 at 120.

²⁸ Id 95.

Chapter 5

CONFIDENTIAL COMMUNICATIONS WITH DOCTORS¹

1. COMMON LAW

5.1 The common law in Australia does not recognise an evidentiary privilege relating to confidential communications between medical doctors and their patients. In Tasmania, Victoria and the Northern Territory such a privilege has been created by statute.²

5.2 The *Duchess of Kingston's Trial* in 1776 was the first reported English case recognising that no such privilege existed at common law.³ In that case a doctor was called as a witness in a trial for bigamy. The doctor was asked whether he knew, from information obtained from either of the two parties, that they were married. The doctor objected to answering any questions which would have breached the confidential relationship between himself and his patients.⁴

5.3 Courts will not generally encourage a breach of professional confidence and have actually expressed disapproval at doctors volunteering medical evidence which is of a confidential nature. In *Hunter v Mann*, Lord Widgery C J stated:⁵

"If a doctor giving evidence in court is asked a question which he finds embarrassing because it involves him talking about things which he would normally regard as confidential, he can seek the protection of the judge and ask the judge if it is necessary for him to answer. The judge, by virtue of the overriding discretion to control his court which all English judges have, can, if he thinks fit, tell the doctor that he need not answer the question. Whether or not the judge would take that line, of course, depends largely on the importance of the potential answer to the issues being tried."

¹ For the purpose of this Chapter, "doctors" will be defined as those medical practitioners, including specialists, registered pursuant to the *Medical Act 1894*.

² See paras 3.3 - 3.16 above.

³ *Duchess of Kingston's Trial* (1776) 20 How St Tr 573.

⁴ Lord Mansfield in that case stated: "If all your Lordships will acquiesce, [the doctor] will understand that it is your judgment and opinion, that a surgeon has no privilege, where it is a material question, in a civil or criminal cause, to know whether parties were married, or whether a child was born, to say that his introduction to the parties was in the course of his profession, and in that way he came to the knowledge of it...If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honour, and of great indiscretion; but to give that information to a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any discretion whatever."

⁵ [1974] 1 QB 767 at 775. For a further example, see *R v St Lawrence's Hospital Statutory Visitors, ex parte Pritchard* [1953] 1 WLR 1158, 1165-1166

2. ETHICAL CONSIDERATIONS AND THE ABSENCE OF PRIVILEGE

5.4 If a doctor's evidence is relevant to the issues before the court, the doctor will be compelled to give the evidence. However, unlike the situation with, for example, the Catholic priest, this may not result in insurmountable ethical problems within the medical profession. Although doctors are under a general ethical obligation not to reveal confidential medical information they are not obliged by their code of ethics to maintain such confidences in the face of a court order to the contrary.

5.5 Doctors in Australia continue to be bound by ethical principles which can be dated back 2300 years to Hippocrates.⁶ The Hippocratic Oath introduced the ethical obligation of doctors "to keep secret anything learned as the outcome of a professional relationship with a patient which should not be divulged."⁷ The reason for the medical profession's continued adherence to the Hippocratic Oath has been summarized as follows:

"To command the respect of his patients and of the public should be the aim of every doctor. The strict observance of basic ethical principles will enable the doctor to attain this end."⁸

5.6 The modern version of the hippocratic oath is found in the Declaration of Geneva adopted by the World Medical Association at its meeting in Geneva in 1948:⁹

"3.1.5 I will respect the secrets which are confided in me, even after the patient has died."

5.7 The World Medical Association in 1949 prepared an International Code of Ethics for observance by doctors in all countries. One of the ethical principles in the Code states:¹⁰

⁶ 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 Hypocratic oath. This is not a requirement for obtaining a degree, although it does not appear that any student to date has failed to make the declaration.

⁷ Australian Medical Association *Code of Medical Ethics* (1989) 7,8.

⁸ Id 8.

⁹ As amended at its meeting in Sydney in 1978 and Venice in 1983.

¹⁰ The World Medical Association's International Code of Ethics is referred to for guidance purposes only in Australia. Although Australia is a member of that Association the Australian Medical Association's Code of Ethics and other local ethical rules are considered more appropriate for dealing with situations involving ethical considerations.

"4.3.3. A doctor owes to his patient absolute secrecy on all which has been confided to him or which he knows because of the confidence entrusted to him."

5.8 The Australian Medical Association¹¹ has also published its own Code of Ethics which was developed by the State branches of the Association over the years when the State branches were attached to the parent body, the British Medical Association. A number of those rules seek to guide and assist members on ethical matters relating to the maintenance of professional confidence.¹² Principle 6.2.4 indicates that doctors are not prohibited by their professional ethics from revealing confidential information when required to do so in judicial proceedings:

"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 override 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."

5.9 Although a doctor's ethical duty to maintain confidentiality is considered extremely important within the medical profession,¹³ medical ethics permit doctors to breach confidences in a number of situations in addition to where a doctor, as a witness, is required during judicial proceedings to breach a confidence. Doctors might also be able to breach confidence without fear of falling foul of their ethical responsibilities in the following circumstances:

- (a) consent (express or implied);
- (b) statutory reporting; and
- (c) public interest.

¹¹ Over 65 percent of Western Australian doctors belong to the AMA although the percentage of practising doctors who are members is considered to be higher.

¹² For relevant rules, see Appendix 4.

¹³ Medical disciplinary tribunals have upheld the duty of doctors to maintain confidentiality. See, for example *Duncan v Medical Practitioners Disciplinary Committee* [1986] 1 NZLR 513. In that case a bus driver made complaint to the New Zealand Medical Practitioners Disciplinary Committee that a doctor had informed members of the public that the bus driver was medically unfit to drive buses. The Committee upheld the complaint of professional misconduct for breach of medical confidence. The decision was a subject of judicial appeal in the High Court and in the New Zealand Court of Appeal. The Committee's view of the law was upheld by Jeffries J in the High Court on procedural grounds. The Committee appealed against this aspect of the judgment and succeeded in the Court of Appeal [1986] 1 NZLR 513, 517.

(a) Consent

5.10 There will be situations in which a patient expressly permits or asks the doctor to reveal to third parties what would otherwise be confidential information. For example, a patient might ask the doctor to explain to the patient's sexual partner that the patient has Acquired Immune Deficiency Syndrome. In such a case the doctor will not be in breach of confidence by telling the partner about the patient's condition, irrespective of the consequences to the patient. Consent might also be implied, for example, where a patient's medical condition is given to another in furtherance of treatment and for the benefit of the patient.

(b) Statutory requirements

5.11 A doctor may be required by law to report certain otherwise confidential information concerning his patient. For example, in Western Australia, doctors must notify the appropriate authorities of a suspicion that a person may suffer from an infectious disease or may be a medium for the transmission of such disease.¹⁴

(c) The public interest

5.12 The possibility of a public interest exemption from the ethical duty not to disclose confidential information is only indirectly referred to in the Australian Medical Association's *Code of Ethics*. Pursuant to the Code, the principle of maintaining confidentiality may be modified so long as:¹⁵

"the overriding consideration...(is)...the adoption of a line of conduct which will benefit the patient or protect his interests."

It is unclear what a doctor would be ethically able to do if revelation of confidential information is in the public interest but not in the interests of the patient.

¹⁴ *Health Act 1911* s 276 (1)(c). See also s 300 (requirement to report venereal diseases) and *Health (Notification of Cancer) Regulations (1981)* requiring notification of patient's cancer.

¹⁵ Principle 6.2.2: See Appendix 4.

5.13 The British Medical Association is more definite in its recognition of a public interest exception, although it still seems that it is up to the doctor to decide when an exception exists:¹⁶

"A doctor must preserve secrecy on all he knows. The fundamental principle is that he must not use or disclose any confidential information which he obtains in the course of his professional work for any purpose other than the clinical care of the patient to whom it relates. The following are the only exceptions to this principle:...

- (iv) If the doctor has an overriding duty to society to disclose the information;
- (v) If the doctor agrees that disclosure is necessary to safeguard national security;
- (vi) If the disclosure is necessary to prevent a serious risk to public health."

5.14 The British Medical Association explains the public interest exception in terms of moral responsibilities:¹⁷

"like every other citizen, a doctor has moral responsibilities as a member of society. Occasions may arise which persuade the doctor that confidential information acquired in the course of his professional work should be disclosed. In such cases, the doctor should wherever possible seek to persuade the patient to disclose the information himself, or to consent to the doctor disclosing it. Failing this, it will be for the doctor to decide on his next course of action in accordance with his conscience, bearing in mind that he may be called to justify what he does...There may well be occasions when the public interest will clearly outweigh the doctor's duty to an individual patient - for instance where the enquiries relate to a crime so grave that the safety of the doctor's other patients, or of the public at large, is at risk."

5.15 Whether or not the protection of the public interest should take priority over the preservation of doctor-patient confidentiality will depend upon the circumstances of each particular case. For example, in recent years the public interest exception has been raised in relation to the legal and social implications of the AIDS pandemic. Without a guarantee of confidentiality by doctors treating AIDS patients, those who are asymptomatic may avoid being tested and counselled. The fear that information passing between patient and doctor will not remain confidential may prevent diagnosis of AIDS or a related condition. Patients may not be prepared to discuss their sexual behaviour with their doctors without an assurance of confidentiality, particularly in those States where such sexual behaviour remains a criminal

¹⁶ British Medical Association *Philosophy and Practice of Medical Ethics* (1988) 20, 21 (Rule 2).

¹⁷ Id 23, 24.

offence or the subject of statutory disapproval.¹⁸ Without such information doctors may be unable to accurately diagnose those infected with the virus which in turn may result in a further spread of the disease. As one academic commentator suggests:¹⁹

"Fear that their condition will be disclosed to others may deter some people who suspect they are infected from being tested. This effect is likely to be significant in the context of AIDS because of stigma and discrimination experienced by those whose antibody status becomes widely known. It seems likely that a general practice of warning contacts would significantly reduce the numbers of people who seek medical help. It is less clear whether the warning of third parties in exceptional cases would discourage people from seeking testing or counselling."

5.16 The Commission is unaware of any relevant studies into the extent to which preservation of doctor-patient confidentiality affects the willingness of individuals to seek medical help or to provide certain personal or sensitive information to doctors. The Commission would welcome submissions on this matter.

5.17 The public interest may also be an exception to the duty of confidentiality in a common law action for breach of confidence.²⁰ Determining what is of sufficient public interest in law to justify breach of confidence will depend largely on the circumstances of each case. In the United States courts have held that there is an exception to the doctor's obligation of confidentiality which allows her to warn a patient's contacts that they are at risk from her patient's sexually transmitted²¹ or contagious disease.²² In the United Kingdom there are dicta to the effect that the equitable duty of confidentiality is subject to an exception in the case of information revealing a threat to individual safety. The exception was applied in the case of *W v Edgell*.²³ That case concerned the duty of confidence owed by a doctor to a patient detained in a secure hospital in the interests of public safety. The patient had killed

¹⁸ In Western Australia, see eg *Law Reform (Decriminalization of Sodomy) Act 1989* the preface to which states in part:

"WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex:

AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour;

AND WHEREAS, the Parliament does not by its action in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour".

¹⁹ M Neave "AIDS -Confidentiality and the Duty to Warn" (1987) 9 *University of Tasmania Law Review* 1, 3.

²⁰ For discussion on action for breach of confidence, see paras 1.40 - 1.55 above.

²¹ *Simonsen v Swenson* (1920) 177 NW 831, 832. Doctor was not liable for breach of confidence in revealing to patient's land lady that patient had syphilis.

²² *Schering v Falkman Chemicals* [1981] 2 WLR 848, 869 per Shaw L J; *Beloff v Pressdram* [1973] 1 All ER 241, 260 per Ungoed-Thomas J.

²³ [1990] 2 WLR 471.

five people and wounded two others. Ten years after he had been detained he applied to a mental health review tribunal to be discharged or transferred to a less secure institution. His solicitors instructed a psychiatrist to prepare a report. The report opposed the transfer. The psychiatrist provided a copy of the report to the hospital and copies of the report were sent to the tribunal. Upon discovering that a copy of the report had been sent to the tribunal, the patient sued the psychiatrist for breach of confidence. The duty of confidentiality was held by the court to be subordinate to the doctor's public duty to disclose the results of his examination to the authorities responsible for the patient if, in his opinion, such disclosure was necessary to ensure that the authorities were fully informed about the patient's condition. The Court of Appeal held that the doctor's disclosure was not in breach of confidence. The public interest in maintaining doctor-patient confidentiality was outweighed by the interests of public safety.²⁴

5.18 In the English case *X v Y*²⁵ the court held that the balance of interests fell in favour of maintaining the confidentiality of hospital records and against public disclosure of the identification of two doctors who were believed to be continuing to practise medicine despite having contracted AIDS. The plaintiff health authority had sought an injunction to restrain publication of that information. The defendants argued that disclosure was necessary to further the public interest in full and informal debate. Rose J granted the injunction on the ground that there was already sufficient information in the public domain to allow the requisite debate. He balanced the competing interests as follows:

"On the one hand, there are the public interests in having a free press and an informed public debate; on the other, it is in the public interest that actual or potential AIDS sufferers should be able to resort to hospitals without fear of this being revealed, that those owing duties of confidence in their employment should be loyal and should not disclose confidential matters and that, prima facie, no one should be allowed to use information extracted in breach of confidence from hospital records even if disclosure of the particular information may not give rise to immediately apparent harm. I keep in the forefront of my mind the very important public interest in knowing that which the defendants seek to publish. But in my judgment those public interests are substantially outweighed when measured against the public interests in relation to loyalty and confidentiality both generally and with particular reference to AIDS patients' hospital records. The records of hospital patients, particularly those suffering from this appalling condition should, in my judgment, be as confidential as the courts

²⁴ See R O'Dair "Liability in Tort for the Transmission of A.I.D.S.: Some lessons from Afar and the Prospects for the Future" (1990) 43 *Current Legal Problems* 219 at 232.

²⁵ [1988] 2 All ER 648.

can properly keep them in order that the plaintiffs may be free from suspicion that they are harbouring disloyal employees.¹²⁶

5.19 The court in *X v Y* stressed that the plaintiff's claim was not merely for protection of its private interest in confidentiality. There was also a public interest in confidentiality - because in the absence of confidentiality fear of social and economic discrimination against AIDS sufferers might deter those who might be at risk from being tested. That testing is vital in order both to provide evidence on the course of the disease and as an opportunity to provide counselling which may lead to the sufferer taking steps to protect others.

3. SIGNIFICANCE OF CONFIDENTIALITY

5.20 The absence of a doctor's privilege and the exceptions to the doctor's ethical duty of confidentiality do not detract from the significance of confidentiality in the relationship between a doctor and his patient. It is said that the maintenance of confidence encourages the patient to make full and frank disclosure to the doctor of all matters that could affect the patient's well being:

"Armed with the full and complete picture, the doctor is best equipped to deal with his patient's problems. It is the knowledge that the information revealed will go no further than the four walls of the consulting room, that fosters this full disclosure."²⁷

5.21 The patient must be able to feel confident that going to the doctor will not result in an outcome which will have an undesirable effect, such as the revelation of his medical condition to the general public. It has been said that this confidence promotes a desirable result for society as a whole - for example, people with communicable diseases are less likely to be deterred from seeking treatment for fear of the consequences.²⁸

5.22 There are also obvious implications for the health of the general community in maintaining confidentiality between doctors and patients. If people do not feel comfortable revealing information to their doctors, through fear that the information will not be kept confidential, then medical services may not be sought when it would be in the best interests of

²⁶ Id 660-661.

²⁷ M Shinn *What you must not say* (unpublished paper, presented to Medico - Legal Conference, Bond University) April 1990, 3 (copy provided by author).

²⁸ British Medical Association *Philosophy and Practice of Medical Ethics* (1988) 19.

the patients and their community that they obtain medical treatment.²⁹ In fact, early statutory provisions in other jurisdictions were created primarily as a public health measure to encourage people to seek medical assistance.³⁰ Many law makers considered that people would not seek treatment for certain diseases out of fear of the social stigma that would attach if it became publicly known that they were suffering from these diseases. Also, legislatures intended the privilege to encourage patients to disclose all information necessary to ensure adequate medical treatment.

5.23 It has been submitted to the Commission that confidentiality is paramount to the psychiatrist-patient relationship.³¹

"Failure to maintain confidentiality may impair trust, openness and frankness. Failure to maintain confidentiality has great potential to damage the therapeutic relationship and, ultimately, therapy. The patient, therefore, may be substantially disadvantaged. In some situations the patient's health may actually be compromised by the aggravation and exacerbation of existing psychiatric problems. In addition, any or all of these outcomes may generalize to other therapeutic relationships with another or other psychiatrists. Thus, breaches of confidentiality may actually have a deterrent effect."

5.24 In its submission to the Commission, the Royal Australian and New Zealand College of Psychiatrists (RANZP, WA Branch) gave the example of an adult who sexually assaults an infant member of his or her family:

"Both the perpetrator and victim (or other potential victims) may be seriously disadvantaged if fears about possible breaches of confidentiality prevent the perpetrator from allowing full and effective assessment and treatment to take place."³²

4. ARGUMENTS IN FAVOUR OF A PRIVILEGE

(a) Privacy

5.25 The privacy of the patient should be respected in the context of the patient in the courtroom threatened with public disclosure of information provided in confidence.³³ The

²⁹ The issue of confidentiality in relation to medical research was the subject of the Commission's *Report on Confidentiality of Medical Records and Medical Research* (Project No 65 Part II 1990).

³⁰ "Developments - Privileged Communications" (1985) 98*Harvard Law Review* 1450 at 1532 referring to the purposes of the original New York statute in 1836.

³¹ Preliminary submission to the Commission from the Royal Australian and New Zealand College of Psychiatrists, Western Australian Branch, 5 December 1990.

³² Presumably referring to "assessment and treatment" of the perpetrator.

main concern here is protection of privacy rather than protection of any confidence. The public disclosure of embarrassing private facts that are not of legitimate public concern may result in tort liability (for example, for defamation). Also, however, society might now expect that a patient's privacy will be respected. Such an expectation of privacy underlies communications made by a patient to a doctor. Patients expect communications made to doctors to be confidential, and recognition of an appropriate professional privilege would serve as a concrete expression of society's respect for the patient's privacy interests in the doctor-patient relationship.

(b) Wigmore criteria

5.26 It could be argued that each of the four criteria referred to by Wigmore³⁴ for the recognition of a privilege, are present in relation to communications between doctors and their patients. In relation to the fourth criterion, that is, that the injury done to the relationship by disclosure must be greater than the benefit gained from the correct disposal of litigation, it could be argued that a confidential relationship is necessary for the restoration and maintenance of health. It has been argued that such an outcome could be at least as important, if not more important, than the administration of justice upon which the lawyer-client privilege is justified.³⁵

(c) Mental and emotional health

5.27 There may be unique arguments in favour of creating a privilege relating to communications between a psychiatrist or other doctor and a patient, on the basis that confidentiality is particularly important in the treatment of mental and emotional conditions. The English Criminal Law Revision Committee observed:³⁶

"There would be a stronger case for giving a narrower privilege according to which a person who had told a doctor practising psychiatry, in confidence, about an offence which he had committed or a criminal propensity to which he was subject, for the purpose of obtaining advice or treatment which might help him to avoid committing offences in future, could object to the doctor's giving evidence about this. It is undoubtedly desirable that a person should consult a doctor for this purpose; and it can

³³ For the present alternatives available to a court to respect the privacy of a witness, and the confidentiality of information, see Chapter 9 below.

³⁴ See para 3.74 above.

³⁵ Scottish Law Commission *Research Paper on the Law of Evidence of Scotland*, 1979 para 18.46.

³⁶ Eleventh Report *Evidence (General)* Cmnd 3472 para 276.

be argued that the possibility that this would bring about a reform in the conduct of the person in question is a good enough reason for conferring the privilege.³⁷

5.28 The Canadian Federal/Provincial Task Force on Uniform Rules of Evidence³⁸ proposed an even narrower privilege. It proposed an amendment to the Canadian *Criminal Code* which would enact a privilege for statements made by an accused to an assessing psychiatrist during a remand for observation. The Task Force considered that a privilege for communications made during a court-ordered assessment would be in the public interest.³⁹

"By encouraging an accused to speak frankly with an assessing psychiatrist it would result in more accurate fact-finding at fitness hearings and would thereby advance the administration of justice."⁴⁰

5.29 However, it has also been argued than an individual's well-being cannot be conveniently split between mind and body. Mental and emotional stress often result in physical illness, and physical illness can lead to emotional stress:⁴¹

"The physician does not treat only the body; many physicians, especially general practitioners, are family counsellors as much as they are medical doctors. And although this 'holistic' approach to medical practice may not appear to reflect today's fragmented and specialized health care delivery system, our legal system need not promote a fragmented model of health care."

5. ARGUMENTS AGAINST A PRIVILEGE

(a) No current problem

5.30 It is not apparent that the present law in Western Australia, which does not confer a privilege on communications between doctors and their patients, has created any significant practical problems. This may be as a result of a reluctance in the courts to require doctors to

³⁷ The Committee decided not to recommend a privilege in relation to medical practitioners or psychiatrists - primarily on the basis of the unlikelihood that any difficulty would arise in practice (id para 276).

³⁸ Report for the Uniform Law Conference of Canada, 1982.

³⁹ Id 422.

⁴⁰ The object of remand for assessment is to determine if the accused is fit to stand trial. In some Canadian Provinces, defence counsel may instruct an accused not to speak with the assessing psychiatrist because if the court decides that the accused is fit to stand trial, the Crown may call the psychiatrist to introduce into evidence the accused's statements concerning the incident. Where the Crown's practice is well established that it will not call an assessing psychiatrist at the trial to reveal the accused's statements, the Task Force observed that suspects seem to be more co-operative with assessing psychiatrists: *ibid*.

⁴¹ "Developments - Privileged Conversations" [1985] 98*Harvard Law Review* 1450 at 1549.

breach confidences⁴² or as a result of constraints on the disclosure of confidential information in judicial proceedings. The Commission would welcome submissions on this matter, and in particular any evidence which suggests that:

- * medical treatment has been hampered to any material degree by the absence of a privilege;
- * the health of Western Australians would be significantly improved by the creation of a privilege - by, for example, encouraging people to seek medical treatment and advice who would not otherwise do so.

(b) Cases involving medical issues

5.31 In civil courts doctors are most commonly called as witnesses in actions for damages for personal injuries. In these cases averments about the plaintiff's injuries are made by the plaintiff himself and, frequently, by the defendant, and all relevant medical records are discovered. Any privilege would have to take account of this common situation. Other civil cases where justice could not be done without disclosure by a doctor of information obtained in the course of his relationship with a patient include cases of medical negligence and cases where the issue is the sanity or testamentary capacity of the patient, or the truth of statements made by him in order to obtain insurance. Such circumstances have been commonly acknowledged by exceptions to existing statutory privileges for the doctor-patient relationship.⁴³

(c) The interests of justice

5.32 In many cases, a doctor's evidence relating to communications between him and his patient or to observations made by him of his patient will be vital to the court's ability to properly adjudicate issues before it. If a doctor were able to or were made to refuse to give evidence about any communication made to him by the patient in confidence, important information might be excluded from the court:⁴⁴

⁴² See Lord Widgery's statement at para 5.3 above.

⁴³ See, for example, *Evidence Act 1910* (Tas) s 96; *Evidence Act 1939* (NT); *Evidence Act 1958* (Vic) s 28.

⁴⁴ English Criminal Law Revision Committee, Eleventh Report *Evidence (General)* Cmnd 3472 Evidence para 276. Note that many statutory privileges relating to doctor-patient communications are restricted to civil proceedings: see eg *Evidence Act 1910* (Tas) s 96; *Evidence Act 1939* (NT) s 12; *Evidence Act 1958* (Vic) s 28; *Evidence Act* (NZ) s 32.

"For example, it would be a scandal if a criminal who had been injured when blowing a safe or committing a robbery could prevent the doctor who had attended him from revealing what the criminal told him about how he came by his injury."

Chapter 6

CONFIDENTIAL COMMUNICATIONS WITH CLERICS¹

1. INTRODUCTION

6.1 In Western Australia there is no professional privilege relating to confidential communications between clerics and people they deal with in a professional capacity. Such a privilege has not been recognized by the common law in any jurisdiction reviewed by the Commission.² A number of jurisdictions have created a statutory privilege for clerics.³

6.2 The Commission is unaware of any studies which have been designed to determine whether or not a significant proportion of the population of this State or of any other jurisdiction believe that a privilege exists with respect to communications with clerics. However, the Commission suspects that many people mistakenly believe that such a privilege does exist either at common law or by statute. The Commission would be particularly interested in receiving submissions on this matter.

6.3 There are a large number and variety of churches and other religious organisations operating in Western Australia. It is apparent that the nature of confidential communications within the various organisations differs. The Commission is seeking submissions from all religious organisations on the nature of confidential communications and the perceived need or otherwise for the creation of a statutory privilege to protect such confidentiality. The Commission, as a preliminary matter, informally approached a number of religious organisations to gain a better understanding of the variety of concerns that they have in relation to confidentiality. Set out below is a summary of the position in the organisations approached. Some attempt has been made in the selection of organisations to reflect the variety of attitudes towards confidentiality across religions. The omission of organisations does not reflect the importance attached by the Commission to one religion over another.

¹ The term "cleric" is used in this discussion paper to mean all religiously ordained officials of any faith whether Christian or some other. For general discussions on the various religions and concepts referred to in this Chapter, see S Ferguson and D Wright (eds) *New Dictionary of Theology* (1988).

² With the possible exception of Scotland: see paras 3.53 above.

³ See Chapter 3 above.

Rather, it indicates the importance to the Commission of receiving further information. The summary is set out purely for illustrative purposes.

2. CONFIDENTIALITY IN RELIGIOUS ORGANISATIONS

(a) Catholic

6.4 Catholic priests are forbidden by Canon Law,⁴ which does not form part of the law of the land in Australia, from revealing confidential information received during a confessional. The conflict between Canon Law and the law of the land, the latter which requires witnesses to provide all relevant information in judicial proceedings, has led to moral and practical dilemmas for priests. Apparent sympathy for the priests' position has led to the introduction of a statutory privilege for clerics in a number of jurisdictions.⁵

6.5 Priests are required by their ethics to respect the revelations of all those who confide in them during the sacrament of reconciliation. Priests are also expected to respect confidences received in everyday context where personal problems and ethical or religious issues are discussed.⁶

6.6 A Catholic's obligation to confess is a fundamental tenet of his faith. The theological source for this is Canon 988 of the Code of Canon Law which states:

"A member of the Christian faithful is obliged to confess in kind and in number all serious sins committed after baptism and not yet directly remitted through the keys of the church nor acknowledged in individual confession of which one is conscious after diligent examination of conscience."

⁴ *Code of Common Law*, 1983.

Canons 983 states:

"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.

An interpreter, if there is one, is also obliged to observe this secret, as are all others who in any way whatever have come to a knowledge of sins from a confession."

Canon 984 states:

"The confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent, even when all danger of the disclosure is excluded.

A person who is in authority may not in any way, for the purpose of external governance, use knowledge about sins which has at any time come to him from the hearing of confession."

⁵ See for example, *Evidence Act 1989* (NSW) s 101(1) and discussion in paras 3.18 - 3.27 above.

⁶ P Fink (ed) *The New Dictionary of Sacramental Worship* (1990) 249.

6.7 By confessing one's sins a penitent seeks forgiveness of God through the Minister of God and the Church.⁷ Acting in the person of Christ the Minister makes a spiritual judgment and forgives or retains the sin.⁸

6.8 The spiritual and emotional benefits to a practising Catholic of confessing her sins to a priest are significant. Once a confession is made and regret is expressed for committing the sin the person making the confession is absolved. At that stage the person has usually agreed to do something to change the situation which led to the sin - for example, going to the police to confess to a crime. Absolution may be conditional upon performing that which the Catholic agreed to do.

6.9 The theory and practice of confidentiality within the Catholic church has evolved over time. Early forms of confession were often public and therefore confidentiality was hardly an issue. However, private confessions became the norm in the fifth or sixth century and was canonically formalized six centuries later. Penalties for breaching that privacy included excommunication and perpetual pilgrimage or life-time imprisonment in a monastery.⁹ Even today, a priest will be liable to severe punishment within the church should he breach the confidence of a confessional. This punishment is automatic excommunication which can only be revoked upon confession to, and absolution from, the Apostolic See.¹⁰

6.10 Priests are now forbidden from directly revealing or even modifying their external behaviour in accord with what they learn during confessions although they are encouraged to pray for their penitents.

6.11 Confessions, or reconciliations, are claimed to be not only spiritually healing but also psychologically therapeutic. Priests may in fact be regarded by some segments of the community as having a function similar to that of a psychiatrist.¹¹

6.12 It is clear that priests adopt different roles according to the type of conversation they are having with members of their congregation. When a priest is hearing a confession during

⁷ For discussion on confessions see S Ferguson and D Wright (eds) *New Dictionary of Theology* (1988) 153-157.

⁸ P Fink, ed *The New Dictionary of Sacramental Worship* 1990, 246

⁹ Id 251.

¹⁰ Code of Canon Law, Canon 1388.

¹¹ Ibid. As previously pointed out, psychiatrists do not have a privilege.

the rite of reconciliation there is no doubt that what he hears should go no further.¹² Discussions between a priest and a member of his congregation which are not part of a confession will not be subject to the *Code of Canon Law*. It will be for the individual priest to determine whether or not he will repeat what was told to him in confidence.

6.13 When priests talk to members of their congregation in the context of a counselling session, rather than as part of the rite of reconciliation, what he hears is addressed to him and not to God. Even though the person may benefit greatly from discussing problems with a priest during a counselling session that person cannot be assured that what she has said to a priest will go no further.

6.14 There have been very few instances in recent history in Australia where a priest has been required by a court to breach the confidence of a confessional. The New South Wales case of *R v Young*¹³ is one of the rare examples. In that case a priest was asked by both the prosecutor and defence counsel during committal proceedings about what had been said or occurred between him and the defendant. The defendant had been charged with murder. A conversation had apparently taken place between the priest and the defendant at a police station shortly after the defendant had been charged. The priest refused to answer any questions relating to the conversation he had had with the defendant and refused to answer any questions relating to the nature of the pastoral care provided to the defendant at that time. The priest relied upon Canons 983 and 984.¹⁴ The priest maintained his refusal to answer questions despite the fact that the defendant through her lawyer had released the priest from his duty to maintain confidentiality.¹⁵ The defendant's counsel had received instructions not to ask the magistrate to deal with the priest for contempt of court and the magistrate decided not to initiate contempt proceedings against the priest. The magistrate believed that the matter could be better dealt with by the Supreme Court should the same situation arise there.

6.15 It appears to the Commission that prosecutors would be hesitant to call a priest to give evidence on matters relating to confidential communications between the priest and a member

¹² Informal discussion with Dr Michael Owen, Lecturer in Systematic Theology, School of Theology, Murdoch University.

¹³ NSW Committal Hearing T347 - H/1 CM 16 and 17 August 1988 (transcript provided by NSW Attorney-General's Department).

¹⁴ See note 4 above.

¹⁵ NSW Committal Hearing T347-H/1 CM 16 August 1988, 46.

of his congregation.¹⁶ The Commission would welcome any submissions relating to this matter.

(b) Anglican

6.16 The situation in the Anglican High Church is much the same as in the Catholic Church.¹⁷ The Anglican High Church also offers confessionals - the confidentiality of which is protected by the "seal of the confessional". The Anglican Low Church does not have the rite of reconciliation. Priests in the Anglican High Church are present at the confessional only as mediator between the penitent and God, not as a supervisor or interrogator. Confession is therefore regarded as an act of worship and not subject to secular law. If a Anglican priest reveals anything that was said in a confessional (other than with the permission of the person making the confession) that person will be liable to punishment within the Church - probably something less than excommunication, but nevertheless severe.¹⁸

6.17 Discussions with clerics outside the confessional are unlikely to be considered by Anglicans as having the same degree of confidentiality - particularly when the cleric is being questioned about the conversation in judicial proceedings.¹⁹

6.18 Absolution of sins following a confession is usually dependant upon the penitent's undertaking to redress the sin confessed. If, for example, a person confessed to having stolen a watch, they may be told to return it. If they confessed to a murder, they may be told that before absolution can be granted they must turn themselves in to the police.

6.19 The choice facing the Anglican priest who is questioned during judicial proceedings on confidential matters will be to disclose the information and face punishment by the Church or to maintain the confidentiality and face the possibility of punishment for contempt of court. As with the Catholic priest, punishment by a court may be considered less onerous than the religious ramifications of breaching the confidence - for example, being cut off from one's God.

¹⁶ Informal discussions with John McKechnie QC formerly Crown Prosecutor (WA Crown Law Department).

¹⁷ For discussion on Anglicanism, see S Ferguson and D Wright (eds) *New Dictionary of Theology* (1988) 21-23

¹⁸ Informal discussion with Archbishop Peter Carnley, Anglican Archbishop of Perth.

¹⁹ Ibid.

(c) The Uniting Church

6.20 The Uniting Church does not have a doctrinal platform in relation to maintaining confidences. Counselling and sharing confidences within the Church are, however, regarded very seriously.²⁰

6.21 It is considered to be a personal decision of the cleric whether or not he breaches a confidence. There will be no punishment by the Church if the cleric does so although the Uniting Church Council²¹ may decide to consider the situation.

6.22 Members of the Church are seeking counsel from clerics on an increasingly regular basis. The counselling sessions are similar to Catholic and Anglican confessions although the United Church clerics do not hold themselves out as moderating between members of the Church and God.

(d) The Church of Jesus Christ of Latter Day Saints

6.23 The Mormon religion has no policy on confidential communications.²² The 12th Article of Faith of the Church does, however, dictate that the laws of the country in which members of the Church live must be upheld.²³ Thus, in jurisdictions such as Western Australia, elders of the Church would not be obliged to refuse to answer questions even though the answer represents a breach of confidence.

6.24 In the United States where the Church was first established, there is a privilege for clerics in many States.²⁴

²⁰ Informal discussion with Reverend John Phillipson, consultant for Uniting Church Children's and Family Ministries (WA).

²¹ Made up of ex-moderators.

²² Informal discussion with Mr Keith Chapman, State President (WA). Also see discussion in S Ferguson and D Wright (eds) *New Dictionary of Theology* (1988) 633.

²³ Article 12 reads:

"We believe in being subject to kings, presidents, rulers and magistrates, in obeying, honouring, and sustaining the law.": The Articles of Faith of the Church of Jesus Christ of Latter-Day Saints, History of the Church, Volume 4, pp 535-541. Originally published in 1842 in a newspaper article by the Prophet Joseph Smith and currently appears as part of *The Pearl of Great Price*.

²⁴ See paras 3.85 - 3.88 above.

(e) Lutheran²⁵

6.25 Pastors of the Lutheran Church are obliged, in much the same way as Anglican High Church and Catholic Priests, to maintain the confidentiality of the confessional.²⁶

"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."

(f) Islam

6.26 Religious leaders are not counsellors or advisers in the Islam/Muslim religion. There is no such concept as "confession" and "confidentiality" is not an issue.²⁷

(g) Spiritualists

6.27 Independent Spiritualists²⁸ have no rules relating to the maintenance of confidentiality. It will be a personal decision of the minister involved whether or not he will breach a confidence during judicial proceedings.

(h) Jewish Orthodox

6.28 A fundamental doctrine of Judaism is that the law of the land is to be abided by.²⁹ The law of the land will therefore generally take precedence over the laws of the Church. There is

²⁵ For discussion on Lutheran Church see S Ferguson and D Wright (eds) *New Dictionary of Theology* (1988) 404-406.

²⁶ *Lutheran Encyclopedia* (1968) and written submission from Rev Schulz, President, WA District dated 9 Oct 1990.

²⁷ Informal discussion with representative of the Islamic Council of Canning, WA. See also discussion in S Ferguson and D Wright (eds) *New Dictionary of Theology* (1988) 343-345. At 343 it is noted that Islam has rejected the doctrine of atonement although the Prophet is widely regarded as an intercessor who turns away divine wrath.

²⁸ Informal discussion with Rev L Sanderson, Spiritualist Church of Western Australia. This Church is one of a group of independent spiritualists churches. Spiritualists believe in three things which distinguish them from main-stream churches:

life after death (body dies, spirit lives)

reincarnation

by the power of God, people can be used as instruments of healing.

Also see discussion in S Ferguson and D Wright (eds) *New Dictionary of Theology* (1988) 634.

²⁹ Informal discussion with Rabbi D Freilich, Chief Rabbi of the Perth Hebrew Congregation.

no religious requirement to maintain confidentiality in the face of a requirement to breach a confidence in judicial proceedings.

6.29 There is a general belief in the Jewish community that confidential information shared with a rabbi will remain confidential. There would, however, be no severe doctrinal repercussions for a rabbi if such a confidence were broken as a result of compulsion of law. Whether or not to breach a confidence in the particular case will be a decision to be made by the individual rabbi involved.

6.30 Rabbis provide spiritual guidance to their congregation - and it is considered that if they were unable to maintain confidences, that function may be hindered.

3. PROTECTION OF THE CONFESSIONAL

6.31 A number of jurisdictions in Australia and overseas have created statutory privileges relating to confessional information revealed to clerics during the exercise of their profession.³⁰ Those privileges usually relate to confidential information passing during a formal confession or similar ritual in the relevant religion. The confidentiality of confessionals is obviously very important to the followers of some religions. For followers of other religions the maintenance of such confidentiality is considered sacrosanct.

6.32 Possibly due to the importance attached to the confidentiality of confessions it would seem that clerics are rarely called before judicial proceedings to give evidence concerning information confided in them during the course of their profession. This may also be due in part to the fact that prosecutors would prefer to discover other evidence in support of the prosecution.

6.33 Nevertheless in Western Australia a cleric could still be required to breach the confidence of the confessional or similar ritual during judicial proceedings. It is therefore appropriate to review arguments for and against granting clerics a professional privilege.

³⁰ See Chapter 3 above.

4. ARGUMENTS IN FAVOUR OF PRIVILEGE FOR CLERICS

(a) Nothing achieved by requiring cleric to testify

6.34 If in the end a cleric refuses to comply with the court's request to provide confidential information, even at the cost of being punished, there would be nothing achieved apart from loss of respect for the court.³¹

(b) Spiritual and community advice at risk

6.35 Members of a number of religions would not feel comfortable sharing confidences with their clerics if they thought that such confidences may be repeated during judicial proceedings. The role played by clerics as spiritual and community advisors could thereby be jeopardised. Clerics often see themselves in a position similar to that of a psychologist or a psychiatrist attending the concerns of patients. It has been argued that such assistance can only be provided effectively if those seeking assistance are able to approach the cleric on the basis or under the belief that whatever is said to the cleric will go no further.

(c) Public confidence in clerics

6.36 If a cleric refuses to give evidence concerning confidences given to him in an official capacity, he is less likely to attract media attention if he were not legally required to testify.³² The role of clerics in the community could be publicly undermined as a result of such a requirement.

(d) Reconciliation with God and freedom of religion

6.37 The role of clerics could be inhibited if they had to disclose the contents of a confession. The Queensland Law Reform Commission recognised the benefit to the community of the confession or reconciliation function of clerics:³³

³¹ D J Doyle "Religious Freedom & Canadian Church Privileges" (1984) 26 *Journal of Church & State Spring* 293 at 295.

³² Queensland Law Reform Commission *The Protection of Statements made to Religiously Ordained Officials* (Report No 41 1991) 1.

³³ *Ibid.*

"One of the primary roles of these officials is to reconcile the members of their religious denomination with their God. This requires an examination and explanation of the actions and thoughts of members of the religious denomination. This process has the ancillary advantage of arming the religiously ordained official with sufficient information to help the person who is confiding past actions and thoughts, to reconcile with self and with family and friends. The community is benefited through this process by the lessening of tension between its members."

A wrongdoer might seek spiritual consolation from a cleric and may thereby be encouraged to lead a better life.³⁴

6.38 It may be argued that the right of citizens to practise their religious beliefs is being interfered with in those jurisdictions which do not have a statutory privilege for clerics. The ALRC notes:³⁵

"the potential for the courts to compel disclosure by a spiritual adviser of confidential communications to him constitutes at least in theory a barrier to free and unfettered practice of religion. By not providing any rules, the law has failed to provide the machinery with which to cope with the ethical dilemma that can face a minister of religion. It is an ethical, if not a fully stated, obligation of ministers of most religions to keep in confidence what is entrusted to them under confidential circumstances. The absence of legislation may thus be criticised as leaving a difficult decision for clerics when faced with the choice of disobeying their own ethical standards or complying with the demands of the court for evidence."

(e) Self incrimination

6.39 It has been argued that compelling the disclosure of confidential information relating to a suspect received either during a confession or some other form of religious interview may

³⁴ Scottish Law Commission *Research Paper on the Law of Evidence of Scotland* (1979) para 18.43.

³⁵ ALRC *Interim Report on Evidence* (Report No. 26) para 461. It should also be noted that in the Commonwealth sphere s 116 of the *Australian Constitution* protects both freedom of religious opinion and the free exercise of religion. The High Court of Australia has considered the nature of religion for the purposes of that provision and has indicated that the free exercise of religion does not imply that religions can be practiced outside the confines of the law. See for example, *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983), 49 ALR 65. In that case Mason ACJ and Brennan J stated at p 73: "the area of legal immunity marked out by the concept of religion can not extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them...Religious conviction is not a solvent of legal obligation.

Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, that is, if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion....Canons of Conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."

be tantamount to demanding self-incrimination. The law recognises that the court must prove the suspect guilty, not force the suspect to confess. A person may not solicit the help of a cleric knowing the cleric to be a potential agent of the court who is able to use any confessional material, possibly to the person's disadvantage.³⁶

(f) Wigmore criteria fulfilled

6.40 It has been suggested that each of Wigmore's four criteria³⁷ are satisfied by confidential communications between clerics and penitents.³⁸

(g) Practical considerations

6.41 It is possible that few, if any, courts in Australia would be prepared to hold a cleric in contempt of court for refusing to divulge confidences made to them. Although it might be considered unlikely that a prosecutor in Western Australia would call a cleric who received a confession as a witness in order to obtain a conviction,³⁹ it may not be appropriate to simply rely on the common sense and fairness of police and prosecutors to ensure that that does not occur.⁴⁰

(h) Existing privileges for clerics rarely questioned

6.42 In the context of the various United States' statutory privileges for clerics,⁴¹ it has been observed that, due to the "legal system's respect for the clergy and for established religions", neither scholars nor courts question the legitimacy of the privilege.⁴² Further, lawyers rarely litigate the issue. This deference has shaped the legislative definitions of the privilege and

³⁶ D J Doyle "Religious Freedom & Canadian Church Privileges" (1984) 26 *Journal of Church and State* 293 at 296.

³⁷ Wigmore *Evidence at Trials in Common Law* Vol.8 para 2285. See para 3.74 above.

³⁸ Law Reform Commission of Canada, Study Paper *Professional Privilege before the Courts* (1975).

³⁹ That may not be the case in the situation where no other evidence existed. In *R v Fosty and Gruenke* (1989) 68 C R (3d) 382 (Manitoba Court of Appeal), the Crown's case of murder was based mainly on admissions (held to be admissible) made to a church counsellor and pastor. Leave to appeal the Supreme Court of Canada against the conviction was refused.

⁴⁰ In *R v Clot* (1982) 27 C R (3d) 324 (Quebec Superior Court) a police officer disguised himself as a priest in order to secure a confession, and a prosecutor, unsuccessfully, attempted to introduce the confession into evidence. G. Letourneau, "*R v Clot: An Even Better Case for the 'Fruit of the Poisonous Tree' Rule*" (1982) 27 C R (3d) 359, suggested that the facts in *Clot's* case "form part of a case which by no means can be treated as an isolated one in Quebec" and that "[C]itizens of this province and defence counsel know only too well of many other similar proven cases."

⁴¹ See paras 3.85 - 3.88 above.

⁴² "Developments in the Law-Privileged Communications" (1985) 98 *Harvard Law Review* 1450 at 1556.

resulted in limitations on it designed to ensure that the protected communication has a religious purpose. The emphasis on the privilege's religious purpose prevents it "...from protecting an individual's privacy interest when the communicant seeks personal but non-religious advice from her clergyperson."⁴³

(i) Conscientious objection

6.43 Clerics who have been entrusted with certain types of confidential communication, given to them for spiritual reasons, may be prepared to suffer imprisonment rather than breach confidences they feel bound in conscience to respect. For example, Catholic priests are doctrinally bound to maintain all communications given in the confessional irrespective of legal sanction, physical threat or any other consequence. It may well be that one reason priests are rarely called as witnesses in such cases is the appreciation that it will be counterproductive given the historically demonstrated willingness to suffer the legal consequences of a refusal to answer questions relating to the confidence. Given this demonstrated willingness to suffer legal consequences on grounds of conscience, one reason to extend a privilege would be societal respect for strictly limited categories of conscientious objection. Many countries including Australia provide for a regime recognising conscientious objection to compulsory military service, at times when such is required.⁴⁴ The basis for such a regime is societal respect for certain deeply held beliefs and the knowledge that the true conscientious objector would be prepared to suffer imprisonment rather than conform to certain legal requirements. In the light of this it could be argued that a civilised society ought not to require a cleric to breach confidences.

⁴³ Ibid.

⁴⁴ *National Service Act 1951* section 29A states:

- (1) A person whose conscientious beliefs do not allow him to engage in any form of military service is, so long as he holds these beliefs, exempt from liability to render service under this Act.
- (2) A person whose conscientious beliefs do not allow him to engage in military duties of a combatant nature but allow him to engage in military duties of a non-combatant nature, shall not, so long as he holds these beliefs, be required to engage in duties of a combatant nature." Also note, under section 29 theological students and "ministers of religion" are exempt from liability to render service under this Act (under s. 4 *National Service Termination Act 1973* - obligations to provide service under the *National Service Act* were terminated).

5. ARGUMENTS AGAINST A PRIVILEGE FOR CLERICS

(a) Protecting criminals

6.44 Adverse effects for the community may result from the protection of communications made to clerics. For example, the Queensland Law Reform Commission instanced the possibility that such a privilege could protect a repeat offender who discloses crimes to the cleric.⁴⁵ Criminal proceedings against the repeat offender could be inhibited if the cleric cannot repeat the confession to the court. Further, the repeat offender may commit other offences uninhibited if prosecuting authorities are unable to explore all sources of possible evidence.

(b) Information relevant in criminal cases

6.45 There should be no restriction on the right of a party in criminal proceedings to compel a witness to give any information in his possession which is relevant to the charge, unless there is a compelling reason in policy for the restriction.⁴⁶

6.46 The Queensland Law Reform Commission was not convinced of the need to create a privilege for clerics. It did not consider that such legislation was necessary or desirable.⁴⁷ That Commission considered that the potential benefit derived from protecting statements made to clerics is outweighed by the possible disadvantages - particularly in situations where the statement involves the confession about the commission of a crime.⁴⁸ The Queensland Law Reform Commission observed that a priest in the Catholic church will not grant absolution to a penitent who confesses to a criminal offence unless the penitent informs the police about the offence:

⁴⁵ Queensland Law Reform Commission *The Protection of Statements made to Religiously Ordained Officials* (Report No. 41 1991) 2.

⁴⁶ English Criminal Law Revision Committee, Eleventh Report *Evidence (General)* (1972) Cmnd 3472 para 274.

⁴⁷ It was noted for instance that there has only been one reported case in Australia which has considered the matter: *R v Lynch* [1954] Tas S R 47. See paras 3.3 - 3.6 above.

⁴⁸ Queensland Law Reform Commission *The Protection of Statements made to Religiously Ordained Officials* (Report No. 41 1991) 3.

"Implicitly, the church has recognised that offenders who have confessed to crimes should not be protected by the reconciliation process...The Commission believes that the law should also reflect this attitude."⁴⁹

(c) Any practical problems with existing law can be addressed by courts and others

6.47 The English Criminal Law Revision Committee observed that no serious difficulty had arisen as a result of the absence of a privilege for clerics in England. A majority of the Committee were satisfied that the prosecuting authorities and the courts would always be able to prevent a clash. The Committee summarised what it saw as the practical situation in England as follows:⁵⁰

"In a case where the accused had told a minister of religion that he had committed the offence charged - or, say, that he had a propensity to commit an offence of this kind - it would be exceptional for the prosecution to know of the communication, and there would have to be a strong reason for the prosecution to seek to compel the minister to give evidence about the communication or for the court to insist that he should give the evidence. On the other hand, it might occasionally happen that one of two accused persons had confessed to a minister that he, alone, and not his co-accused, committed the offence. Even if any minister of religion felt able to stand by and let a possibly innocent person be convicted when the minister was in a position to exculpate him by giving evidence, we should not wish to recommend legislation which would allow this. It is possible, therefore, that any provision which might be enacted should apply only to information given by the accused about his own conduct. We have no doubt that the legislation would have to secure that the minister should be compellable to give evidence about a disclosure which the person who made it was willing to have disclosed. Whether the minister should be free (so far as the law is concerned) to give the evidence without the consent of the person who made the disclosure is a more difficult question, and the fact that it would arise is an additional reason for our preference for not legislating but for leaving it to the courts and prosecuting authorities to deal with any case which might arise in practice."

(d) Effect of absence of privilege on number of confessions

6.48 It is unlikely that the absence of a privilege discourages Catholics from making confessions, or adherents of other religions from practising their required rituals.

⁴⁹ Id 3.

⁵⁰ English Criminal Law Revision Committee, Eleventh Report *Evidence (General)* (1972) Cmnd 3472 para 275.

6. PROBLEMS WITH DEFINING SCOPE OF A PRIVILEGE

6.49 The variations in the privileges for clerics in the United States (US) indicate some of the difficult issues which would need to be addressed if the creation of a statutory privilege were to be considered desirable in Western Australia.⁵¹

6.50 The US statutes vary as to who can claim and waive the privilege. Many States grant the privilege to the cleric as well as to the communicant. Some prohibit clerics from disclosing confidential communications (in these States, neither the cleric nor the communicant may waive the privilege). A small number of States grant the privilege to the cleric rather than to the penitent. In the latter States the penitent has no standing to object to the freely given testimony of a cleric.

6.51 The US statutes are either vague or very expansive in their definition of clerics. Georgia is the only State that explicitly defines the clerics included in its provision: "any Protestant Minister of the Gospel, any priest of the Roman Catholic faith, and any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or to any Christian or Jewish minister, by whatever name called." But 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. "Courts have denied the privilege, however, to religious practitioners who do not claim to be ordained clergy within their respective churches."⁵²

6.52 A number of US statutes state that the communications must be required by church doctrine to receive protection. The strict application of such a requirement could remove the protection of the privilege from communications made to clerics of the Protestant, Jewish and other religions whose doctrines do not mandate confessions. It appears however, that most courts construe the requirement liberally by, for example, holding that the privilege will still apply to a voluntary confession made with a purpose of seeking religious counsel, even if not strictly required by the religion.

6.53 Some US States have adopted other requirements to ensure that the protected communication is of a religious nature. Some States require that the communications be

⁵¹ The following material is based on "Developments in the Law - Privileged Communications" (1985) 98 *Harvard Law Review* 1450, 1556-1559.

⁵² Id 1557.

made to a cleric in his professional capacity as a religious or spiritual adviser. Some also require that the penitent intend that the communication be confidential.

6.54 Some US State courts have extended the coverage of the statute to include secular counselling activities of clerics. Courts have also extended the privilege to secular counselling activities of counsellors who are not clerics, by emphasising their spiritual and moral nature.

6.55 Some US States have passed legislation which have created exceptions to the privilege. For example, some States require clerics to disclose any knowledge they have regarding potential child abuse violations.

6.56 A number of variations have also been referred to in relation to the privileges for clerics created in Tasmania, Victoria, the Northern Territory and New South Wales⁵³ and proposed in the Commonwealth Evidence Bill 1991.⁵⁴

⁵³ See Chapter 3 above.

⁵⁴ See paras 3.28 - 3.35 above.

Chapter 7

CONFIDENTIAL COMMUNICATIONS WITH JOURNALISTS

1. INTRODUCTION

7.1 Neither the common law nor statute law in Australia has recognised or created an evidentiary privilege relating to confidential communications between journalists¹ and the people they deal with in their professional capacity.²

7.2 The issue of whether or not a professional privilege should be created in relation to confidential communications with journalists most often arises when a journalist is called as a witness to give evidence relating to the identity of the source of information which she has used, or referred to, in a media report or which is the subject of a proposed media report. It is not uncommon for journalists to obtain information from sources who prefer not to be publicly identified. Once it is known to, or suspected by, a journalist, that her source does not wish to be publicly identified, she may well seek to maintain that confidence even when faced with a court order to disclose the identity of the source. If a court requires documents or other information from a journalist and she refuses to comply, she may be punished for contempt of court.

¹ The word "journalist" is defined in the *Concise Oxford Dictionary* (5th ed 1975) as "one whose business is to edit or write for a public journal." It has also been defined more widely as "anybody whose main profession, regular and remunerated occupation consists in contributing, by articles, words or images, to one or more publications whether in written media or in radio and television, this occupation being his (her) major income source." G Bohere (ed) *International Labour Organisation Profession: Journalist* (1984). See also para 7.22 below.

² The question of privilege for confidential communications has arisen on a number of occasions in Australia in the interlocutory stages of a defamation action against a media defendant when the allegedly offended party seeks to discover the identity of the defendant's source of information. If the source of the allegedly defamatory information can be identified she may then be appropriately dealt with or proceeded against by the plaintiff. Pursuant to what has been commonly referred to as the "newspaper rule", generally speaking, disclosure of such information will not be compelled at the interlocutory stages of a defamation or related action unless it is necessary to do justice between the parties. The High Court of Australia in *John Fairfax & Sons Ltd v Cojuango* (1988) 165 CLR 346, confirmed that the "newspaper rule" is not a rule of law or of evidence but merely a rule of practice serving to guide or inform the exercise of judicial discretion. 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 land holdings 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 interest of justice.

Note that confidentiality might still be protected during judicial proceedings - see ch 9 below.

7.3 There are a number of reasons why a particular journalist might wish to place the confidentiality of information above the court's need for the information. For example:

- (1) there may be a contractual arrangement between the journalist and her source of information;
- (2) the journalist might feel it necessary to maintain the confidentiality simply in order to obtain further information from the same source in the future. The journalist might feel obliged to abide by her profession's code of ethics which prohibits all breaches of confidentiality;
- (3) the journalist's continued employment might depend upon her adherence to certain rules of conduct - including the maintenance of confidentiality;
- (4) more significantly, the journalist's stance could arise from her conscientious belief in freedom of the press and in the pivotal role that the press plays in the maintenance of a democratic society.

7.4 Refusal by a journalist to reveal the identity of a source of information, or other confidential information, may result in adverse consequences to other parties. Such information may, for example, be relevant in *criminal proceedings* to the determination of guilt or innocence of a third party and could result in a person being wrongly convicted or acquitted. Such information might be of interest to the Crown in determining who to prosecute for a particular offence. Without the information which only the journalist can provide, a person might be unable to commence a *civil action*, for example, for recovery of damages for defamation. The revelation of confidential information might also lead to the prevention of further damages being incurred by an innocent third party.

7.5 The Australian Journalists Association's Code of Ethics prohibits the Association's members from revealing the identity of confidential sources of information.³ Each member of the Association personally undertakes, as part of her professional responsibilities, to abide by that prohibition.

³ 1985, Rule 7(a): "in all circumstances they shall respect all confidences received in the course of their calling."

7.6 Journalists have sought a professional privilege for many years, particularly in their attempts to refuse to disclose confidential information in courts.⁴ The main arguments for and against the creation of such a privilege either at common law or by statute are referred to below.

Arguments in favour of a journalist's privilege:

- (a) Protection of democracy.
- (b) Contractual and other obligations to source.
- (c) Refusal to testify.
- (d) Protection of source distinct from other professional secrecy.

Arguments against a journalist's privilege:

- (a) Danger of fabrication of stories and imaginary sources.
- (b) Adverse consequences to administration of justice.
- (c) Identity of source may not be the subject of a 'communication'.
- (d) The need for a privilege has not been demonstrated in Australia.
- (e) Professional ethics and confidentiality not sufficient to exclude relevant evidence.
- (f) Journalist-source unlike other recognised professional relationships.

2. ARGUMENTS IN FAVOUR OF A JOURNALIST'S PRIVILEGE

(a) Protection of democracy

7.7 Newspapers and other media communications fulfil a number of functions in most communities. They entertain, circulate commercial information, transmit news and influence political thought. They reveal and scrutinize situations which may not otherwise come to the

⁴ *Attorney-General v Clough* [1983] 1 QB 773; *Attorney-General v Mulholland* [1963] 2 QB 477; *British Steel Corporation v Granada* [1981] AC 1096; *Attorney-General v Lundin* [1962] 75 Cr App R 90; *Secretary of State for Defence v Guardian Newspapers* [1984] 1 All ER 453; *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 All ER 203. See Y Cripps "Judicial Proceedings and refusal to Disclose the Identity of Sources of Information" (1984) 43 *Cambridge Law Journal* 266. Also, Australian Journalists' Association (AJA) submission to this Commission for its project on *Privilege for Journalists*, 1980 and preliminary submission of Australian Journalists Association to the Commission, 9 February 1990.

attention of some groups of the public. The media carry a considerable amount of information about and between groups.

7.8 A Swedish Parliamentary Commission on the Press found four functions of the media to be particularly important to the maintenance of a democracy:⁵

"The media should

- (1) provide all-round information
- (2) Comment upon the events of the day
- (3) Survey and scrutinize holders of power, and
- (4) Facilitate communication between and within organised groups."

Each of these functions may require the use of confidential information or the use of a confidential informant.

7.9 The Fitzgerald Inquiry⁶ in Queensland provides an example of where the media's positive role was officially acknowledged:⁷

"The media played a part in exposing corruption, and two media organisations contributed to the setting up of this Inquiry."

7.10 If the only information available to the media is official information, journalists might be seen to be simply official mouthpieces. Any right that the public might have to be freely informed and to form its own opinion would suffer. Countries which subscribe to the International Covenant on Civil and Political Rights⁸ would acknowledge the right to such freedoms. Article 19 of that Covenant states, in part:

⁵ K E Gustafsson and S Hadenius *Swedish Press Policy* (1976) 54. Both authors were associated with the Commission, Hadenius as principal secretary and Gustafsson as economic expert. The Commission sat in 1972.

⁶ G E Fitzgerald *Report of A Commission of Inquiry into Possible Illegal Activities & Associated Police Misconduct* (1989) (Queensland).

⁷ Id para 3.9.1. It has also been observed that:

"Over the 1980's a substantial amount of investigative reporting was produced in Australia. These reports have a major impact on public life in this country, and have triggered more than a dozen Royal Commissions, parliamentary and other committees of inquiry - in a way the body of investigative journalism that was produced in Australia in the 1980's could be seen as Australia's Watergate." (Julianne Shultz, Associate Professor and Director, Australian Centre for Independent Journalism, "Legislative Limits to Freedom of Speech" Journalism, Justice and the Future Conference 12-14 July 1991, 2. (Qld)).

⁸ Australia is a signatory. See *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Schedule 2.

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."⁹

7.11 Unless the right to protect the identity of sources of information is guaranteed by legislation, it is argued, there can be no freedom of the press - and, in turn, democracy will suffer.

7.12 Journalists' organisations have argued that non-disclosure of the identity of a source of information is a duty of journalists rather than a right. It is a duty to their sources, as a corollary to their duty to provide the public with freely collected information.¹⁰ If the confidential identity of a source is not assured the source may fear retaliation. As a consequence, information sources, other than official sources, may dry up. If sources of information refuse to provide journalists with information because of a fear that the journalists will reveal the confidences in court, the public's right to know about important matters will suffer. The consequent reduction in the flow of information would harm the public by impeding law enforcement efforts, the dissemination of news or the advancement of knowledge and it may stifle political debate. Information relating to matters of major public concern such as criminal activities and official misconduct could be denied to the public unless a privilege is created.

7.13 The significance of the investigative journalist's task to the democratic state has been described as follows:¹¹

"One of the tasks of the investigative journalist is to bring to the surface much that those in positions of power and influence, including public officials, businessmen and professionals, would prefer remained hidden. It is often the only way the public will find out (sic) about public mismanagement, official corruption and professional negligence, and is undertaken on the assumption that governments are interested in having well-informed and self assured citizens actively co-operating in the process of democracy."

⁹ However other fundamental "rights" might be considered as more important - for example, rights associated with state security and the administration of justice.

¹⁰ P Wilhelm "Protection of Sources: An International Review of Journalistic and Legal Practice" *Norwegian Institute of Journalism & International Federation of Journalists* 1988 10.

¹¹ Id 4.

(b) Contractual and other obligations to source

7.14 Where the relationship between the journalist and her source of information is contractual or based upon trust, the source might have a civil action against the journalist, and possibly her employer, for breach of confidence.¹² Such actions would not lie if the confidential information was revealed under compulsion of law.¹³ If a privilege existed in relation to the information the integrity of the journalist's relationship with her source could be maintained.

(c) Refusal to testify

7.15 Unlike the situation in relation to medical ethics¹⁴ and in relation to the ethics or beliefs of a number of religions,¹⁵ there is no provision in the journalist's code of ethics to release journalists from their professional responsibility to maintain confidentiality in situations where they are legally required to reveal such information. Where a conflict arises, journalists may have to decide between obeying the law, their profession's code of ethics or abiding by their conscience.

7.16 If a journalist breaches her ethical obligation to maintain confidentiality she may have to face disciplinary action by the Australian Journalists' Association, employment consequences such as dismissal, and admonishment by colleagues.

(d) Protection of sources distinct from other professional secrecy

7.17 Professional secrecy or confidentiality, in relation to professions other than journalism, refers to the obligation not to reveal information obtained from or learned about clients in the course of the professional's work. Such information is received in confidence. Journalists have an opposite primary mission - that is, to reveal what they know. The secret they often wish to keep does not relate to the information received but rather to the origin of that information. Thus, a journalist will refuse to reveal the identity of an informant without the latter's consent. Journalists will also refuse to disclose documents in their possession

¹² See paras 1.40 - 1.55 above.

¹³ See para 1.51 above.

¹⁴ See paras 5.4 - 5.12 above.

¹⁵ See, for instance, the discussion on the Uniting Church and on Judaism, paras 6.20 - 6.22, 6.28 - 6.30 above.

when such documents could lead to the identification of the source. Because the relationship between a journalist and her source is essentially limited to the passing of information, failure to protect the identity of the person providing the information undermines the entire basis of the relationship. This could be compared, for example, to the doctor-patient relationship. That relationship may extend beyond the mere flow of information from the patient to the doctor. The patient's need for medical treatment may sustain the relationship despite a threat to the confidentiality of communications.

3. ARGUMENTS AGAINST A JOURNALIST'S PRIVILEGE

(a) Danger of fabrication of stories and imaginary sources

7.18 It is difficult to properly assess the accuracy of information unless the identity of the person who supplied the information is disclosed so that her reliability and knowledge of the subject can be evaluated. If an allegation of serious misconduct is made in a media report, but the allegation cannot be adequately investigated because the identity of the source of the information is withheld, it could be said that the public's "right to know" is being asserted on the one hand, and denied on the other.¹⁶

7.19 This Commission in its Report on *Privilege for Journalists* summarised the dangers of an absolute journalists' privilege:¹⁷

"Not every person treats with caution material purportedly emanating from an unidentified source, and it is this credulity on the part of many readers which would provide opportunities for...abuse... The granting of a journalists' privilege in absolute terms would enable an unscrupulous journalist to publish an exaggerated (or even a speculative) account of events, secure in the knowledge that no judicial inquiry could compel him to disclose the identify of his sources, if any. An unscrupulous informant could give a journalist misleading information, with the object of promoting the informant's personal advantage (for example a company manipulation). Assuming the journalist kept his promise of confidentiality, the informant would remain protected from identification and thus from any disadvantages that would follow if his identity were known".

7.20 Although the Fitzgerald Inquiry in Queensland acknowledged the role of the media in having the Inquiry set up in the first place, Mr Tony Fitzgerald QC noted:¹⁸

¹⁶ (Project No 53 1980) para 5.60.

¹⁷ Id para 5.7.

"Unfortunately, it is also true that parts of the media in this State (Queensland) have over the years contributed to a climate in which misconduct has flourished. Fitting in with the system and associating and developing a mutual interdependence with those in power have had obvious benefits."

7.21 The fabrication of stories and sources could be seen as a possible outcome of such associations and interdependence, particularly if it helped promote the beneficial aspects for the journalist involved.

7.22 The fact that anyone can practise as a journalist in Australia, without formal qualifications, without training in ethics and professional responsibilities, and without being a member of a professional association such as the Australian Journalists Association, heightens the dangers referred to above. If a privilege were to be granted to journalists then the definition of "journalist" would have to be inserted and the terms of the definition would need to be carefully considered.

(b) Adverse consequences to administration of justice

7.23 The consequences of withholding relevant information in civil or criminal proceedings could be serious. For example, refusal of a journalist to disclose her source of information in defamation proceedings could deny the court evidence of malice, which may be necessary to negate a defence of qualified privilege, or which would justify an award of exemplary damages.

7.24 The impact of denying the court relevant information in criminal proceedings could be much worse. It could result in the denial of evidence essential for the conviction of a person on a serious charge or, more importantly, her acquittal.

(c) Identity of source may not be the subject of a confidential "communication"

7.25 As noted earlier, the information passing between a source and a journalist would rarely be confidential. Rather, it is often only desired that the identity of the source be kept secret.

¹⁸ G E Fitzgerald *Report of A Commission of Inquiry into Possible Illegal Activities & Associated Police Misconduct* (1989) (Queensland) para 3.9.1.

(d) The need for a privilege has not been demonstrated in Australia

7.26 The scarcity of reported cases in Australia where journalists have been required against their will to disclose confidential information as evidence may indicate that the identity of the sources of journalists' information is not often relevant to litigation or investigations. It might also indicate that the parties may not press the matter or, if a government is involved, it may not want to appear to be attacking the media. Further, it might indicate that journalists in Australia are relatively free to publish what they will.¹⁹

7.27 In some cases it may be possible for judges to assist journalists in their dilemma.²⁰ A judge will normally respect professional confidences and will not require a person to answer a question which would involve a breach of confidence unless it is not only relevant but also proper and a necessary question for justice to be met. Furthermore, to ensure public confidence in the authenticity of information, journalists generally tend to identify the sources of their information. It would be a relatively rare case where not only does the informant not want to be identified, but also the information is published notwithstanding that the source cannot be identified.²¹

(e) Professional ethics and confidentiality not sufficient to exclude relevant evidence.

7.28 It has been argued that the mere existence of a professional obligation not to reveal the confidential identity of a source of information, or other confidential information, should be sufficient justification for the creation of a legal privilege. However, courts have not accepted that that argument by itself is sufficient to grant journalists a privilege from revealing such information in judicial proceedings.²²

¹⁹ There are at least 113 separate Acts of the Commonwealth Parliament which contain provisions prohibiting the disclosure of information or documents (Julianne Schultz, Associate Professor and Director, Australian Centre for Independent Journalism "Legislative Limits to Freedom of Speech" p 1, Journalism, Justice and the Future Conference, 12-14 July 1991, Brisbane. This may indicate there are other restrictions on the ability of journalists to publish what they will.

²⁰ See discussion in Chapter 9 below.

²¹ See S Walker *The Law of Journalism in Australia* (1989) 89.

²² See cases referred to in note 4, above.

7.29 Since the eighteenth century²³ there has been a rule of common law that a witness is not entitled to refuse to answer questions during judicial proceedings solely on the basis that it would be a breach of confidence. In its Report on *Privilege for Journalists*²⁴ this Commission supported the continuation of this position:²⁵

"The Commission agrees with the policy lying behind this rule. Much information of a commercial, social or personal nature is given and received in confidence and the administration of justice would be stultified if witnesses could lawfully decline to disclose that information on that ground alone."

7.30 Lord Donaldson in *X Ltd v Morgan-Grampian*²⁶ rejected the argument that journalists must adhere to their ethical obligations over and above the court's need for information:²⁷

"The journalists' claim to be bound in honour to protect their sources is of very long standing. It is also unique amongst the professions. Doctors, whose relationship with patients has a much greater claim to confidentiality, accept without reservation that in exceptional circumstances the courts may require them to break this confidence."

7.31 In *Francome v Mirror Group Newspapers Ltd*²⁸ Lord Donaldson discussed the dilemma people may find themselves in when there is a conflict between the law of the land and their ethical or moral responsibilities:

"In conducting the business of the courts, judges seek to avoid such conflict, but occasionally it is unavoidable. Yielding to the moral imperative does not excuse a breach of the law of the land, but it is understandable and in some circumstances may even be praiseworthy. However, I cannot overemphasize the rarity of the moral imperative. Furthermore it is almost unheard of for compliance with the moral imperative to be in the financial or other best interests of the person concerned. Anyone who conceives himself to be morally obliged to break the law, should also ask himself whether such a course furthers his own interests. If it does, he would be well advised to re-examine his conscience."

Lord Donaldson specifically commended that view to journalists in the latter case of *X Ltd v Morgan-Grampian*.²⁹

²³ *Duchess of Kingston's case* (1776) S C 1 East P C 468, 168 ER 1705.

²⁴ Project No 53 1980.

²⁵ Id 12-13.

²⁶ [1991] 1 AC 1.

²⁷ Id 18.

²⁸ [1984] 1 WLR 892.

²⁹ [1991] 1 AC 1 at 19

(f) Journalist-source unlike other professional relationships

7.32 Unlike other relationships which have claimed or been granted professional privileges in some Australian and overseas jurisdictions, such as the doctor/patient, cleric/penitent, lawyer/client relationships, the relationship between the journalist and her source is not based on the provision of professional services or professional advice.³⁰ Further, whereas privileges which have been granted in other jurisdictions are usually couched in terms of the privilege attaching to the person with whom the confidential communication took place, this would be difficult in the case of a source of information who wishes her identity to remain a secret.³¹

4. HOW FAR SHOULD A PRIVILEGE FOR "JOURNALISTS" EXTEND?

7.33 If a privilege is to be granted to journalists should it be confined to professional journalists exclusively, or should it extend to those who have another primary occupation but who occasionally contribute to the media? An argument in favour of restricting privilege to the professional journalist is that such people are committed to higher professional standards, and further, they may be bound by ethical rules. However, non-professional journalists might also adhere to high moral standards. They work under an editor who normally is a professional journalist. Under a broad definition of 'journalist' the author of a letter written to a local newspaper might be classified as a journalist. Similarly, a person contributing to a broadsheet distributed to a small section of the community might also be classified as a journalist. Should a privilege exist, that person may be exempt from the obligation to provide otherwise confidential information as evidence in judicial proceedings.

³⁰ In *X Ltd v Morgan-Grampian Lord Donaldson* [1991] 1 AC 1, 19 commented on a claim that the relationship between a journalist and the source of information is somehow akin to the relationship between priest and penitent:

"Nothing could be further from the truth. The penitent comes to the priest for spiritual advice and guidance within a framework of a different and divine law. If the penitent is breaking confidences, he does so in circumstances in which he knows that the priest will make no use of that breached confidence and that there will be no further publication. This is the antithesis of a "confession" to a journalist which is made with the express or implied intention that there should be wider publicity than the source can himself achieve. If any secular relationship is analogous to that between priest and penitent, it is that between lawyer and client. That is sanctioned, both expressly and impliedly by Parliament, in the public interest of enabling every citizen to obtain advice as to his legal rights, obligations and liabilities without fear of the consequences. I have no doubt that Parliament would, if necessary, confer the same immunity upon priests, albeit for different reasons, but that is unnecessary because judges do not traditionally require priests to break the seal of the confessional."

³¹ It could be argued that because there is no professional relationship existing between a journalist and her source of information, and because the Commission's terms of reference refer to "professional privilege" the question of a professional privilege for journalists is outside the terms of reference. The Commission has not adopted this interpretation in view of the circumstances that gave rise to this reference: see paras 1.6 above.

Chapter 8

CONFIDENTIAL COMMUNICATIONS WITH OTHER PROFESSIONALS

1. INTRODUCTION

8.1 A wide range of professionals not already referred to in this paper have an ethical or other obligation to maintain secrecy in relation to information obtained during communications with their clients. Such people may assume that they will not be compelled to give evidence in court which would involve a breach of that confidentiality. The expectation of confidentiality may in fact have been a primary motivation for the client when seeking the professional services or advice in the first place. However, such assumptions have no legal basis in Western Australia.¹

8.2 There does not appear to have been a concerted lobbying in Western Australia for an evidentiary privilege by professional groups, other than journalists. However, a number of different types of professionals may, at one time or another, receive information in confidence from clients which they believe should be kept confidential, even from a judicial body.

8.3 Set out below are some comments in relation to a small number of professional groups. The groups are not intended to be exhaustive of the professional groups who may be interested in the issue of privilege.

8.4 The Commission will welcome submissions from any professional group or individual on the subject matter of this reference.

2. ACCOUNTANTS

8.5 There is no one professional association representing accountants in Australia and no certification requirements restricting the people who may call themselves accountants in Western Australia. However, there are a number of organisations which represent many people who hold themselves out to be accountants. The major organisations in Western

¹ Other than in relation to the lawyer-client relationship - see Chapter 4 above.

Australia are the Australian Society of Certified Practising Accountants, the Institute of Chartered Accountants in Australia, the National Institute of Accountants and the Chartered Institute of Management Accountants. Each of these organisations has a code of ethics which restrict members' ability to reveal confidential information acquired in the course of their profession.² A typical provision is that contained in the Australian Society of Accountants' *Code of Professional Conduct*:

"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."

8.6 Although accountants may hesitate to reveal confidential information obtained from clients as evidence in court, they are not bound by a professional ethical duty to hold back the information in such circumstances.³ If they are required by law to reveal confidential information they must do so or face the possibility of punishment for contempt.⁴

8.7 Some accountants assume that confidential communications between them and their clients are privileged.⁵ However, clients cannot be assured at law that what passes between them and their accountants will remain confidential if that information is relevant to issues being addressed by judicial proceedings.⁶

8.8 The Trade Practices Commission (TPC) is currently reviewing competition in markets for professional services. The first stage of that review involves a study of the accountancy

² For example:

- Australian Society of Accountants' *Code of Professional Conduct* 1 July 1988, Section B.7
- Institute of Chartered Accountants in Australia *Rules of Ethical Conduct* Rec 1 para 8 of definitions.
- Chartered Institute of Management Accountants *Statement on Standards of Professional Conduct and Competence* Appendix: Guidelines for members in ethical difficulties, 1989 under heading "Confidentiality".

³ Compare Journalists in Chapter 7 above and certain clerics, Chapter 6 above.

⁴ The lack of a privilege for accountants is illustrated by the case of *Chantrey Martin & Co v Martin* [1953] 2 All ER 691. In that case it was held that the fact that certain documents were the subject of professional confidence as between the plaintiff firm of accountants and a company client was insufficient ground for resisting production. The court emphasised that the only professional relationship which enjoyed a privilege was that between lawyer and client.

⁵ Informal discussion with Mr Graham Winters, Regional Director, Australian Society of Accountants (WA).

⁶ If an accountant breaches the confidentiality other than as consequence of a legal requirement, he may be liable for breach of contract or for a civil action for breach of confidence. See paras 1.40- 1.55 above.

profession. In a paper entitled "Study of the Accountancy Profession: Issues for Discussion"⁷ the TPC raised for discussion the competitive disadvantage to accountants arising from the fact that both lawyers and accountants may give advice on taxation matters. Clients of lawyers operating in this segment of the market may avail themselves of professional privilege to protect confidential communications from examination. However, clients of accountants operating in the same area cannot avail themselves of the benefits of the privilege. The TPC has referred to the possible effect of this disparity:⁸

"Clients of accountants operating in the area ... may not avail themselves of the benefits of the privilege. Concern has been expressed that this regulatory difference in benefits available to the clients of the different professionals leads to an unintended competitive disadvantage to accountants when competing directly with legal professionals providing similar services."

8.9 The TPC acknowledged that important public policy issues and principles of law need to be kept in mind when considering the disparity:⁹

"The doctrine of legal professional privilege has long-standing roots in public policy and is directed to ensuring the effective operation of the legal system. It is perhaps a novel and unintended result that legal professional privilege offers a competitive advantage to lawyers in their competition with other professions in areas such as taxation advice."

8.10 The accountancy profession responded to the TPC Issues Paper by proposing a number of options relating to the granting of a privilege to accountants:¹⁰

1. "Legislatively extend professional privilege to members of professions who advise on complex legal matters. This is the preferred option of the accounting profession."

⁷ Trade Practices Commission *Study of the Accountancy Profession, Issues for Discussion* (1991) 25. Also, see response of Law Council of Australia in "Privilege is Misunderstood" *Australian Law News* September 1991, 35-38. Also, Law Reform Commission of Victoria *Access to the Law: Restrictions on Legal Practice* (Discussion Paper No. 23 1991) 49-50, for discussion on the possibility of multi-disciplinary practices with resultant effect of presence or absence of privileges on clients of different professionals.

⁸ Ibid.

⁹ Ibid.

¹⁰ Joint Working Party of the Australian Society of Certified Practising Accountants and the Institute of Chartered Accountants 1991.

2. "Extend professional privilege to tax agents who have dealings with the Federal Commissioner of Taxation by amendment to the *Income Tax Assessment Act* (ITAA)."
3. "Amend the ITAA to remove legal professional privilege from tax matters. This may be achieved, for example, by amending the ITAA so that privilege no longer applies to ss 263 and 264."
4. "The Federal Commissioner of Taxation may exercise a discretionary fiat to give accountants the same privilege as lawyers. There may be some doubt as to the FCT's power in this regard."
5. "Presently lawyers with corporation practising certificates have the benefit of privilege but cannot give advice to the clients of their employers. Relaxing this rule could assist accounting practices structure themselves to remove the present difficulties."
6. "Lawyers with full practising certificates are subject to a prohibition against members of the relevant legal professional body sharing profits with non-members. This restriction could be relaxed to allow profit-sharing between members and non-members of the legal profession."
7. "It may be an open question as to whether the privilege attaches to the provider of the advice or to the nature of the advice given. This could be an issue to be tested in the courts."

8.11 The Law Council of Australia has responded to each of the accountants' "options" by claiming that accountants have misconceived the public policy base of the doctrine of lawyer-client privilege - namely, that the confidentiality of communications between a client and her lawyer is essential to the administration of justice because it facilitates representation of clients.¹¹ The Law Council's response also noted that the lawyer-client privilege is that of the client and not that of the lawyer, and that:¹² "It does not exist to give an advantage to the lawyer or the client over others. It exists in the public interest."

3. BANKERS

8.12 Australian bankers are not governed by a written code of ethical practice and bankers are under no ethical duty to maintain confidentiality if the law requires them to breach it.

¹¹ "Privilege is Misunderstood" *Australian Law New* September 1991 pp36-38. Also see Chapter 4 above.

¹² *Ibid.* In response to accountants option 6 the Law Council stated (*ibid* 38): "The proposal confuses two separate issues. The question of profit-sharing by lawyers with non-lawyers should not be considered in the context of legal professional privilege."

However, the case of *Tournier v National Provincial and Union Bank of England*¹³ imposes a number of obligations on bankers. Subject to certain qualifications, a banker ought not, without the customer's consent, disclose to any person any document or information obtained by the banker in the course of that relationship. These qualifications have been expressed as arising under four heads:¹⁴

- "(a) Where disclosure is under compulsion of law;
- (b) Where there is a duty to the public to disclose;
- (c) Where the interests of the bank require disclosure;
- (d) Where the disclosure is made by the express or implied consent of the customer."

8.13 The common law protects confidential information in the possession of bankers unless the law requires it to be disclosed.¹⁵ However, if such information is relevant to issues before judicial proceedings the bank must reveal the appropriate information as required or face the possibility of punishment for contempt of court.

8.14 A bank's duty to maintain confidentiality and the qualifications thereto have been acknowledged in legislation. For example, section 41 of the *R & I Bank Act 1990* states:

- "(1) Nothing in this Act entitles the Minister or R & I Holdings to have information in the possession of the Bank -
 - (a) concerning the affairs of the Bank or a subsidiary of the Bank in a form that -
 - (i) discloses the identity and affairs of any person who is or has been a customer of the Bank or a subsidiary of the Bank; or
 - (ii) might enable the identity and affairs of any such person to be ascertained; or
 - (b) that has been obtained from a person by the Bank or a subsidiary of the Bank on a confidential basis.

¹³ [1923] All E R Rep 550. In this case the English Court of Appeal established that a bank's duty of confidence to its customers is a legal duty arising out of contract. The duty applies to all information that a bank acquires about its customers in the course of its banking duties. That case remains the authority in Australia.

¹⁴ Id per Bankes LJ 554.

¹⁵ For breach of contract or breach of confidentiality, see paras 1.40 - 1.55 above.

- (2) Subsection (1) does not apply where disclosure of the information -
- (a) is required by some other written law; or
 - (b) is authorized by the customer or the person to whom the duty of confidentiality is owed".

8.15 A number of statutes require banks to reveal information about their customers' accounts.¹⁶

8.16 It is likely that most bank customers in Australia are aware that banks are legally obliged to reveal certain customer information to third parties, such as the Australian Tax Office, and that bankers are under no ethical duty to refuse to reveal such information.¹⁷

8.17 The Commission is not aware of any concerted effort on the part of banks and other financial institutions to be granted a professional privilege - be it absolute or qualified.¹⁸

4. ACADEMICS

8.18 No Australian jurisdiction provides for a professional privilege covering the confidential relationship of academic researcher and subject/informant. In some circumstances recognised privileges such as the lawyer-client privilege or, in relevant jurisdictions, the doctor-patient privilege might apply. In most cases, however, academics will be liable to punishment for contempt of court if they refuse to answer questions during judicial proceedings where the answers would be relevant to issues before those proceedings.

8.19 The possibility of an academic researcher being required to breach the confidential relationship she has with a subject/informant may arise in a variety of contexts. Suzanne McNichol has observed:¹⁹

"There are certainly situations in which academic researchers, particularly those involved in human sciences such as psychologists, criminologists and anthropologists,

¹⁶ For example: *Crimes (Confiscation of Profits) Act 1988*; the *Cash Transaction Reports Act 1988* (Cth); *Income Tax Assessment Act* (Cth) ss 263, 264; *Corporations Act 1990* (Cth) ss 876 1225.

¹⁷ Informal discussion with Francine Mullan, Director of Legal Services, Australian Bankers' Association.

¹⁸ The House of Representatives (Cth) Standing Committee on Finance and Public Administration is currently investigating a number of issues relating to banking in Australia some of which may be relevant to the Commission's terms of reference.

¹⁹ "Privilege in Academia: A Consideration of the Power to Resist Disclosure of Information Obtained by Academics in Confidence", (1989) 9 *University of Tasmania Law Review* 205 at 211.

would be loath to produce all their field notes or research data for public examination ... social scientists such as anthropologists may have been particularly "privileged" to receive certain information from their subject/informant or there may even have been strings of secrecy attached to it on whose conditions it was imparted."

8.20 The ALRC Report on *The Recognition of Aboriginal Customary Law*²⁰ examined the question whether a professional privilege should be created in respect of confidential communications between anthropologists and their clients/informants. The ALRC concluded that it would be inappropriate to extend a privilege to the anthropologist-informant relationship.²¹ The ALRC preferred the creation of a judicial discretion for the creation of privileges in all categories of confidential communications.²²

8.21 It has been argued that academic research which leads to publication should be covered by the same privilege, if one exists, as the one existing for journalists.²³ Requiring disclosure of identities of subjects who provide confidential information for research purposes may inhibit the future flow of information necessary for research purposes. However, academic researchers are less likely than journalists to become involved in litigation in which the identity of a source of information is an issue.

8.22 A researcher's undertaking of confidentiality against voluntary disclosure is usually sufficient to ensure the co-operation of future research subjects - despite compelled disclosure in certain circumstances. However, one opinion is that:²⁴

"To the extent ... that researchers undertake to educate the public or advance general knowledge through publication, teaching or other means of disseminating information, their research subjects should be protected to the same degree as the media's sources. In contrast, research for private purposes - for example, marketing or research and development studies undertaken by profit-making corporations merits no such protection."

²⁰ Report No. 31 1986.

²¹ Id para 661. "There would be no reason to allow such a privilege to anthropologists who may be entrusted with Aboriginal secrets."

²² Reinforced by the ALRC's recommendations in its Report on *Evidence*, (Report No 38 1987) see Appendix 1. The ALRC's recommendation has not been implemented to date. See Cth Evidence Bill 1991, paras 3.28 - 3.35 above.

²³ "Developments - Privileged Communications" (1985) 98 *Harvard Law Review* 1450 at 1610.

²⁴ Id 1611.

5. SOCIAL WORKERS AND PSYCHOLOGISTS

8.23 The Australian Association of Social Workers has adopted a code of ethics which covers confidentiality of communications between members and their clients. It is similar to the stance adopted by most other professions reviewed by the Commission. Social Workers who are members of the Association must respect the privacy of clients and hold information obtained in the course of professional service in confidence "except where the law demands otherwise or there are ethical or moral reasons not to do so."²⁵

8.24 Psychologists who are members of the Australian Psychological Society are under a similar ethical obligation.²⁶

8.25 Social workers and psychologists are not ethically obliged by their professional rules to refuse to disclose otherwise confidential information in judicial proceedings if legally required to do so, even though most would consider confidentiality to be fundamental to satisfactory relationships with their clients.²⁷

6. NURSES²⁸

8.26 The Australian Nursing Federation has made a preliminary submission to the Commission on the protection of confidential communications between nurses and their clients.²⁹ The Federation expressed the view that courts should be given a general discretion

²⁵ Australian Association of Social Workers Ltd *Code of Ethics* (1990) Principles of Practice No. 4 states:
"The social worker will respect the privacy of clients and hold information obtained in the course of professional service in confidence, except where the law demands otherwise or there are ethical or moral reasons not to do so."

²⁶ Australian Psychological Society *Code of Professional Conduct* (1988) General Principles:
Section B (1): "Psychologists may not disclose information about criminal acts of a client unless there is an overriding legal or social obligation to do so."

But, see Appendix E, Principles Relating to Research with Human Participants, No. 7: "Test results or other confidential data obtained in a research study must never be disclosed in situations or circumstances which might lead to identification of the subjects unless their permission has been obtained. Steps should be taken, wherever possible, to ensure that the procedures for establishing confidentiality are explained to subjects at the outset of the research." The Society has made a preliminary submission to the Attorney-General expressing concern at the lack of privilege for psychologists (7 June 1991).

²⁷ K Bristow, "Legal and Moral Dilemmas Inherent in Reporting or not Reporting Family Violence or Child Abuse for both Clients and Counsellors with Particular Reference to Issues of Confidentiality", Australian Association of Marriage and Family Counsellors, 5th National Conference, 4 July 1991, Melbourne.

²⁸ The Nurses Board of Western Australia maintains a register of nurses and has disciplinary functions with respect to registered nurses under the *Nurses Act 1968* (WA).

²⁹ Letter to the Commission from the WA Branch of the Australian Nursing Federation, 21 September 1990.

to protect the communications and/or records of the relationship between nurses and their clients.³⁰

8.27 Some aspects of confidential communications between nurses and their clients could be seen as similar to confidential communications between doctors and their patients. A therapeutic benefit may result from the confidentiality aspect of nurses' communications with clients.³¹

³⁰ The Nurses Board of Western Australia has adopted a *Code of Nursing Practice* (approved 8 August 1990) which includes: "Nurses (to) respect the client's right to confidentiality." It is interesting to note that the Australian Nursing Federation (WA Branch) has adopted a "conscience clause" enabling its members to ethically refuse to participate in non life-threatening procedures to which they hold conscientious objection (Policy Statement 1989). The Australian Nursing Federation has also adopted a policy relating to "HIV/AIDS and the Nursing Profession" 1988 (currently under review) which contains a statement relating to confidentiality: "ANF re-affirms the right of patients/clients to privacy, and to confidentiality of patient records. Where HIV status of a client is known and with the *consent* of the client, that knowledge should be shared with other nurses directly involved in the care of the client." Also see Health Department of Western Australia *Charter of Patients Rights and Responsibilities* (Discussion Paper 1991) items 1 and 5 which propose a right of patients to confidentiality from all health care professionals.

³¹ There is no privilege attaching to confidential communications between doctors and their patients in Western Australia: see paras 5.30 - 5.32 above.

Chapter 9

PROTECTION OF CONFIDENTIALITY WITHIN CURRENT LAW

1. INTRODUCTION

9.1 It may be possible for some professionals (such as doctors) and/or the people with whom they have had confidential communications (such as patients), to maintain a satisfactory degree of confidentiality in relation to those professional communications throughout judicial proceedings, without the need for statutory intervention. The following alternatives are currently possible under existing law.

2. OTHER PRIVILEGES

9.2 There will be cases where an existing privilege will apply in relation to the confidential information. Depending upon the circumstances of the case, resort might be made, for example, to lawyer-client privilege, public interest privilege or to the privilege against self-incrimination.¹ Those privileges are well defined at common law.

9.3 A claim to *legal professional privilege* is concerned with the purposes for which information was brought into existence.² The privilege is strictly confined to communications made to and from a legal adviser for the purpose of obtaining legal advice and assistance. Such communications are protected from disclosure in the course of legal proceedings, both during discovery and at trial. The sole purpose of the communication must be for advice or use in legal proceedings.³

9.4 The foundation for *public interest privilege* (or "immunity") is that the court will not compel or permit the disclosure of information where to do so would be injurious to state interests.⁴ It has commonly been applied to cases where a government department or agency is asked to produce a document in its possession which contains an internal communication or

¹ Other privileges which may be relevant include for example, marital privilege, police informant's privilege, parliamentary privilege.

² *National Employers' Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648, 654.

³ *Grant v Downs* (1976) 135 CLR 674 688. See Chapter 4 above for discussion of this privilege.

⁴ See *Sankey v Whitlam* (1978) 142 CLR 1, 38, 48.

a communication between different departments within the Government. Evidence has been excluded under the public interest privilege because its disclosure would be injurious to national security or where its reception would be injurious to some other national interest.⁵

9.5 "Confidentiality" is not a separate head of privilege. However, it may be a material consideration when privilege is claimed on the ground of public interest.⁶ In the case of *Finch v Grieve*⁷ the New South Wales Bar Council resisted a request by a barrister to produce documents relating to the Council's investigation into the alleged misconduct of the barrister. The court recognised that claims to public interest immunity are not to be narrowly confined to departments or organs of government. In appropriate circumstances a body like the Bar Council can make such a claim. Where it does, a balancing exercise by the court is required - weighing the detriment to the public interest involved in disclosure against the detriment to the public interest in non-disclosure. In this case, the substantial public interest of the Bar Council in protecting the public from barristers who are guilty of misconduct or unsatisfactory professional conduct had to be balanced against the public interest in eliciting of truth in a disciplinary proceeding and in making all relevant material available to both parties.⁸ The court held that in this instance there should be disclosure of the documents subject to editing out of some material.

9.6 The *privilege against self-incrimination* excuses anyone from answering any question or from producing any document if the answer or document would have a tendency to expose that person to the imposition of a civil penalty or to conviction for a crime.⁹

3. AVOIDING DISCLOSURE WITHOUT CLAIMING PRIVILEGE

9.7 A professional and/or his client may seek to maintain the confidentiality of their communications during judicial proceedings despite the lack of an existing privilege which

⁵ See development of this privilege in the United Kingdom: paras 3.46 - 3.61 above.

⁶ Id.

⁷ Wood J, 26 April 1991 ALD No 30062/90 (NSW Supreme Court unreported).

⁸ There were also the considerations that:

- * practising barristers or solicitors, who are expected to adopt high standards of conduct and fearlessness in their duties as officers of the court, should not be deterred by fear of disclosure or embarrassment from bringing matters of misconduct to notice,
- * the *Legal Profession Act 1987* (NSW) does not hold out any promise of confidentiality,
- * lay clients aggrieved by their barrister's conduct would expect their identity and the terms of the complaint to come to the knowledge of the barrister in the course of the disciplinary proceedings,
- * in appropriate cases a barrister should be protected against vindictive litigants.

⁹ Byrne and Heydon 25065 and see *Evidence Act 1906* ss 11 and 24. Note this privilege does not operate in Western Australian Royal Commissions: *Royal Commissions Act 1968* s 14(2).

would be capable of exempting them, or either of them, from the general requirement to provide the court with all relevant evidence including details of confidential communications. Depending on the circumstances of the case other methods to avoid having to disclose confidential information and documents may be available.

9.8 It may be appropriate for the person wishing to maintain a confidence to decline to produce documents or give evidence until actually ordered to do so by the court. This refusal would not be based on the ground that the claim is privileged, but rather on the basis that when the court does order disclosure, it may be on restricted terms.¹⁰ In some cases, the confidential nature of a communication might be accommodated within the policy requiring its disclosure.

9.9 Both statute and case-law have contemplated situations where it is desirable for witnesses to decline to produce documents or give evidence until ordered to do so by the court.¹¹ In *R v Statutory Visitors to St Lawrence's Hospital, Caterham*¹² Lord Goddard CJ approved the refusal of medical officers to disclose their communications with the visitors to a hospital under the United Kingdom's *Mental Deficiency Act*, without the order of the court.

9.10 Courts have powers to restrict the ability of parties to inspect documents in certain circumstances.¹³ The courts have an inherent jurisdiction to refuse an order for production of documents when to do so would be unnecessary and oppressive.¹⁴ Although confidentiality of a document does not afford privilege from production, in the exercise of its discretion to order production the court may have regard to the fact that it is confidential and that to order its production would involve a breach of confidence.¹⁵

¹⁰ C Tapper *Cross on Evidence* (7th ed. 1990) 446.

¹¹ Byrne and Heydon 25305. See eg *Guardianship and Administration Act 1990* s 113, which reads:

"(1) No person performing any function under this Act shall, whether directly or indirectly, divulge any personal information obtained in the course of duty relating to a represented person or person in respect of whom an application is made, other than information that he is authorised or required to divulge -

(a) in the course of duty;
 (b) by this Act or any other law;
 (c) with the consent of the person, if he is capable of giving consent; or
 (d) in other prescribed circumstances.

Penalty: \$2,000 or imprisonment for 6 months."

¹² [1953] 2 All ER 766, 772.

¹³ Byrne and Heydon 25060.

¹⁴ *Attorney-General v North Metropolitan Tramways Co* [1892] 3 Ch 70, 74.

¹⁵ *Science Research Council v Nasse* [1980] AC 1028, 1065. Also see *PL Seaman Civil Procedure Western Australia* (1990), para 26.4.14.

9.11 Courts are able to forbid any questions regarded as indecent or scandalous and questions intended to insult or annoy, or which are needlessly offensive in form, notwithstanding that they may be proper in themselves.¹⁶

9.12 It is possible for a judge to order that certain hearings be held "in camera".¹⁷ Under the common law a judge may exclude the public where it is necessary for the administration of justice - such as in a situation of "tumult or disorder, or the just apprehension of it."¹⁸ In such a situation the judge may exclude "all from whom such interruption is expected, or if such discrimination is impossible the exclusion of the public in general."¹⁹ Courts can exclude persons where their presence might intimidate witnesses,²⁰ deter a party from seeking relief,²¹ prevent a witness from giving evidence,²² involve the divulging of a secret process,²³ endanger legitimate business interests²⁴ or endanger national security.²⁵ However, the public interest in maintaining a system of public justice is a very strong one and such powers are only exercisable if necessary in the interests of justice. The media will also normally act upon the "advice" of a judge that certain material not be published.

¹⁶ *Evidence Act 1906* s 26.

¹⁷ Hearings may be held "in camera" if provided for by statute. For example, the Western Australian Royal Commission into Commercial Activities of Government has recently held private hearings to take evidence from professional people who are reluctant to provide voluntary statements because of confidentiality obligations to clients. The source of the power of Western Australia Royal Commissions to hold private hearings is in section 7(1) of the *Royal Commissions Act 1968*. That section provides that the Commission is empowered to do all such things as are necessary or incidental to the exercise of its function as a Commission and to the performance of its terms of appointment. The power is expressly recognised in sections 19 and 19A. As to the advantages of holding such hearings in private, see statement of the Royal Commission into Commercial Activities of Government entitled *Private Hearings and Provision of Statements* issued October 1991. In *R v Tait* (1979) 24 ALR 473 at 487-88, the Federal Court of Australia (Brennan, Dean and Gallop JJ) stated the present rule:

"In order that a court may accede to an application that it sit *in camera*, it must appear either that there is a statutory provision which enables it to do so, or that the case falls within one of the strictly defined exceptions'...to the rule that the proceedings of courts of justice should be conducted 'publicly and in open view'".

One exception is where the exercise of the court's jurisdiction would be defeated or frustrated if the proceedings were held in public.

¹⁸ *Scott v Scott* [1913] AC 417, 435 per Viscount Haldane.

¹⁹ Id 445-446 per Earl Loreburn. Note also s 635A *Criminal Code* (WA) under which the court may in its discretion exclude all or any persons not directly interested in the case from the courtroom or place of trial where either the accused is under 18 years or where the charge is of an indecent character against a person under 18. Under *Justices Act 1902* s 65 the court may also exclude all or any persons where the interests of public morality so require.

²⁰ *R v Governor of Lewes Prison* [1918] 2 KB 254, 271.

²¹ *Scott v Scott* [1913] AC 417.

²² *Jamieson v Jamieson* (1913) 30 WN (NSW) 159.

²³ *Sanders v Curnan* [1965] VLR 648.

²⁴ *Bagot's Executor and Trustee v King* [1948] SASR 141.

²⁵ *Scott v Scott* [1913] AC 417, *Mirror Newspapers Ltd v Walker* (1985) 1, NSWLR 1. Note, under *Justices Act 1902* s 65 [WA] in relation to committal proceedings, people may be excluded in the interests of justice.

9.13 Documents which contain confidential material may be produced to the court and not read aloud. 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.²⁶ In the case of oral testimony, a witness may be permitted not to give his or her address where he has good reason to conceal this, or he may be permitted to write words down on a paper which is shown to the judge, jury and counsel, rather than to utter them aloud. The judge may direct that no use be made of the information outside particular proceedings.²⁷ The confidential nature of a communication may also be accommodated by the court limiting the use which may be made of the communications. Courts may, for example, grant protective orders including orders suppressing publication of proceedings.

4. EXISTING DISCRETION TO INSIST ON NO EVIDENCE

9.14 It is debatable whether a judge has a residual discretion not to insist on the evidence being given at all. There is no clear authority for this in Australia.²⁸ In the English case of *Attorney-General v Mulholland*²⁹ Lord Denning MR foresaw situations in which a court might properly exercise its discretion not to require answers, that is, 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:³⁰

"There may be considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstances which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer....[I]t would be wrong to hold that a judge is tied hand and foot in such a case..."

9.15 In the United Kingdom, the existence of the discretion has gained strength from the decision in *D v National Society for the Prevention of Cruelty to Children*.³¹ Lord Hailsham LC (Lord Kilbrandon agreeing) supported the existence of the discretion and accepted the view of the English Law Reform Committee in its *Report on Privilege in Civil Proceedings*, that a judge has a:

²⁶ See eg *Finch v Grieve*, para. 9.5 above.

²⁷ *Chantrey Martin & Co v Martin* [1953] 2 QB 286. Non compliance with the order would be a contempt of court.

²⁸ Against the discretion is *Re Buchanan* (1964) 65 SR (NSW) 9 at 11.

²⁹ [1963] 2 QB 477, 490.

³⁰ Id 492, approved in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

³¹ [1978] AC 171.

"Wide discretion to permit the 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."³²

9.16 The trend in English cases in the last two decades appears to be a movement to attempt to preserve the privacy and confidentiality of information even where the law demands compulsory disclosure.³³ However, the preferred approach of these courts has been to attempt to elicit the evidence in an alternative way if reasonably possible.

9.17 In Australia it would appear that courts do not have a general discretion. The New South Wales Supreme Court in the case of *Re Buchanan* stated:

"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."³⁴

³² The House of Lords was evenly divided. In 1981 a specific privilege was given to journalists to enable them to protect the confidential nature of their source of information - see s 10 of the *Contempt of Court Act 1981* (UK) and para 3.49 above.

³³ See Chapter 7 note 4 above.

³⁴ *Re Buchanan* (1964) 65 SR (NSW) 9 at 11.

Chapter 10

THE NEED FOR REFORM

10.1 The possible options for reform upon which public comment is invited are:

- 1 Leave to the common law any development of the law relating to professional privilege for confidential communications.
- 2 Create a statutory privilege for confidential communications arising in all professional relationships.
- 3 Create a statutory privilege for confidential communications arising in particular professional relationships.
- 4 Provide courts with a statutory discretion to grant a professional privilege for confidential communications on a case-by-case basis, irrespective of the type of profession involved.
- 5 Establish a body or statutorily nominate an existing body, independent of the court, to determine issues relating to privilege.
- 6 Create privileges but restrict to appropriate classes of proceedings.

OPTION 1: RETAIN COMMON LAW

10.2 The common law in Australia has only recognised a professional privilege for confidential communications arising out of the lawyer/client relationship. It is possible that the common law in any one or more jurisdictions in Australia will respond in the future to perceived community attitudes at that time and recognise other professional privileges. There are discernible changes in judicial attitudes towards confidentiality and professional relationships in the United Kingdom.¹ Whether those attitudes will prevail in Australia is uncertain.

10.3 It is not apparent what is the extent of any injustice, if any, which has resulted from the limitations imposed upon professionals and their clients in Western Australia to claim privilege in relation to confidential communications. The Commission has no evidence as to

¹ See paras 3.46 - 3.61 above.

the frequency with which professionals are required to breach confidences in judicial proceedings.

10.4 The Commission is also unaware of the effect the current law has on the professional relationships referred to throughout this discussion paper. The relationship between lawyer and client can only be strengthened by the existence of the lawyer-client privilege. But the effect of the absence of such a privilege with respect to relationships such as cleric-penitent and doctor-patient can at this stage only be surmised. The Commission would welcome any submissions on this matter and would particularly appreciate actual examples of the effect the absence of professional privilege(s) has had on particular relationships or on wider interests. For instance, how many more stories or articles of social significance would have been reported by journalists if they had had a privilege relating to the identity of the source of their information? Is there any evidence to suggest that people do not confess sins to their priests simply because no privilege exists concerning the confidential nature of the confessional?

10.5 A leading United States text on evidence² has expressed the need to exercise great caution when contemplating the creation of new privileges at common law or by statute. This is because each privilege is an intrusion on, or exception to, the principle that a court should have available to it all relevant evidence when adjudicating matters.

10.6 The four conditions suggested by Wigmore³ as necessary before a privilege against the disclosure of communications between persons standing in a particular relationship should be contemplated are:

- 1 The 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.

² Wigmore, *Evidence at Trials in Common Law* 1961, Vol. 8 1961 para 2285.

³ See also discussion paras 3.74 and 6.40 above.

Only when all the above conditions are present, Wigmore suggests, should a privilege be recognised, and not otherwise.

10.7 The absence of one or more of the conditions could explain why certain claims for privileges have failed. Wigmore suggests that all four conditions are present in the lawyer-client relationship - thereby justifying the lawyer-client privilege. In relation to the claim that a privilege should exist for doctor and patient, Wigmore suggests that the second and fourth conditions are not invariably present in that relationship. Similarly, the four conditions may not invariably be present in the cleric-penitent relationship.

10.8 There is an important public interest in as much relevant evidence as possible being put before the court. However, there are numerous other public interests in maintaining confidentiality relating to such matters as individual and community physical, mental, spiritual and economic well-being, which may compete in importance with the public interest in all relevant evidence being put before the court. Whether or not the public interest in maintaining the confidentiality of communications within certain professional relationships or in any relationship in certain circumstances is sufficient to justify a further exception to the rule that all relevant information be made available to judicial proceedings is a difficult problem and one that can only be addressed by the Commission if it receives an indication from the public of the relevant importance the public attaches to each of the competing interests.

10.9 The common law has attempted to balance these interests. As a result, in relation to confidential communications involving professionals, to date it has only recognised the relationship between lawyers and their clients as outweighing the general public interest of having all relevant evidence before the court.

**OPTION 2: STATUTORY PRIVILEGE FOR ALL PROFESSIONAL
RELATIONSHIPS**

10.10 The creation of a statutory privilege for all professional relationships would effectively result in the creation of a general privilege for confidential information. The consequence of such a statutory privilege would be to deny courts what may be relevant and important

information to judicial proceedings. The Scottish Law Commission⁴ suggested that such a privilege would be easy to claim and difficult to withhold, and the administration of justice would be seriously obstructed.⁵ Although many professionals and the people they share confidential information with would be supportive of such a proposal, it may be too great a hindrance to the operation of the court. The pursuit of justice requires as much relevant information as possible being before the court for the just determination of issues.

10.11 Since the *Duchess of Kingston's* case⁶ the common law has refused to recognise the existence of a privilege simply on the basis of the confidential nature of the information sought to be withheld. The concept of confidentiality can be used for good or evil purposes. If the goal to be achieved with the aid of confidentiality is desirable - such as promoting love, friendship or trust or public debate - then it could be argued that efforts should be made to preserve confidentiality. But if the confidentiality is used, for example, to help perpetrate crimes or to hide from the public information of social significance, it should not be protected.

OPTION 3: PRIVILEGE RELATING TO PARTICULAR PROFESSIONAL RELATIONSHIPS

10.12 In some Australian and overseas' jurisdictions legislation exists recognising privileges vis a vis certain relationships.⁷ Such legislation has never existed in Western Australia.

10.13 The legislative provisions in other Australian States are rarely the subject of judicial consideration. This may be because it is rare that parties to judicial proceedings would require a professional of the type referred to in the legislation to breach a confidence obtained during the course of his profession. It may also mean that knowing that a legislative provision exists granting such a privilege, parties see no point in endeavouring to obtain the information. There has also been a dearth of judicial consideration of the existence or otherwise of such privileges at common law. This may support the argument that parties, and perhaps the courts as well, are hesitant to require a professional and/or his client, to reveal the content of a professional confidential communication.

⁴ Scottish Law Commission *Research Paper on the Law of Evidence of Scotland* by Sheriff L D MacPhail (1979).

⁵ Id para 18.34.

⁶ (1776) 20 St. Tr. 355.

⁷ Chapter 3 above.

10.14 Apart from the New South Wales privilege relating to communications with clerics⁸ the Australian privileges⁹ for clerics and doctors are of long standing. Similar provisions in many jurisdictions in the United States¹⁰ and elsewhere¹¹ have also recognised a statutory privilege in relation to those professions for a number of years. This may indicate a widespread and long standing acknowledgement of the social importance of maintaining such confidences, even in the knowledge that certain relevant and important information may thereby be withheld from judicial proceedings.

10.15 Other professional relationships have attracted statutory privileges in a number of jurisdictions reviewed by the Commission. In a number of Scandinavian countries, the United Kingdom and the United States the confidential identity of the source of a journalist's information has been given varying degrees of "protection".¹² This has been ascribed primarily to a recognition in those jurisdictions of the importance of such protection to democracy and freedom of the press.

10.16 It has been suggested that legislation creating professional privileges in the United States was the result of successful lobbying by professional groups:¹³

"Most of these attempts have been made by organized occupational groups who believe that for the protection of their own particular interests a privilege is needed and justified."

But, it has also been suggested that there may be little if any empirical foundation for those privileges:¹⁴

"In no instance has it been made to appear that the occasional disclosure, in judicial proceedings, of the communication sought to be kept secret would be injurious to the general exercise of the occupation, or that all the conditions exist which justify a general privilege."

10.17 If the administration of justice is accepted as an overriding consideration the correct tendency may be to decrease the scope of the existing privileges rather than create new ones.

⁸ See paras 3.18 - 3.27 above.

⁹ See paras 3.1 - 3.35 above.

¹⁰ See paras 3.80 - 3.93 above.

¹¹ See Chapter 3 above.

¹² No privilege to journalists exists in any Australian jurisdiction.

¹³ JH Wigmo re *Evidence at Trials in Common Law* 1961 Vol 8 at para 2286.

¹⁴ Ibid.

10.18 If confidential communications arising from professional relationships other than the lawyer-client relationship are to be privileged, one approach may be to at least ensure that each of the conditions referred to by Wigmore is fulfilled. To determine that that is the case, it would be necessary to consider and balance the competing interests and to determine the general public attitude towards the relationship.

10.19 Within certain professional groups there will be individuals whose confidential communications during the course of their profession would tend to contain all the conditions referred to by Wigmore. For example, breaching the confidential nature of confessions heard by some clerics may result in an injury to the relationship between the cleric and the penitent which outweighs the benefit thereby gained for the correct disposal of related litigation. However it is unlikely that all professional relationships involving confidential communications, within any particular profession other than the legal profession, would satisfy each of the Wigmore conditions.

10.20 The privileges statutorily granted in a number of jurisdictions to particular professional relationships are usually subject to broad limitations. For example:

- * the privilege relating to the identity of journalists' sources of information in the United Kingdom is subject to "the interests of justice".¹⁵
- * the recently enacted privilege for journalists and other media professionals in Denmark will still require journalists to reveal the identity of their sources in any important case.¹⁶
- * in Sweden, considered to be one of the most liberal of jurisdictions in relation to freedom of the press, privilege is not extended to the protection of journalists' sources of information where the court considers it to be in the general interest, or in the interest of individuals for the journalist to be examined.¹⁷
- * the Codes of Civil and Criminal Law in Japan which provide a privilege relating to confidential communications over a wide range of professions requires the professional to explain to the court the reasons for the refusal to provide evidence.¹⁸

¹⁵ *Contempt of Court Act 1981* (UK) s 10, para 3.49 above.

¹⁶ *Media Liability Act 1991* (Denmark) para 3.97 above.

¹⁷ *Freedom of the Press Act* (Sweden), paras 3.101 - 3.105 above.

¹⁸ *Code of Civil Procedure, and Penal Code* (Japan), paras 3.106 - 3.111 above.

- * The proposed Commonwealth provisions relating to professional privilege impose a restriction on the availability of privilege where there would be a likelihood of a greater risk of physical harm if evidence is adduced.¹⁹

OPTION 4: JUDICIAL DISCRETION TO GRANT PRIVILEGES

10.21 This option would involve a statutory scheme which provides the court with a discretionary power to recognise a privilege in certain circumstances, in addition to the lawyer-client privilege. This type of scheme is said to:

- * promote the exercise and development of certain professions deemed socially useful, such as that of the social worker,²⁰
- * eliminate the necessity for specifying in legislation the particular professions entitled to privilege, and,
- * be sufficiently flexible to be considered as a long-term reform.²¹

(a) Canada

10.22 The Law Reform Commission of Canada in 1975 recommended in favour of this type of legislative policy.²² It did not specify the criteria to be applied in the exercise of the discretion.

10.23 The Canadian Commission considered that any attempt to define the circumstances where maintenance of confidentiality in communications made in the course of professional relationships outweighs the benefit of their disclosure would be unrealistic. It therefore recommended a general professional privilege in the following terms:²³

"A person who has consulted a person exercising a profession for the purpose of obtaining professional services, or 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".

¹⁹ Evidence Bill 1991 (Australia), paras 3.28 - 3.35 above.

²⁰ Scottish Law Commission *Research Paper on The Law of Evidence in Scotland* (1979) para 18.36.

²¹ Ibid.

²² *Report on Evidence* (1975) Draft Evidence Code clause 41. This recommendation has not been implemented.

²³ Ibid.

10.24 The Canadian Commission further rationalised a general discretion, as opposed to a privilege for particular professionals, in the following terms:²⁴

"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. Some may object to this general solution on the grounds of the courts of common law countries have had a very conservative attitude towards privileges and that there would thus be a risk of missing the aims of a reform directed to an extension of privileges. A clear legislative drafting showing clearly the intentions of the reform would probably be sufficient to overcome this difficulty."

10.25 The Scottish Law Commission was not convinced by the Canadian argument that courts could be relied upon to develop a policy in relation to the application of such a discretion:²⁵

"It may be suggested, on the other hand, that however clear the drafting may be, there would be a risk of inconsistent decisions at first instance and considerable delay before any judicial policy could be developed by the Court of Session and the High Court ... and that the more widely the privilege of non-disclosure is conferred, the wider are the areas closed to the judicial process in its search for the truth."

10.26 The ALRC was also concerned that the Canadian proposal gives little assistance to the courts in the exercise of the discretion.²⁶

10.27 A further criticism of the Canadian Commission's proposal was made by the Canadian Federal/Provincial Task Force on Uniform Rules of Evidence.²⁷ It questioned whether those who want an absolute assurance that their confidential communications will never be used in court would be satisfied with an unfettered discretion in the court. The Task Force did state, however, that "this flexibility is preferable to a fixed rule that confidential communications must always be disclosed if they are relevant and otherwise admissible."²⁸

10.28 The ALRC was also attracted by the flexibility argument:

²⁴ Law Reform Commission of Canada, Evidence Project Study Paper No. 12 *Professional Privileges before the Courts* (1975) 21.

²⁵ Scottish Law Commission, Research Paper on *The Law of Evidence of Scotland* (1979) para 18.36.

²⁶ ALRC Research Paper, Evidence Reference *Privilege* (1983) para 164.

²⁷ Report, (1982).

²⁸ Id 420.

"The other side of the coin, of course is the increased degree of flexibility created by such a protection and the fact that the courts' need for evidence would be one of the factors to be weighed in the balance when determining the advisability of the courts' compelling disclosure.'²⁹

(b) New Zealand

10.29 A number of law reform bodies have canvassed the possibility of creating a judicial discretion relating to privilege for confidential communications. Only in New Zealand has a law reform proposal to that effect been adopted by legislation.³⁰

10.30 The New Zealand Torts and General Law Reform Committee³¹ recommended in 1977 that courts be given a general discretion to disallow a question or to permit a witness to refuse to answer, having regard to the confidential nature of the communication and to all the other circumstances of the case.

10.31 The Committee clarified the proposed discretion as follows:³²

- 1 That the general discretionary power be conferred by statute on courts, tribunals, authorities and persons acting judicially to disallow a question or permit a witness to refuse to answer a question which would involve the disclosure of a confidential communication.
- 2 The statute should make provision for the determination of any question as to the obligation of a witness to divulge information or produce documents obtained in confidence. It should be open to any party to the proceedings and to any person called to give evidence as a witness to apply for such a ruling, either before the hearing commences or at any stage during the hearing. The court, tribunal, authority or person acting judicially should be entitled if it thinks fit to adjourn the application or reserve its decision until the appropriate stage of the hearing has been reached.
- 3 Without limiting the discretion of the court, tribunal, authority or person acting judicially regard should be had to the following factors -
 - (a) The likely significance of the evidence to the resolution of the issues to be decided in the proceedings.

²⁹ ALRC Research Paper Evidence Reference *Privilege* (1983) para 166.

³⁰ *Evidence Amendment Act (No 2) 1980* (NZ) s 35.

³¹ Report on *Professional Privilege in the Law of Evidence* (1977).

³² Id 75-76.

- (b) The nature of the confidence and the special relationship between the confidant and the witness.
- (c) The likely effect of the disclosure on the confidant or any other person.
- (d) Whether or not the disclosure would be in the public interest.
- (e) The desirability of respecting confidences between persons in the relative positions towards each other of the confidant and the witness, including the importance of encouraging free communication between such persons.

(c) **Australian Law Reform Commission**

10.32 The ALRC adopted a similar approach to the New Zealand statute. It did so only after attempting to assess the respective claims of various professions regarding the importance of confidentiality in their professional relationships. The ALRC received expressions of concern about the inflexibility and harshness of the law in Australia with regard to compulsory disclosure of confidential communications from psychiatrists, psychologists, social workers, welfare workers, journalists, clerics and accountants.³³ It observed that:³⁴

"It has frequently been asserted that the ethics of these professions have dictated that they should keep secret confidences made to them and that a difficult conflict is felt between the dictates of the law when the professionals are required to give testimony in the courts and the ethics of their professions. In addition, each of the professions has claimed that there is a public interest in maintaining the confidentiality of at least some of the relationships in which they participate. It has been claimed that the quality of those relationships would suffer if the courts successfully compelled disclosure of information entrusted under confidential auspices and that the formation of other relationships can be discouraged by the absence of protection for the privacy of such relationships. The point has been made that such a deterrent effect is contrary to the best interests of the community".

10.33 The ALRC concluded that there is widespread support for these assertions. It also noted what it considered to be a well-based concern that the only discretion in the courts has been not as to the admission of the evidence but rather as to the sentence for contempt when faced with refusal to provide the evidence sought by the court. Although the reaction of the common law, in particular in England, has been to adopt a balancing of public interests

³³ The Law Reform Commission of Western Australia has had a similar preliminary response from a number of professionals including clerics, journalists, nurses, psychiatrists, accountants and bankers.

³⁴ ALRC Research Paper, Evidence Reference *Privilege* (1983) para 172.

approach to the admission of evidence "the law in the area is in its infancy and perforce uncertain in many respects...."³⁵

10.34 The provision of a discretion pursuant to a statutory scheme is said to have the advantage, in general terms, of following the trend of the present common law and allows the flexible balancing of different community interests and a recognition that on occasion other public priorities should take precedence over the optimally informed determination of legal issues.

10.35 The ALRC described its proposal in the following terms:³⁶

"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 a confidential record outweighs the desirability of admitting it, the court may direct that the evidence not be given. 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. The protection is, therefore, broadly based but confined to circumstances of confidentiality. It allows a psychiatrist or social worker, for example, to object either to testifying about words exchanged with a patient or to supplying notes of interviews with a patient and analyses made pursuant to such interviews. This allows what are generally regarded as socially important relationships to proceed without fear of the disclosure of communications made pursuant to the relationship".

10.36 The ALRC devised a checklist of factors for assistance in the court's determination of the relative desirabilities and undesirabilities. It recommended that the court *shall* take into account the following:³⁷

- 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 the person to whom the confidential information is entrusted;

³⁵ Ibid.

³⁶ Id para 172.

³⁷ Ibid.

- 4 The importance, if any, to relationships of that kind of the 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.

10.37 The focus in the ALRC proposal is upon whether confidentiality is of the essence in the relationship and on the deleterious consequences of qualifying the privacy of relations between the witness and the people he deals with in his professional capacity. Both the danger to the individual relationship and to professional relationships generally are factors upon which the court is encouraged to focus.

10.38 The court would be under a duty to inform a person entitled to object to giving evidence that he may so object. This means that the onus is not on the court to determine on each occasion whether the desirability of admitting the evidence outweighs the undesirability. However, it would be the court's responsibility to raise the matter, thereby making the witness aware of his rights. Only upon the witness' objecting to give evidence does the balancing process begin.

10.39 The ALRC approach is said to have an advantage over the Canadian proposal in that it gives guidelines to the courts in undertaking the balancing of harms. It thus removes the discretion from the bounds of nebulosity.³⁸

10.40 The discretion recommended by the ALRC would be an alternative to the courts attempts to protect the confidential communications of professionals by, for example:

- * encouraging parties to admit facts;
- * calling other evidence;
- * limiting the evidence required of a witness;
- * not insisting on answers if other evidence is available;
- * not imposing any or any significant penalty for refusal.

10.41 The ALRC's proposed judicial discretion is set out in Clause 109 of the draft Evidence Bill attached as Appendix A to its Report 38:

³⁸ Ibid.

- 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 proceedings;
 - (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 abuse of power, was committed; 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 whom about whom or on whose behalf the communication was made or the record prepared.

10.42 Judicial balancing of the various "harms" against the "desirability of admitting the evidence" in every appropriate case, may be a daunting task, 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" have to be taken into account.

10.43 The exceptions to the operation of the privilege referred to in subsection 3 are also relatively non-specific and may lead to anomalous decisions. For example, the privilege would not apply to "the making of [a communication or document] which affects a right of a person." However, there is no definition of "right" and no indication of a remoteness test to be applied in relation to the people who may be affected by the making of the communication.

Would "a right of a person" include:

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;

the "right" of a person allegedly defamed in a newspaper article to initiate proceedings against a party whose identity is being withheld by a journalist?

10.44 Clause 109 would 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. The discretion in the ALRC provision, as with any other discretion, can offer no guarantees as to the decision which will eventually be made.

10.45 The lack of certainty, from case to case, which would necessarily have to flow from the introduction of a statutory discretion, could also be seen as a constant threat to one or more of the interests which need to be balanced against each other. As soon as it is decided, for example, that the identity of the source of information in a particular case cannot be revealed because the harm which would result to "an interested person" *or* to a particular relationship, *or* to relationships of that kind, "together with the extent of that harm", outweigh the desirability of admitting the evidence, a benchmark would have been set for courts to rely upon in exercising the discretion in future similar cases. "(T)he desirability of admitting the evidence" in certain types of cases may very well change over time. There is also no assurance, given the wide number of variables within the decision-making process, that consistent decisions will be made between similar cases.

10.46 The recommendation embodied in Clause 109 has not been implemented to date. It has not been included in the Commonwealth Evidence Bill 1991.

OPTION 5: PRIVILEGE REFEREE

10.47 In its Report on *Privilege for Journalists*³⁹ this Commission considered a proposal made by the Law Society of Western Australia for the establishment of a privilege referee to determine certain matters when journalists refuse to divulge the identity of their confidential sources of information during judicial proceedings.

10.48 The Law Society's suggestion can be summarised as follows:

- 1 A journalist wishing to claim privilege tells the "privilege referee" either personally or in a sealed envelope, the name of the informant.
- 2 The presiding judicial officer provides a note to the referee setting out in general terms the nature of the information said to have been communicated to the journalist.
- 3 The informant then appears before the referee, who would satisfy himself that the informant gave information to the journalist of the general nature set out in the note and that the informant desires that his identity not be revealed in the proceedings.
- 4 Only if the referee is satisfied as to the matters set out in 3 (above) would the journalist be excused from identifying his informant in the proceedings.

³⁹ Project No 53 1980.

10.49 The object of the privilege referee scheme was to maintain a degree of confidentiality for the journalist's source whilst safeguarding against one form of abuse which could arise if absolute privilege is granted - that is, the possibility that a journalist will exaggerate what an informant has told the informant to make for a better story, or indeed create an imaginary source and attribute the source of information to the imaginary "confidential" source.

10.50 In 1980 the Commission's Report identified several practical defects in such a scheme. It would not deal with the situation where the tribunal desired to examine the informant in person for the purpose of ascertaining the truth or otherwise of the information given to the journalist. If the scheme were to be altered to allow the court to interview the informant then the scheme might end up cumbersome, cause delay and expense, and would most likely be considered an unsatisfactory compromise by judges and journalists. The Commission rejected the proposal in its 1980 Report.

10.51 The scheme would not prevent a source being publicly identified when he physically turns up at the referee's hearing. It also fails to address the concern that a defendant or respondent would have in judicial proceedings, that all relevant evidence be available to the court for it to be able to properly adjudicate the issues before it.

OPTION 6: PRIVILEGE IN CERTAIN CLASSES OF PROCEEDINGS

10.52 This option involves legislatively creating a privilege which would be available only in certain types of cases. As an alternative to granting an absolute privilege in relation to confidential communications a qualified privilege could be granted based upon different classes of proceedings. For example, a privilege could be granted for the doctor/patient relationship in civil proceedings only.⁴⁰ A privilege could be granted to certain professionals and their clients in relation to less serious criminal cases. The privilege could be excluded in classes of proceedings where the ascertainment of the truth is regarded as particularly important and where material facts could not otherwise be proved.

10.53 A major difficulty with this approach is that any division between proceedings where the privilege is applied as of right, and those where it is not, would be arbitrary. Wherever the

⁴⁰ See for example, para 3.3 above - *Evidence Act 1910* (Tas) s 96; para 3.9 above - *Evidence Act 1939* (NT) s 12 - (an exception being the case where the sanity of the patient is in issue).

line is drawn, there would be the possibility of an injustice being done in proceedings where the privilege applied.

10.54 In any event it has been argued that privileges should not generally apply in criminal proceedings because of the possible adverse consequences to an accused person should relevant information be detained from the court.⁴¹

10.55 There is also an argument that privilege should not apply to Royal Commissions. A Royal Commission is usually set up to investigate an area where it is of the utmost public importance that all information be disclosed to assist in the determination of issues.

⁴¹ WA Law Reform Commission Report on *Privilege for Journalists* (Project No 53 1980) para 5.18.

APPENDIX 1

Australian Law Reform Commission Draft Evidence Bill, Clause 109 (Report 38, Evidence, 1987, Appendix A):

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 proceedings;
- (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 abuse of power, was committed; 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 whom, about whom or on whose behalf the communication was made or the record prepared.

APPENDIX 2
Law Reform Commission of Western Australia
Report on Privilege of Journalists, 1980 pp 22-35.

CHAPTER 5 - THE COMMISSION'S RECOMMENDATIONS
ABSOLUTE PRIVILEGE

The Commission's view

5.1 The Commission does not consider that the granting of a journalists' privilege, expressed in absolute terms and applicable to all classes of judicial proceedings, would be justified. Such a privilege would give a journalist called as a witness an unqualified right to refuse to disclose the identity of the person who had supplied him with information (and, if the privilege extended as far, to refuse to disclose any information he had received in confidence) irrespective of whether the proceedings were civil or criminal or investigatory (such as a Royal Commission) and no matter how important disclosure would be for the correct resolution of the issues involved in the proceedings. In the Commission's view, the disadvantages flowing from an absolute privilege would far outweigh any benefits which could reasonably be expected from granting it.

5.2 The privilege might of course not necessarily be invoked in every case. A journalist might successfully persuade the informant to release him from his undertaking of confidentiality or he might decide that the public interest justified disclosure in violation of his undertaking. Nevertheless, if an absolute privilege were granted, his decision whether or not to take either of these steps would be unaffected by fear of punishment if he did not make disclosure and, in the Commission's view, it would not be desirable to place such power in private hands. The following sets out in detail the Commission's reasons for coming to this conclusion.

The importance of confidential sources

5.3 Those in favour of the privilege stress the need for journalists to enter into undertakings of confidentiality. Although it seems clear that some information of public importance would not be made available to journalists unless they undertook in general terms

not to reveal the identity of their source, it is unclear whether the flow of information would be significantly reduced if journalists expressly declined to extend their undertaking of confidentiality to judicial proceedings.¹ Much would depend on the circumstances of each case. A source such as "Deep Throat" of Watergate fame might insist on an explicit undertaking from the journalist that the latter would never disclose his identity in any circumstances.² On the other hand, a potential informant might be content with an undertaking that the journalist would not publish his name in the article or disclose it in any casual context. The informant might regard the possibility of disclosure in judicial proceedings as remote and be prepared to take the risk of that occurring.³ Further, granted that some information would not be divulged to journalists unless their assurance of confidentiality specifically extended to judicial proceedings, it would not necessarily follow that all such information would be published. For example, where publication of the information was likely to injure a person's reputation, the law of defamation would be an inhibiting factor.⁴

5.4 Although the media undoubtedly perform a valuable function in drawing public attention to matters of importance, it is not the only channel of communication used by informants. Information may be directly disclosed to members of Parliament so that it can be raised in Parliament. Where the information concerns possible breaches of the law, the informant may pass it to the police or other authority as the basis for investigation and prosecution. No doubt in these cases the allegations would not reach the general public unless they were published in a newspaper or other news medium, but that medium would not itself be doing so as the result

¹ Five members of the United States Supreme Court in *Branzburg v Hayes* ((1972) 33 L Ed 2d 626 at 646), after reviewing the voluminous evidence the Court had received on this question, concluded that it was doubtful whether there would be a significant restriction in the flow of news if journalists fulfilled their testimonial obligations. They said:

"...the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public".

On the other hand, four other members considered that there would be a significant reduction in the flow of news.

² See *All The President's Men* by C. Bernstein and B. Woodward, Quartet Books (1974) at page 71.

³ He may consider that the information he wishes to divulge would be unlikely ever to be irrelevant in judicial proceedings or, if it did become relevant, that the journalist would be called as a witness or that the court would insist on disclosure.

⁴ See the Report of the Australian Law Reform Commission, *Unfair Publication* (1979), Ch.3, and the Report of this Commission, *Defamation* (1979), Ch. 2. It is doubtful whether implementation of the recommendations of the Australian Law Reform Commission, whether or not modified as recommended by this Commission, would significantly alter the position as regards publication of information from unidentified sources. In particular, the Australian Commission's proposed new defence of attributed statements would only apply in the case of the publication of a statement by a named informant. In addition, the proposed tort of publication of sensitive private facts (see Part III of the Australian Law Reform Commission's Report) would significantly restrict the present area of permissible publication.

of any confidential relationship with sources.⁵ It is accordingly doubtful that public disclosure of abuses depends mainly upon journalists maintaining the confidentiality of their sources.

The public's "right to know"

5.5 The AJA submitted in its comments that the public's "right to know" depended on journalists respecting all confidences received in the course of their work.⁶ As used in this context, the phrase "the right to know" expresses a political, not a legal, principle, and there could consequentially be wide disagreement about the proper limits of that right.⁷ As the two previous paragraphs indicate, the Commission is in no doubt that the public is entitled to accurate information and fair comment, but this must be balanced against other claims, such as national security and the reputation and privacy of individuals. The public interest is not synonymous with whatever the public find interesting, nor is the question what is proper to publish a matter for the exclusive judgment of the media itself. The enactment of a journalists' privilege in absolute terms could encourage informants to "leak" information which should not be published, as well as information which should.⁸ It might be difficult for the media, or at least some sections of it, to resist the temptation to publish such information,⁹ particularly in the face of strong competition. The Commission would be reluctant to recommend a step which could have this result.

The public's right to know the identity of the source

5.6 Whether or not there are limits to the public's "right to know", the Commission is not convinced that the public's knowledge is necessarily advanced by the publication of material from unidentified sources. It is difficult, if not impossible, to assess properly the accuracy of purported information unless the identity of the person who supplied the information is disclosed so that his reliability and knowledge of the subject can be evaluated. As the New Zealand Torts and General Law Reform Committee stated in its Report, *Professional Privilege in the Law of Evidence*¹⁰ it is in a sense contradictory for journalists to assert the

⁵ The Law Society, in its comments, made a point along similar lines: see paragraph 4.6 above.

⁶ See paragraph 4.2 above.

⁷ The AJA did not provide any detailed views on this question.

⁸ An informant would know that the journalist involved could not be required to disclose his identity should the source of the leak ever be an issue in judicial proceedings.

⁹ Assuming, of course, that publication of it would not breach any civil or criminal law: see Chapter 4 above, n.5.

¹⁰ 1977, at page 70.

public interest in receiving the "news" and at the same time deny the community the ability to make what is the appropriate response. For example, if an allegation of serious misconduct is made in a newspaper, but the allegation cannot be adequately investigated because the source of the information is withheld, the publisher is in effect asserting the public's "right to know" on the one hand and denying it on the other.¹¹

5.7 Not every person treats with caution material purportedly emanating from an unidentified source, and it is this credulity on the part of many readers which would provide opportunities for the sort of abuse which concerned the Law Society of Western Australia.¹² The granting of a journalists' privilege in absolute terms would enable an unscrupulous journalist to publish an exaggerated (or even a speculative) account of events, secure in the knowledge that no judicial inquiry could compel him to disclose the identity of his sources, if any. An unscrupulous informant could give a journalist misleading information, with the object of promoting the informant's personal advantage (for example a company manipulation). Assuming the journalist kept his promise of confidentiality, the informant would remain protected from identification and thus from any disadvantages that would follow if his identity were known.¹³

5.8 The previous paragraphs outline the difficulties that commissions of inquiry and the like would face if journalists were given an absolute right not to disclose their sources of information. Courts would face similar difficulties. As far as the Commission is aware, the cases in Australia where journalists have refused to disclose their sources have been confined to civil proceedings (defamation, breach of confidence).¹⁴ The consequences of withholding relevant information in civil proceedings could be serious enough. For example, as was pointed out in the Working Paper,¹⁵ refusal by a journalist to disclose his source in defamation

¹¹ The Royal Commission which had been set up by the Victorian Government in 1939 to investigate allegations in a Melbourne newspaper that members of the Victorian Parliament had been bribed, stated in its Report that it had been hampered in its investigation by the refusal of the editor of the newspaper to disclose the sources of his information: see the Report of the Royal Commission, 1940 (Government Printer, Melbourne). The Vassall Tribunal in England in 1963 also indicated that it was unable to investigate certain newspaper allegations about Vassall's spying activities because the journalists concerned refused to disclose the identity of their sources: see paragraphs 3.6 to 3.8 above.

¹² See paragraph 4.7 above.

¹³ The granting of an absolute privilege would, for example, entitle the journalist to refuse to disclose his source's identity to an inspector appointed under s. 17 of the *Securities Industry Act 1975* (WA) or under Part VIA of the *Companies Act 1961* (WA).

¹⁴ See the Working Paper, paragraphs 2.4 and 2.10. See also Chapter 3 above, n.29.

¹⁵ Paragraph 4.9.

proceedings could deny the court evidence of malice, which may be necessary to negate a defence of qualified privilege, or which would justify an award of exemplary damages.¹⁶

5.9 However, the impact of denying the court relevant information in criminal proceedings could be much worse, since it could result in the denial of evidence essential for the conviction of a person on a serious charge or, more importantly, for his acquittal. In the United States there have been a number of occasions where journalists have refused to reveal the identity of their sources in criminal proceedings.

5.10 A case occurred in the State of New Jersey in 1978 which provides a dramatic example of a journalist refusing to disclose confidential information in criminal proceedings. The case is significant in two respects, first as illustrating how far a journalist might be prepared to go in protecting his confidential sources, and secondly as illustrating how widely it would be necessary to draft the law to give absolute protection to such information. The defendant was on trial for allegedly murdering a number of patients in a hospital where he was a doctor. The journalist concerned had written a series of articles implicating the doctor in the deaths and it was largely as a result of his allegations that the doctor was put on trial. On the application of the defence a subpoena was issued to the journalist requiring him to produce written material recording the interviews he had made and upon which he had based his articles.¹⁷ The journalist refused to comply with the subpoena, relying both on the United States Constitution and on a New Jersey statute which provides for a journalists' privilege covering both sources and information.¹⁸ The trial judge, however, ruled that the statute did not preclude him ordering that the journalist deliver the material to *him* for inspection so that he could decide whether it was relevant to the proceedings and, if so, whether it was protected from disclosure to the defence. The journalist refused to comply with the judge's order and was imprisoned and fined for contempt.¹⁹ The Commission does not consider that legislation which permitted a journalist to withhold relevant evidence in criminal proceedings (whether

¹⁶ Under the Australian Law Reform Commission's defamation proposals in its Report, *Unfair Publication* (1979) the defence of qualified privilege (called limited privilege) would not be available to the media, and exemplary damages would be abolished: *ibid.*, paragraphs 148 and 263.

¹⁷ The defence said it intended to use the material as a basis for the cross-examination of a prosecution witness.

¹⁸ Rev. Stat. ss.2A:84A-21; 2A:84A-29 (Supp. 1972-1973). Under the statute the privilege is deemed to be waived in respect of material, any part of which has already been disclosed by the journalist. It may also be unavailable if it would prejudice a defendant's right under the Constitution to a fair trial.

¹⁹ For an account of the incident, see *The New York Times*, 15, 25-30 July 1978. The case was also reported in Australia, see, for example, *The West Australian*, 17, 26, 31 July 1978, 26 October 1978. The doctor was acquitted.

or not it went further than the New Jersey statute by entitling a journalist to withhold material from the judge himself) would be generally acceptable in Australia, nor would it be desirable.

United States legislation

5.11 Although a number of States of the United States of America have statutory provisions which provide for a journalists' privilege,²⁰ their enactment appears to have been largely brought about by the activities of grand juries. In the United States, grand juries have the function of inquiring into possible criminal activity with a view to indicting those against whom a prima facie case has been established.²¹ They possess wide investigatory powers and can summon before them for examination any person who might have relevant information. Apparently, the State legislatures concerned considered that, prompted by prosecuting authorities, grand juries were using investigative journalists as an "investigative arm of the Government". They were being required to divulge information about possible criminal activity which they had collected during the course of their work and which the police should have obtained for themselves. The American grand jury has no counterpart in Australia and legislation designed to overcome problems associated with that institution provides no precedent for the enactment of similar legislation here. The nearest equivalent in Australia to the grand jury is the Royal Commission. However unlike American grand juries, which are part of the ordinary criminal process their appointment is of infrequent occurrence. Royal Commissions are normally set up only when substantial pressure has arisen for a thorough investigation into some area of particular social or political concern and when there is a real need to uncover all the relevant facts. In any event, as far as the Commission is aware, there has been no suggestion that Royal Commissions in Australia have attempted to use journalists as their "investigative arm".

Recommendation as to absolute privilege

5.12 For the above reasons, the Commission recommends against the granting of a journalists' privilege expressed in absolute terms.

²⁰ These are popularly known as "shield laws".

²¹ See the Working Paper, paragraphs 3.3 and 4.6.

QUALIFIED PRIVILEGE

5.13 The arguments against the grant of an absolute privilege extending to all classes of judicial proceedings do not apply with equal force to a qualified privilege. Theoretically, a qualified privilege could take a number of forms, as follows -

- (a) a journalist could be required to disclose his informant's identity to a "Privilege Referee" as a condition of being excused from disclosing it in open court;
- (b) the privilege could be claimable only in certain classes of proceedings; or
- (c) the privilege could be granted or withheld at the discretion of the presiding judicial officer in accordance with prescribed guidelines.

These suggestions are considered in the following paragraphs.

Privilege Referee

5.14 The Law Society of Western Australia suggested this form if, contrary to its submission, it were decided to enact a form of journalists' privilege. In outline, the procedure would be as follows -²²

- (a) The journalist wishing to claim the privilege in judicial proceedings would be required to communicate the name of his informant to a "Privilege Referee", either personally or in a sealed envelope.
- (b) The presiding judicial officer would then supply to the Referee a note setting out in general terms the nature of the information said to have been communicated by the informant to the journalist.
- (c) The informant would then appear before the Referee who would satisfy himself that the informant gave information to the journalist of the general

²² In the Law Society's view the scheme should in any case operate only in civil proceedings. In other proceedings the existing law should continue to apply: see paragraph 4.9 above.

nature set out in the note and that he desires that his identity be not revealed in the proceedings.

- (d) Only if the Referee was satisfied as to the matters set out in (c) would the journalist be excused from identifying his informant in the proceedings.

5.15 The object of the scheme would be to maintain a degree of confidentiality for a journalist's source while safeguarding against one form of abuse which could arise if an absolute privilege were granted.²³ The Commission, however, considers that such a scheme would have substantial defects in practice. It would not deal with the case where the tribunal desired to examine the informant himself for the purpose of ascertaining the truth or otherwise of the information he gave the journalist.²⁴ The scheme could perhaps be revised to include this additional feature,²⁵ but it would then become very cumbersome, cause considerable delay and expense and in any event would be unlikely to be regarded as a satisfactory compromise, either by journalists or by the judiciary.²⁶ The Commission does not recommend its adoption in either form.

Classes of proceedings

5.16 A qualified privilege based on different classes of proceedings could take a number of forms, depending on the view takes as to the desirability of protecting journalists' sources on the one hand and the desirability of full disclosure on the other. For example, the legislation could provide that the privilege would only be excluded in criminal proceedings (or criminal proceedings of a serious nature). Alternatively, it could provide that the privilege would only apply in civil proceedings.²⁷

²³ Namely, where a journalist publishes exaggerated or imagined "information" purporting to come from a confidential source.

²⁴ This could be particularly important in Royal Commission proceedings if the scheme were drafted so as to have general applicability: see paragraphs 3.6 to 3.8 above. See also paragraph 2.2 of the Working Paper.

²⁵ As proposed by another commentator who favoured a broadly similar scheme: see paragraph 4.4 above.

²⁶ Under the existing law, a Royal Commission could, if it thought the circumstances warranted it, take evidence in private and to this extent the confidentiality of a journalist's source would be preserved. But this is a matter for the Commission's discretion. A journalist has no right to insist that his evidence be given in camera.

²⁷ As was suggested by the Law Society of Western Australia in its comments on the Working Paper. The Society was against any form of journalists' privilege at all, and only offered this suggestion as a means of limiting the privilege should it be decided to enact one.

5.17 A number of those States of the United States which have enacted a journalists' privilege have adopted the approach of excluding the privilege in classes of proceedings where ascertainment of the truth was regarded as particularly important and where material facts could not otherwise be proved. In Minnesota,²⁸ for example, the privilege is excluded in defamation actions where the issue of malice is raised²⁹ and in proceedings where there is probable cause to believe that the source has information clearly relevant to a specific violation of the law other than a misdemeanour. Even in these cases, the privilege is divested only if the person seeking disclosure satisfies the court that the relevant evidence cannot be obtained by other reasonable means.

5.18 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. The Commission does not in any event consider that the privilege should apply in criminal proceedings.³⁰ Nor would it be desirable that it should apply in Royal Commission proceedings,³¹ yet this is one of the areas where journalists are most likely to be called upon to reveal the identity of their sources.³² 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.

The case by case approach

5.19 The advantage claimed for this approach is its flexibility. It would enable the court or tribunal to weigh the conflicting interests involved - the need to arrive at the truth in the particular proceedings as against the need to protect the journalist's confidential source.

²⁸ Stat. Ann. ss. 595:021-025 (Supp 1973). Paragraph 3.17 of the Working Paper sets out the text of the statute.

²⁹ It has been held by the United States Supreme Court that a "public figure" cannot succeed in such an action unless he proves that the publisher acted with actual malice. If relevant evidence as to malice were excluded he would have no remedy at all. For an account of the United States law in this area see Appendix F of the Report of the Australian Law Reform Commission, *Unfair Publication* (1979).

³⁰ See paragraph 5.10 above.

³¹ A Royal Commission could be set up to investigate an area where it was of the utmost public importance that the whole truth be revealed.

³² See note 11 of this Chapter.

5.20 The English Law Reform Committee assumed that such a discretion already existed at common law.³³ It said:

"Privilege in the main is the creation of the common law whose policy, pragmatic as always, has been to limit to a minimum the categories of privileges which a person has an absolute right to claim, but to accord to the judge a wide discretion to permit a witness, whether a party to the proceedings or not, 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".

5.21 In its Report, *Professional Privilege in the Law of Evidence*,³⁴ the New Zealand Torts and General Law Reform Committee said that, whatever the status of the rule in New Zealand, such a discretion was desirable and should be put on a statutory basis. The Committee said:³⁵

"This discretion, if given the force of statute and exercised in accordance with guidelines laid down by statute, could provide a satisfactory and certainly more desirable alternative to the granting of privilege to a wider number of named groups".

5.22 Accordingly, it proposed that the following provision should be added to the *Evidence Act* of New Zealand:³⁶

"8B. *Discretion of court, etc. to exclude evidence* - (1) In any proceedings before any court, or before any tribunal or authority constituted by or pursuant to any Act and having power to compel the attendance of witnesses, or before any other person acting judicially, the court or tribunal or authority or other person may, in its or his discretion, excuse any witness 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) Without limiting the matters that the court or tribunal or authority or person acting judicially may take into account, the court or tribunal or authority or person, in

³³ In its 16th Report, *Privilege in Civil Proceedings*, 1967, Cmnd. 3472. The Committee cited *Attorney General v Mulholland and Foster* [1963] 1 All ER 767 and *Attorney General v Clough* [1963] 1 All ER 420 as authority for its view. See also paragraph 3.4 above.

³⁴ 1977.

³⁵ Report, page 10.

³⁶ *Ibid.*, pages 76 and 77.

deciding any application for the exercise of its or his discretion under subsection (1) of this section, shall have regard to -

- (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 or any other person:
- (d) Whether or not the disclosure would be in the public interest:
- (e) The desirability of respecting confidences between persons in the relative positions towards each other of the confidant and the witness, including the importance of encouraging free communication between such persons.

(3) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in any court or in any tribunal or in any authority constituted by or pursuant to any Act and having power to compel the attendance of witnesses or in any other person acting judicially or by other provision of this Act or of any other Act or by any rule of the common law.

(4) Any application to the court or tribunal or authority or person acting judicially for the exercise of its or his discretion under subsection (1) of this section may be made by any party to the proceedings or by the witness concerned at any time before the commencement of the hearing of the proceedings or at the hearing".

5.23 The Commission is not concerned in this report with confidential relationships other than between journalists and their informants, whereas the New Zealand Committee was concerned to deal with confidential relationships generally (as the terms of its proposed amendment shows). However, the terms of the proposed clause³⁷ could be adapted so as to confine its operation to the journalist-informant relationship, and it is on this basis that the Commission has considered its desirability.

5.24 It is doubtful whether the clause proposed by the New Zealand Committee does no more than put into statutory form what the English Law Reform Committee assumed was already the law, since it appears to give a wider discretion to the court or tribunal than the statement quoted above of the English Committee would allow. According to that Committee, the discretion to authorise non-disclosure could be exercised only if serious injustice was not likely to ensue, whereas the New Zealand Committee's proposal would appear to authorise non-disclosure even if such a result would follow. In this Commission's view, such a discretion would be too wide and its exercise difficult to control by the use of the normal appeal process. As applied to the journalist-informant relationship the practical difficulties

³⁷ An Evidence Amendment Bill was introduced into the New Zealand Parliament in October 1979 containing a clause to give effect to the New Zealand Committee's proposal. The Bill has been referred to a Select Committee for consideration.

that would arise in exercising the discretion would be formidable, since the tribunal would be required to determine what the effect of disclosure would be upon that particular informant, upon other informants of that journalist and upon informants of other journalists, both present and future, all without being able to examine any of them. The result would be likely to be no more than a series of ad hoc decisions, each made largely in the light of each judge's basic philosophy. It may in any event do little to alleviate the "chilling effect" of the present law,³⁸ since would-be informants would never be sure when disclosure of their identity would be required.

5.25 After carefully considering the question, the Commission has concluded that any 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.³⁹ 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. As pointed out in paragraph 3.4 above, the judicial discretion in this area is as yet unsettled and judicial attitudes appear to be changing fairly rapidly. It would consequently seem desirable to await further judicial development.

5.26 As part of its privacy reference, the Commission will be reviewing the question of disclosure in judicial proceedings of other kinds of confidential information (such as doctor and patient) and it will consider at that stage whether a case can be made out for the introduction of a statutory discretion, whether covering certain classes of confidential information or generally.

Recommendation as to qualified privilege

5.27 For the above reasons, the Commission does not recommend the adoption of any form of qualified privilege at this stage.

(Signed) David K. Malcolm
Chairman

Eric Freeman
Member

³⁸ See paragraph 3.19 above.

³⁹ See paragraphs 3.3 to 3.8 above.

Charles Ogilvie
Member

H.H. Jackson
Member

L.L. Proksch
Member

7 February 1980

APPENDIX 3

United States' Shield Laws

1. New York [New York Civil Rights Law s 79-b (in part)]

Special provisions relating to persons employed by or connected with, news media.

- (b) Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.
- (c) Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television

transmission station or network or other professional medium of communicating news to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence, unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defence or proof of an issue material thereto; and (iii) is not obtainable from any alternative source. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing. The provisions of this subdivision shall not affect the availability, under appropriate circumstances, of sanctions under section thirty-one hundred twenty-six of the civil practice law and rules.

- (d) Any information obtained in violation of the provisions of this section shall be inadmissible in any action or proceeding or hearing before any agency.
- (e) No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.
- (f) The privilege contained within this section shall apply to supervisory or employer third person or organization having authority over the person described in this section.
- (g) Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subdivision (b) or (c) of this section waives such exemption if such person voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section.

APPENDIX 3 cont'd

2. **All States [JC Goodale, JP Moodhe, LG Markoff, RW Ott Reporter's Privilege Cases, November 1991 pp 359-427 (Prepared for 1991 Practising Law Institute Communications Law Conferences New York).]**

B. State Decisions and Shield Laws (By State)

ALABAMA

Shield Law: Ala. Code Section 12-21-142 (1986).

A substantially similar predecessor statute was interpreted in *Ex parte Sparrow, infra*. The court upheld the refusal by a deponent in a libel action to answer "only those questions which would have required disclosure of the source of information procured...and published in the newspaper on which he was employed." 14 F.R.D. 351, 352.

Qualified Privilege: Recognized.

1. Ex parte Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953)
2. Norandal USA Inc. v Local Union Co. 7468, 13 Med. L. Rptr. 2167 (Ala. Cir. Ct. 1986)
3. Brothers v Brothers, 16 Med. L. Rptr. 1031 (Ala. Cir. Ct. 1989)

ALASKA

Shield Law: Alaska Stat. Sections 09.25.150.220 (1983 & Cumm. Supp. 1990).

The Alaska statute prohibits compelled disclosure of the "source of information" obtained while acting in the scope of journalistic duties. A court may order disclosure however, if it finds that withholding the testimony would (a) result in a miscarriage of justice or deny a fair trial, or (b) be contrary to the public interest.

Qualified Privilege: Recognized in brief Nebel opinion.

1. Nebel v Mapco Petroleum, 10 Med. L. Rptr. 1871 (Alaska 1984)
2. Alaska v Pruett, 11 Med. L. Rptr. 1968 (Super. Ct. 1984)

ARIZONA

Shield Law: Ariz. Rev. Stat. Ann. § 12-2237 (1982); Ariz. Rev. Stat. Ann. § 12-2214 (1982 & Supp.).

The Arizona shield law protects against the compelled disclosure in any legal proceeding of the source of information. The statute was amended in 1982 (§ 12-2214) to make it one of the most protective shield laws. The amendment provides that a subpoena for a witness in a criminal or civil proceeding must attach an affidavit to the subpoena stating, among other things: that the affiant has attempted to obtain the information from other sources, the identity of those sources, and that the information is relevant and material to the action. A subpoena not accompanied by such an affidavit may be ignored. The party resisting the subpoena may request a hearing, and the reporter need not comply while the appeal is pending.

In Dombey v Phoenix Newspapers Inc., *infra*, defendants refused to disclose confidential sources, relying on the shield law. The trial judge instructed the jury that the defendants were precluded from relying on the sources and information therefrom as proof of verification or evidence of responsibility, citing Greenberg v CBS.

Qualified Privilege: No reported decisions.

Rodriguez, *infra*, does not reach the question of qualified privilege.

1. Rodriguez v Pima County Superior Court, 123 Ariz. 555, 601 P.2d 318 (Ct App. 1979)
2. Mosley v IRE, Inc., No. C-365969 (Ariz. Super. Ct., Maricopa Co., Jan 31 1980)
3. Dombey v Phoenix Newspapers, Inc., News Notes, 7 Med. L. Rptr. 2024 (Ariz. Super. Ct. Oct. 16, 1981)
4. State v Edwards, (Ariz. Super. Ct. 1987) (unpublished), summarized in News Media Update, July 20 1987 at 2.

ARKANSAS

Shield Law: Ark. Code Ann. § 16-85-510 (1987).

The Arkansas shield law was interpreted by the Arkansas Supreme Court in Saxton, *infra*, to apply to both civil and criminal proceedings. In Williams, *infra*, the Western District held that the Arkansas shield law applies only to a source, and does not protect outtakes.

Saxton also affirmed the lower court's ruling that the shield law "malice" exception, permitting divestiture on a showing of "bad faith" or "malice" was not coextensive with New York Times Co v Sullivan, but rather than only a

“reasonable showing” of bad faith or reckless disregard of truth on the part of the reporter was required. The Court also read an exhaustion requirement into the statute, approving a requirement that a “reasonable effort” be made to determine the identity of the source.

Qualified Privilege: No reported decisions.
Saxton does not reach.

1. Saxton v Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (1978)
2. Williams v ABC, 96 F.R.D. 658 (W.D. Ark. 1983)

CALIFORNIA

Shield Law: Cal. Evid. Code §1070 (Cumm. Supp. 1991); California Constitution Art. 1, §2 (1983). Shield law bars contempt only; explicitly protects unpublished information such as outtakes.

California’s courts have interpreted its shield law as giving journalists (but not free-lance writers, In re Van Ness) an absolute privilege to refuse to turn over information, whether that information is confidential, Rosato v Superior Court, *infra*, or non-confidential, Delaney v Superior Court, *infra*. Playboy Enterprises v Superior Court, *infra*; Hammarley v Superior Court, *infra*. But cf. KSDO v Riverside Superior Court, *infra* (shield law does not create reporters’ privilege; merely creates immunity from contempt). A federal court has found Playboy to state the current law and the Shield Law to protect a memo obtained by the reporter. Shaklee Corp v Grunnell, *infra*. However, the absolute protection conveyed by the statute has been read as limited by the Sixth Amendment when the information sought was essential to a fair trial, Delaney, *infra*, and Hammarley, *infra*, and as an unconstitutional encroachment on the separation of powers when the information was deemed necessary to judicial control over court officers. Rosato, *infra*; Farr v Superior Court, *infra*.

To overcome a prima facie assertion of the privilege, a party seeking information in a criminal case must first show that there is a “reasonable possibility” that the information will materially assist the defense. The trial court should then weigh such factors as (a) whether the information is confidential or sensitive, (b) the interests sought to be protected by the shield law, (c) the importance of the information to the criminal defendant, and (d) whether there is an alternative source for the information. Delaney, *infra*. In a recent superior court criminal case, CBS was ordered to turn over “60 Minutes” outtakes involving a confession by an accused murderer. The court held that the California shield law violated the Sixth Amendment. The order overturning the shield law was subsequently vacated when CBS turned over a tape recording of part of the interview in question to the judge for in camera review. People v Braeske, *infra*.

In its most recent pronouncement on the shield law, the California Supreme Court ruled that the statute provided an absolute, not qualified, immunity. However, the immunity extended only to contempt proceedings, leaving the possibility open that other sanctions could be imposed. The court believed, however, that such other

sanctions were not likely to be effective, and thus would not pose much of a threat. N.Y. Times v Superior Court.

Qualified Privilege: Recognized.

In Mitchell v Marin County Superior Court, the California Supreme Court recognized that there is a reporter's qualified privilege under the California and United States Constitutions.

Among the five factors to be considered by courts evaluating such claims was, in the context of a libel action, the need for a plaintiff to make a prima facie showing of falsity. The California reaffirmed the validity of Mitchell in Delaney, infra, but explained that the Mitchell analysis is not appropriate in the context of criminal cases.

1. Farr cases, Farr v Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Ct. App. 1971), cert. denied, 409 U.S. 101. In re Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (Ct. App. 1974)
2. In re Foster, (Ruling, Superior Ct., Alameda County, Calif., March 28 1974)
3. People of State of Calif. v Gillings and Brown, Nos. 27492 & 27490 (March 26, 1976)
4. Rosato v Superior Court [Fresno Bee case], 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), cert. denied, 427 U.S. 912 (1976)
5. CBS Inc. v Superior Court, 85 Cal. App. 3d 241, 149 Cal. Rptr. 421 (Ct. App. 1978)
6. Rancho La Costa, Inc. v Penthouse, 4 Med. L. Rptr. 1564 (Cal. Super. Ct. Oct 2, 1978), reversed, 6 Med. L. Rptr. 1249 (Cal. Super. Ct. 1980)
7. Hammarley v Superior Court, 89 Cal. App. 3d 388, 153 Cal. Rptr. 608 (Ct. App. 1979)
8. Los Angeles Memorial Coliseum Commission v NFL, 89 F.R.D. 489 (C.D. Calif. 1981)
9. People v Braeseke, Editor & Publisher, Feb 6, 1982 at 18 (Cal. Super. Ct. Alameda Co. Jan. 25, 1982)
10. Bunting v Municipal Court, summarized in News Media & The Law, June-July 1982, at 33 (Cal. Super. Ct. 1982 [?])
11. In re Van Ness, 8 Med. L. Rptr. 2563 (Cal. Super. Ct. Nov. 12, 1982)
12. In re Brenna, 8 Med. L. Rptr. 2561 (Cal. Super. Ct. Nov. 19, 1982)
13. KSDO v Riverside Superior Court, 8 Med. L. Rptr. 2360 (Cal Ct. App. Oct. 7, 1982)

14. Bowman v Superior Court, Nos. 139660 & 140770 (Cal. Ct. App. June 15, 1982)
15. Plotkin v Van Nuys Publishing Co., summarized in Editor & Publisher, 3/26/83 (Cal. Super. Ct. Mar. 22, 1983); order modified 11/83, 10 Med. L. Rptr. News Notes at 3 (Mar. 13, 1984)
16. Galloway v CBS, summarized in News Media & The Law at 47-48, Sept. – Oct. 1983 (L.A. Super. Ct. Mar. 1983)
17. Playboy Enterprises, Inc. v Superior Court, 154 Cal. App. 3d 14, 201 Cal. Rptr. 207 (Ct. App. 1984)
18. Mitchell v Marin County Superior Court, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984), rev'q 148 Cal. App. 3d 360, 196 Cal. Rptr. 27 (Ct. App. 1983)
19. Dalitz v Penthouse, 11 Med. L. Rptr. 2153 (Cal. Ct. App. 1985)
20. People v Smith [Belushi] (unpublished), July 10, 1985
21. McCoy v Hearst Corp., 12 Med. L. Rptr. 1313 (Cal. Ct. App. 1985)
22. Shaklee Corp. v Gunnell 12 Med. L. Rptr. 2221 (N.D. Cal. 1986)
23. People v Verketis (Cal. Super. Ct. 1986) (unpublished) summarized in News Media Update, Sept. 15 1986 at 4
24. California v Lucas, (Cal. Ct. App. 1987) (unpublished) summarized in The News Media & The Law, Winter 1987 at 19-20
25. Hallsy v Superior Court, 200 Cal. App. 3d 1038 248 Cal. Rptr. 6315 (Cal. Ct. App. 1988)
26. Delaney v Superior Court, 50 Cal. 3d 785, 268 Cal. Rptr. 753, 789 P.2d 934 (1990)
27. California v Fain (Cal. Sup. Ct. 1988) (Unreported), summarized in News Media Update, November 12, 1988 at 1
28. Oakland Tribune v Municipal Court of Oakland, (Cal. Mun. Ct. 1989) (unreported), summarized in News Media Update, May 13, 1989 at 3
29. Friedman v Superior Court, 212 Cal. App. 3d 464, 261 Cal. Rptr. 87 (Cal. Ct. App. 1989)
30. Liggett v Superior Court (Gregerson), 211 (Cal. App. 3d 1461, 260 Cal. Rptr. 161 (Cal. Ct. App. 1989), vacated, 800 P.2d 516 (1990)
31. New York Times Co. v Superior Court of Santa Barbara County, 51 Cal. 3d 453, 796 P.2d 811, 273 Cal. Rptr. 98, 18 Med. L. Rptr. 1145 (Sept 27, 1990)

COLORADO

Shield Law: Colo. Rev. Stat. §§ 13-90-119 & 24-72.5-101 to 106 (Cumm. Supp. 1990).

Qualified Privilege: Not recognized in libel actions where court finds relevance (Gagnon); not recognized where reporter has witnessed a crime (Pankratz).

Colorado became the twenty-eighth state to enact a shield law, giving reporters a qualified privilege against compelled disclosure of news sources, notes, photos, videotapes, films, recordings, etc. The privilege applies to both confidential and non-confidential information, and in both civil and criminal proceedings. The privilege can be defeated if the opposing party shows by a preponderance of the evidence that the information is directly relevant to a substantial issue, cannot be obtained by other reasonable means, and the seeking party's interest outweighs the reporter's and public's first amendment right. A reporter cannot withhold information that has already been published. Lastly, the privilege does not apply to a reporter's personal observations of a felony, as long as the information cannot be obtained by other reasonable means. Discussed in News Media Update, May 14, 1990.

1. Pankratz v Colorado District Court, 199 Colo. 411, 609 P.2d 1101 (1980)
2. Gagnon v Fremont Dist. Ct., 632 P.2d 567 (Colo. Sup. Ct. 1981)
3. In re Smith and Tragathon (Colo. Dist. Ct., August 11, 1981) (unreported, see Editor & Publisher, Aug 15, 1981, at 10)
4. In re Grand Jury Subpoenas, 8 Med. L. Rptr. 1418 (Dist. Ct. Colo. Feb 19, 1982)
5. People v Garza, Crim. Action No. 81, CR 26 (Colo. Dist. Ct. La Plata Co. 1981); summarized in News Media & The Law at 29 (Sept.-Oct. 1982)
6. Jones v Woodward, 15 Med. L. Rptr. 2060 (Colo. Dist. Ct. 1988)

CONNECTICUT

Shield Law: None.

Qualified Privilege: Recognized.

Connecticut's two cases defining the reporter's privilege, Goldfield v Post Publishing and Conn. Labor Relations Board v Fagin, have both been civil cases, and have both applied the same test. The reporter has been privileged to refuse to disclose sources unless the party demanding the information showed a reasonable effort to obtain the information sought in some other manner, and a tailoring of the inquiry to obtain only highly relevant matter. In Goldfield, the court found that the plaintiffs could easily overcome these requirements where the reporter was a libel defendant. In Fagin, the privilege was sustained because the discovering party had made inadequate efforts to

obtain information from non-media sources and because the information sought, though relevant, was not essential to the case.

1. Linsey v Kelman, Civ. No. 15, 396 (D.C. Conn. Mar 19, 1975)
2. Conn. Labor Relations Board v Fagin, 33 Conn. Sup. 204, 370 A.2d 1095 (Super. Ct. 1976)
3. Goldfield v Post Publishing Co., 4 Med. L. Rptr. 1167 (Conn. Super. Ct. July 11, 1978)
4. City Council v Hall, 180 Conn. 243, 429 A.2d 481 (1980)
5. Rubera v Post-Newsweek Stations, 8 Med. L. Rptr. 2293 (Conn. Super. Ct. Sept. 16, 1982)

DELAWARE

Shield Law: Del. Code tit. 10, Sections 4320-4326 (1974)

The Delaware Statute confers absolute privilege in grand jury proceedings covering both source and content; in adjudicative proceedings, privilege as to “content” but not source may be disregarded if “public interest” requires. In 1986, the Delaware Senate overwhelmingly rejected an amendment that would have required journalists to disclose confidential sources in defamation cases. The News Media & the Law, Fall 1986 at 49.

Qualified Privilege: Recognized at superior court level, Delaware v McBride (criminal case).

In McGowen, *infra*, the Delaware Supreme Court quashed a subpoena on grounds of improper issuance without reaching the question of privilege.

1. In re McGowen, 303 A.2d 645 (Del. Sup. Ct. 1973)
2. Delaware v McBride, 7 Med. L. Rptr. 1371 (Del. Super. Ct. May 6, 1981)
3. McBride v Delaware, No. 125, 1982, slip op. (Del. 1984)
4. Riley v Moyed, slip op., Civ. Act. No. 84C-JA-78 (Del. Super. Ct. 1985)
5. Delaware v Hall, 16 Med. L. Rptr. 1414 (Del. Mun. Ct. 1989)

DISTRICT OF COLOMBIA

Shield Law: None.

Common Law Privilege: Qualified privilege recognized.

1. CBS v Arnold (D.C. Super. Ct.) (unpublished), summarized in News Media Update, March 30, 1987 at 2
2. Wheeler v Goulart, 1991 D.C. App. LEXIS 169 (D.C. May 17, 1991)
3. Braden v News World Communications, 18 Med. L. Rptr. 2040 (D.C. Super. Ct. 1991)

FLORIDA

Shield Law: None.

Common Law Privilege: Qualified privilege recognized. Florida's courts have upheld reporters' claims of privilege more consistently and scrupulously than the courts of any other state. In civil cases and in cases involving disclosures to the press of sealed grand jury materials, the press privilege against disclosure under the First Amendment and the Florida Constitution has been viewed as absolute, not susceptible to being overridden by any showing on the part of the party seeking discovery. Coira v Depoo Hospital, *infra*; Spiva v Francoeur, *infra*; Morgan v State, *infra*.

In criminal cases, where courts have seen the need to balance Sixth Amendment interests in fair trials against the reporter's privilege, defendants have been required to show that the reporter had relevant information that was unavailable elsewhere, that they have attempted unsuccessfully to obtain the evidence from less chilling sources, and that non-production of the desired evidence would result in a violation of their rights. See, eg., Florida v Silber, *infra*; Florida v Peterson, *infra*; Florida v Reid, *infra*. This familiar test has been applied with notable rigor; no court decision since the privilege was recognized has resolved the balance in the defendant's favor. In Tribune Company v Huffstetler, 12 Med. L. Rptr. 2289 (Fla. 1986), the Florida Supreme Court held that a grand jury investigation about the disclosure of an ethic committee complaint (a criminal offense) did not bring the same Sixth Amendment interests into the balance against the reporter's privilege since, unlike other criminal statutes, this provision was designed essentially to vindicate a private interest in reputation.

Florida courts have also repeatedly rejected the argument that only confidential information provided to reporters by undisclosed sources is privileged. Non-confidential information is protected under the Florida rule or the ground that forced disclosure of any information obtained by reporters can chill or otherwise adversely affect the news-gathering process and editorial discretion. Florida v Peterson, *infra*; Florida v Morel, *infra*; United States v Blanton, *infra*. Television videotapes were not protected, however, in Morgan v Roberts, *infra*. The court distinguished the tapes from "reporters' notes, mental impressions or confidential sources", stating that they were "no more than mechanical recordings of a public event..."

In Miami Herald Publishing Co. v Morejon, 561 So. 2d 577 (1990), however, the Florida Supreme Court affirmed the denial of a motion to quash the subpoena of a newspaper journalist who was an eyewitness observer of a search and arrest.

A journalist for the Miami Herald witnessed the search and arrest of Morejon, who later subpoenaed the journalist in an attempt to prove that the police searched without

consent. The court discussed Branzburg and previous Florida cases holding that a qualified privilege existed. The court held that no privilege existed in the present case, since the subpoena sought non-confidential, eyewitness observations. The court also reaffirmed the principle that the public has a right to every person's evidence and that testimonial privileges are disfavoured. A journalist's limited privilege cannot be extended to include eyewitness observations of relevant events. The Supreme Court extended the rationale of Morgan to reject a claim of privilege made with respect to the outtakes of a videotape of a criminal defendant's arrest. CBS Inc. v Jackson.

In Campus Communications, *infra*, a Florida appellate court refused to recognize a privilege, citing Herbert v Lando and Anderson v Nixon, 444 F. Supp. 1195 (D.D.C. 1978), where the press was the plaintiff in an action for conversion and refused to reveal the name of one witness (out of four) who was a confidential source. The court dismissed the complaint. The only exceptions to this trend have been Satz and Huffstetler, in which the reporters allegedly witnessed crimes.

1. Spiva v Fernandez, 303 So. 2d 363 (Fla. Dist. Ct. App. 1974)
2. State of Florida v Stoney, No. 74-227, Crim. Div. (11th Cir. Ct., Fla., Order, 1974)
3. Laughlin v State, 323 So. 2d 691 (Fla. Dist. Ct. App. 1975), cert. denied, 339 So. 2d 1170 (1976)
4. Schwartz v Almart Stores, No. 74-35547 (11th Cir. Ct. Fla. Order of June 18, 1975)
5. Hendrix v Liberty Mutual Insurance Company, No. 75-1616 (17th Cir. Ct. Fla. Dec. 11, 1975)
6. In re Tierney, 328 So. 2d 40 (Fla. Dist. Ct. App. 1976)
7. Morgan v State, 337 So. 2d 951 (Fla. 1976)
8. State of Florida, ex rel., The Brandenton Herald, Inc., La Mee, Poston & Wright v The Honorable Claflin Garst, Jr., County Judge, No. 76-223-7F (Circuit Court of the Twelfth Judicial Circuit Court of Florida in and for Manatee County, Florida, 1976)
9. Florida v Petrantoni, 4 Med. L. Rptr. 1554 (Fla. Cri. Ct. Pinellas Co. 1978)
10. Coira v Depoo Hospital, 4 Med. L. Rptr. 1692 (Fla. Cri. Ct. Monroe Co. Nov. 6, 1978)
11. Florida v Morel, 4 Med. L. Rptr. 2309 (Fla. Cir. Ct. Broward Co. Feb. 13, 1979)
12. Florida v Beattie, 4 Med. L. Rptr. 2150 (Fla. Cir. Ct. Dade Co. Jan 9, 1979)
13. Campus Communications Inc. v Freedman, 374 So. 2d 1169 (Fla. Dist. Ct. App. 1979)
14. Florida v Silber, 5 Med. L. Rptr. 1188 (Fla. Cir. Ct. Dade Co. June 1, 1979)
15. Times Publishing Co v Burke, 375 So. 2d 297 (Fla. Dist. Ct. App. 1979)
16. In re Nugent, 5 Med. L. Rptr. 1723 (Fla. Cir. Ct. Palm Beach Co. Aug. 28, 1979)

17. Schulthise v Weyer Brothers Inc., 6 Med. L. Rptr. 1661 (Fla. Cir. Ct. July 29, 1980)
18. Florida v Evans, 6 Med. L. Rptr. 1979 (Fla. Cir. Ct. May 28 1980)
19. Johnson v Miami, 6 Med. L. Rptr. 1979 (Fla. Cir. Ct. May 28, 1980)
20. Cape Publications, Inc. v Bridges, 387 So. 2d 436 (Fla. Dist. Ct. App. 1980), cert. denied, 104 S. Ct. 239 (1983)
21. Florida v Peterson, 7 Med. L. Rptr. 1090 (Fla. Cir. Ct. March 10, 1981)
22. United States v Blanton, 534 F. Supp. 295 (S.D. Fla. 1982)
23. McCoy v Public Gas Co., 8 Med. L. Rptr. 1057 (Fla. Cir. Ct. Palm Beach Co. Feb. 16, 1982)
24. Florida v Reid, 8 Med. L. Rptr. 1249 (Fla. Cir. Ct. Palm Beach Co. March 8, 1982)
25. Morgan v Roberts, 94 F.R.D. 121 (M.D. Fla. 1982)
26. Florida v Kangus, 8 Med. L. Rptr. 2045 (Fla. Co. Ct. Palm Beach Co. July 6, 1982)
27. Statewide Collection Corp. v Anderson, 9 Med. L. Rptr. 1056 (Fla. Co. Ct. Duval Co. Nov 22, 1982)
28. Florida v Taylor, 9 Med. L. Rptr. 1551 (Fla. Cir. Ct. May 10 1982)
29. Hancock v Wilkinson, 8 Med. L. Rptr. 2566 (Fla. Cir. Ct. Oct 19, 1982)
30. Jasper v Rochelle-Thomas, 9 Med. L. Rptr. 1336 (Fla. Cir. Ct. Sept 16, 1982)
31. Shiner v Florida Transportation Department, 9 Med. L. Rptr. 1672 (Fla. Cir. Ct. 1983)
32. Florida v Roman, 9 Med. L. Rptr. 1733 (Fla. Cir. Ct. 1983)
33. Gadsden County Times Inc. v Horne, 425 So. 2d 1234 (Fla. Dist. Ct. App. 1983)
34. Tribune Co. v Green, 440 So. 2d 484 (Fla. Dist. Ct. App. 1983), cert. denied, 447 So. 2d 886 (Fla. 1984)
35. Overstreet v Neighbor, 9 Med. L. Rptr. 2255 (Fla. Cir. Ct. 1983)
36. U.S. Insurance Group v Doles, 10 Med. L. Rptr. 1038 (Fla. Co. Ct. 1983)
37. Florida v Dibattisto, 11 Med. L. Rptr. 1396 (Dade Co. Cir. Ct. 1984)
38. Johnson v Bentley, 457 So. 2d 507 (Fla. Dist. Ct. App. 1984)
39. Lang v Tampa Television, 11 Med. L. Rptr. 1103 (Duval Co. Cir. Ct. 1984)

40. Satz v News Sun-Sentinel Co., slip op. No. 83-2511 (Fla. Dist. Ct. App. 1985)
41. Shaw v American Learning Systems, 10 Med. L. Rptr. 2045 (17th Cir. Ct. 1984)
42. The Tribune Co. v Huffstetler, 463 So. 2d 1169 (Fla. Dist. Ct. App. 1984)
43. Woods v Lutheran Inner City Center of Jacksonville, Inc., 11 Med. L. Rptr. 1775 (Duval Co. Cir. Ct. Mar. 15, 1985)
44. Florida v Torregrossa, 12 Med. L. Rptr. 1309 (Fla. Cir. Ct. 1985)
45. Florida v Crawford, 12 Med. L. Rptr. 1309 (Fla. Cir. Ct. 1985)
46. Lacy v Disin, 12 Med. L. Rptr. 1431 (Fla. Cir. Ct. 1985)
47. Capriles v Magnum, 12 Med. L. Rptr. 1496 (Fla. Cir. Ct. 1985)
48. Florida v Williams, 12 Med. L. Rptr. 1783 (Fla. Cty. Ct. 1986)
49. Tribune Co. v Huffstetler, 12 Med. L. Rptr. 2288 (Fla. 1986)
50. Kirchner v Aviall, 12 Med. L. Rptr. 1816 (1985)
51. Bartsch v Southland Corporation, 13 Med. L. Rptr. 2165 (Fla. Cir. Ct. 1987)
52. In re Confidential Proceedings, 13 Med. L. Rptr. 2071 (Fla. Cir. Ct. 1987)
53. Damico v Lemen, 14 Med. L. Rptr. 1031 (Fla. Cir. Ct. 1987)
54. McKuiston v Wanicka, 13 Med. L. Rptr. 1975 (Fla. Cir. Ct. 1987)
55. In re Miami News, 13 Med. Lr. Rptr. 2167 (Fla. Cir. Ct. 1987)
56. Miller v Richardson, 13 Med. L. Rptr. 1235 (Fla. Cir. Ct. 1987)
57. Sunset Chevrolet v Heidin, 14 Med. L. Rptr. 1252 (Fla Cir. Ct. 1987)
58. Waterman Broadcasting of Florida v Rese, 523 So. 2d 1161 (Fla. Ct. App. 1988)
59. Carroll Contracting v Edwards, 528 So. 2d 951 (Fla Ct. App. 1988) review denied, 536 So. 2d 243 (Fla. 1988)
60. Florida v Kersey, 14 Med. L. Rptr. 2352 (Fla. Cir. Ct. Dec. 2, 1987)
61. Florida v Lee, 14 Med. L. Rptr. 1863 (Fla. Cir. Ct. 1987)
62. Miami Herald Pub. Co. v Morejon, 561 So. 2d 577 (Fla. 1990)
63. C.B.S. Inc. v Cobb, 536 So. 2d 1067 (Fla. Ct. App. 1988)

64. Florida v Widel, 15 Med. L. Rptr. 1711 (Fl. Cir. Ct. 1988)
65. Florida v Gallagher, 17 Med. L. Rptr. 1254 (Fla. Cir. Ct. Mar. 31 1989)
66. Ludovico v Malfregot, 16 Med. L. Rptr. (Fla. Cir. Ct. Sept. 22, 1989)
67. Florida v Atreu, 316 Med. L. Rptr. 2483 (Fla. Cir. Ct. Oct. 31, 1989)
68. CBS Inc. v Jackson, 557 So. 2d 233 (Fla. Dist. Ct. App. Feb. 28, 1990)
69. Florida v Latorre, 17 Med. L. Rptr. 1878 (Fla. Cir. Ct. 1990)
70. LaTorre v Times Publishing Co., 18 Med. L. Rptr. 1239 (Fla. Cir. Ct. 9/28/90)
71. CBS Inc. v Jackson, 578 So. 2d 698 (Fla. 1991)
72. Morvilius v Hoard, 18 Med. L. Rptr. 1920 (Fla. Cir. Ct. 6/1/90)
73. Florida v Brown, 19 Med. L. Rptr. 1031 (Fla. Cir. Ct. 1991)

GEORGIA

Shield Law: Ga. Code Ann. § 24-9-30 (1991 Cum. Supp.).

Qualified Privilege: In Vaughn v State, the Georgia Supreme Court refused to recognize a reporter's privilege, either under the United States or Georgia Constitutions. A Georgia trial court, however, apparently recognized a First Amendment privilege in quashing a pretrial subpoena to reveal sources and unpublished information, while holding out the possibility that disclosure might be ordered at trial. State v Stanley, (DeKalb Cty Ct. 1986) (unpublished), summarized in News Media Update, Nov. 10, 1986 at 2.

The Georgia Supreme Court recently reaffirmed the holding of Vaughn in Howard v Savannah College of Art & Design, 259 Ga. 785, 387 S.E. 2d 332 (1990).

On March 13, 1990, Governor Joe Frank Harris signed a Shield Law giving journalists a privilege against revealing sources. Section 24-9-30 of the Georgia Code creates a qualified privilege for non-party newspaper, book, magazine, radio and television journalists. The privilege can be defeated if the information sought is (1) material and relevant, (2) cannot be reasonably obtained by alternative means, and (3) is necessary to the proper preparation or presentation of the case of the party seeking the information.

1. Vaughn v State, 381 S.E. 2d 30 (Ga. 1989)
2. Howard v Savannah College of Art & Design, 259 Ga. 785, 387 S.E. 2d 332 (1990)
3. Stripling v State, 401 S.E. 2d 500 (Ga. Feb. 22 1991)

4. Vance v Krause, 18 Med. L. Rptr. 1572 (Super. Ct. DeKalb Cty., Nov 21, 1990)

HAWAII

Shield Law: None.

Qualified Privilege: Not recognized. Goodfader, *infra* (1961 civil action involving third-party subpoena).

1. In re Goodfader's Appeal, 45 Haw. 317, 367 P.2d 472 (1961)
2. DeRoburt v Gannett Co., 507 F. Supp. 880 (D. Haw. 1981)

IDAHO

Shield Law: None.

Qualified Privilege: Recognized

In In re Wright, a majority of the Idaho Supreme Court recognized a qualified privilege for reporters under both the Idaho and United States Constitutions. It limited its prior decision in Marks v Vehlow, *infra*, which found no privilege in the context of a habeas corpus proceeding of a father seeking the return of his child.

1. Caldero v Tribune Pub. Co., 98 Idaho 288, 562 P.2d 791, cert. denied, 430 U.S. 930 (1977)
2. Sierra Life Ins. Co. v Magic Valley Newspapers Inc., 101 Idaho 795, 623 P.2d 103 (1980)
3. Clary v Gilmore, 6 Med. L. Rptr. 2431 (Idaho Dist. Ct. Feb. 2, 1981)
4. Marks v Vehlow, 105 Idaho 560, 671 P.2d 473 (1983)
5. Idaho v Gary Kiss, No. 2821 (Dist. Ct. Latah Co. May 4, 1983)
6. In re Wright, 700 P.2d 40 (Idaho 1985)

ILLINOIS

Shield Law: Ill. Ann. Stat. ch. 110, ¶¶ 8-901 to 8-909 (1984 & 1991 Cumm. Supp.).

Effective July 1, 1982, the Illinois legislature repealed its shield law, replacing it with a reporter's privilege statute incorporated into the state's code of Civil Procedure. Apparently the change came as part of a legislative decision to integrate its numerous procedural statutes into one civil practice act, rather than to substantially change the protections afforded reporters.

The new statute, like the old, does not apply to libel actions where the reporter is a party defendant. § 8-901. An order granting divestiture of the privilege is granted only if the court finds that “all other available sources of information have been exhausted to the protection of the public interest involved.” Since this language parrots the former law, prior case law, summarized below, is still applicable.

In In re Special Grand Jury Investigation, *infra*, the Supreme Court held that the lower court incorrectly divested the reporter of his privilege, since other sources should have first been called before a grand jury investigating the leak of sealed transcripts. The Illinois shield law was construed in Scott, *infra*, to apply to both confidential and non-confidential sources; the court also held that disclosure of some sources did not constitute a waiver under the law. In Childers, *infra*, an Illinois court held that an application for divestiture of the privilege (under the special provisions of the shield law) was properly denied where no exhaustion had been shown. Baker v F&F Investment (see XIV A – Second Circuit) also construes the Illinois law. In Gutierrez, *infra*, the court held that the shield law only protected against the disclosure of sources, not information obtained by reporters from third parties.

Qualified Privilege: No reported decisions, but recognized in People v Dohrn, *infra*. In Hargraves v Scrivner, the court ordered a reporter, who was a defendant in a libel action, to reveal his confidential sources in a case where the plaintiff plainly seemed to have failed to meet his burden to overcome the privilege. The Illinois Supreme Court refused to issue a writ of prohibition, and the United States Supreme Court subsequently refused a stay pending full review by the Illinois Supreme Court. The reporter was jailed until one of the sources stepped forward later that day.

1. People v Dohrn, No. 69-3808 (June 12, 1970 Illinois Circuit Court of Cook County Criminal Division) (unreported; cited in Gulliver’s Periodicals, Ltd v Chas Levy Circulating Co., 455 F.D. Supp. 1197, 1202 (N.D. Ill. 1978))
2. People v Black, 130 Ill. App. 2d 996, 266 N.E. 2d 458 (App. Ct. 1970)
3. Baker v F&F Investment, 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973)
4. Westby v Board of Fire & Police Commissioners, 48 Ill. App. 3d 388, 362 N.E.2d 1098 (App. Ct. 1977)
5. People ex rel Scott v Silverstein, 89 Ill. App. 3d 1039, 412 N.E.2d 692 (App. Ct. 1980), rev’d 87 Ill. 2d 167, 429 N.E.2d 483 (1981)
6. People v Childers, 94 Ill. App. 3d 104, 418 N.E.2d 959 (App. Ct. 1981), cert. denied, 455 U.S. 947 (1982)
7. Gutierrez v Shafer, 9 Med L. Rptr. 1054 (Ill. Cir. Ct. Aug. 18, 1982)
8. Hargraves v Scrivner, News Media Update (June 18, 1984); 52 U.S.L.W. 3928 (July 2, 1984)

9. In re Special Grand Jury Investigation, 104 Ill. 2d 419, 472 N.E.2d 450 (1984)
10. Illinois v Johnson, 11 Med. L. Rptr. 1101 (Cook Co. Cir. Ct. 1984)
11. In re Grand Jury Investigation of Illinois v John Doe, 15 Med. L. Rptr. 1468 (Cook Cty. Cir. Ct. 1988)
12. Illinois v Fort, 15 Med. L. Rptr. 2251 (Ill. Cir. Ct. 1988)
13. Illinois Racing Board v Segal, 16 Med. L. Rptr. 1138 (Ill. Cir. Ct. 1988)
14. Illinois v Drazen, 16 Med. L. Rptr. 2081 (Ill. Cir. Ct. 1989)

INDIANA

Shield Law: Ind. Code Section 34-3-5-1 (1986)

Qualified Privilege: Recognized.

The shield law in Indiana has been consistently applied to preserve confidentiality of sources. In Jamerson, the court called the privilege absolute. Lipps and Hestand hold that shield law rights are personal to the reporter. Haak, infra, holds that the statute does not cover non-confidential information.

In re Stearns held that the First Amendment's qualified privilege unpublished photographs of a traffic accident sought by the defendant in a tort suit.

1. Lipps v State, 254 Ind. 141, 258 N.E.2d 622 (1970)
2. Hestand v State, 257 Ind. 191, 273 N.E.2d 282 (1971)
3. Shindler v State, 166 Ind. App. 258, 335 N.E.2d 638 (Ct. App. 1975)
4. In re Wireman, 270 Ind. 344, 367 N.E.2d 1368 (1977), cert. denied, 436 U.S. 904 (1978)
5. Indiana v Haak, 10 Med. L. Rptr. 1128 (Sup. Ct. LaPorte Co. Nov. 16, 1983)
6. Northside Sanitary Landfill Inc. v Bradley, 462 N.E.2d 1321 (Ind. Ct. App. 1984)
7. Jamerson v American Newspapers Inc., 169 N.E.2d 1243 (Ind. Ct. App. 1984)
8. In re Stearns, 12 Med. L. Rptr. 1837 (Ind. Ct. App. 1986)

IOWA

Shield Law: None.

Qualified Privilege: Recognized, but conditions for disclosure held satisfied in Winegard and Bell.

Winegard, a defamation action, recognized a 3-part qualified privilege: (a) heart of claim; (b) reasonable exhaustion; and (c) non-frivolousness of claim. In Bell, the trial ruled that the estate of a suicide victim had shown a compelling need and no alternative source for a videotape of the decedent's suicide, which it wished to view in order to determine whether to bring an action against the police. The Supreme Court reversed, finding the defendants had failed to meet the tests of need or exhaustion.

1. Winegard v Oxberger, 258 N.W.2d 847 (Iowa 1977), cert. denied, 436 U.S. 905 (1978)
2. Lamberto v Bown, summarized in News Media Update, Dec. 14, 1981 at page 3 (Iowa Dist. Ct. Polk Co. 1981)
3. Lamberto v Bown, 326 N.W.2d 305 (Iowa Dist. Ct. 1982)
4. Bell v City of Des Moines, Slip op. No. 86-1048 (Sup. Ct. Sept. 23, 1987)
5. Stanfield v Polk County, 18 Med. L. Rptr. 1262 (Iowa Dist. Ct. 9/13/90)

KANSAS

Shield Law: None.

Qualified Privilege: Privilege recognized, but disclosure ordered after Sixth Amendment balancing in Sandstrom.

1. State v Sandstrom, 225 Kan. 573, 581 P.2d 812 (1978), cert. denied, 440 U.S. 929 (1979)
2. Medlin v Betlis Asphalt & Constr., 17 Med. L. Rep. 1783 (Kan. Dist. Ct. Mar. 20, 1990)

KENTUCKY

Shield Law: Ky. Rev. Stat. 421.100 (1990)

The shield law has been interpreted by the Kentucky Supreme Court narrowly to protect only the identity of informants, and not other sources of eg., the reporter's observations or areas of investigation. Moreover, the statute requires that the information be published in order for the source to be protected. Lexington Herald-

Leader v Beard, *infra*; Branzburg v Pound, *infra*. The statute will not prevent a reporter from being subpoenaed to testify about information received from confidential sources. Branzburg v Meigs, *infra*.

Common Law Privilege: No privilege recognized.

The Kentucky Supreme Court has recently rejected a news reporter's claim of privilege under the First Amendment and the Kentucky Constitution although not completely denying the presence of First Amendment interests. Lexington Herald-Leader v Beard, *infra*; Branzburg v Meigs, *infra*.

1. Branzburg v Hayes, 408 U.S. 665 (1972)
2. Branzburg v Pound, 461 S.W.2d 345 (Ky. Ct. App. 1971) (as modified), *aff'd sub nom.* Branzburg v Hayes, 408 U.S. 665 (1972)
3. Branzburg v Meigs, 503 S.W.2d 748 (Ky. Ct. App. 1971), *aff'd sub nom.* Branzburg v Hayes, 408 U.S. 665 (1972)
4. Lexington Herald-Leader v Beard, 11 Med. L. Rptr. 1376 (Ky. Sup. Ct. 1984)

LOUISIANA

Shield Law: La. Rev. Stat. Ann. Sections 45: 1451-1454, 45:1459 (1982 & 1991 Cumm. Supp.).

Statute permits divestiture upon application to judge if "essential to the public interest." In 1989, the Louisiana Legislature enacted 45:1459, "Qualified protection for nonconfidential news." The statute provides a qualified privilege for reporters and news media organizations against being adjudged in contempt for failing to disclose any news that was not published but was obtained in the course of gathering the news. The privilege applies even if the news or source was not obtained in confidence. This qualified privilege can be overcome if the news is (1) highly material and relevant, (2) critical or necessary to the maintenance of a claim or defense, and (3) not obtainable from an alternative source.

In re Michael Burns held the shield law to apply not only to the identity of the source, but also to any information that might reveal the identity.

The Louisiana Court of Appeals construed the shield law in Dumez, *infra*, as follows: (a) it protects only sources, and (b) the information need not be published for the source to come within the ambit of the privilege. The court in Dumez held that the identity of the source was privileged under the shield law.

Qualified Privilege: Recognized. Ridenhour

1. Dumez v Houma Municipal Fire and Police Civil Service Board, 341 So. 2d 1206 (La. Ct. App.), *cert. denied*, 344 So. 2d 667 (1976)

2. Rochon v Wolter, 10 Med. L. Rptr. News Notes at 2 (July 17, 1984)
3. State v Cumella, News Media Update, April 14, 1986 at 2
4. Munson v Gaylor Broadcasting, 13 Med. L. Rptr. 1618 (La. Ct. App. 1986) (quashing solely on grounds of irrelevancy)
5. In re Michael Burns, 484 So. 2d 658 (La. 1986)
6. In re Ridenhour, 15 Med. L. Rptr. (La. 1988)

MAINE

Shield Law: None

In In re Hohler, Maine Super. Ct. 1987, reported in News Media Update, June 8 1987 at 2; 14 Med. L. Rptr., No. 16, News Notes. Hohler had refused to testify at a murder trial after the court concluded that his qualified privilege was outweighed by the need of the state for his testimony. The defendant was convicted without Hohler's testimony. Nevertheless, Hohler was tried for contempt and found guilty by a jury. On appeal the Maine Supreme Court affirmed the conviction. Maine v Hohler, 543 A.2d 364 (Me. 1988) It found that Hohler had admitted that, not only was no confidential source involved, but that all of the information gained in the interview was in the article. The Court concluded that there was no privilege for nonconfidential, published information.

In In re Letellier, 578 A.2d 722 (Me. 1990), the Supreme Judicial Court affirmed the lower court's denial of reporter's motion to quash subpoena for outtakes of nonconfidential interview of public official under criminal investigation.

Letellier was a police commissioner charged with misusing his office to "fix" criminal charges against his son for drunk driving. Television reporter John Impemba of WCSH-TV videotaped a nonconfidential interview with Letellier during which Letellier made inculpatory statements. Brief segments of the interview were broadcast, and the prosecution subpoenaed Impemba and the entire videotape. the Superior Court denied Impemba's motion to quash the subpoena.

The Supreme Judicial Court discussed Branzburg and decided that no three-pronged test is required under the federal constitution. Instead the trial court should balance on a case-by-case basis the potential injury or impairment of the protected news gathering and editorial processes against the demonstrated need for evidence possessed by the reporter.

The court also concluded that its analysis of the reporter's claim of privilege under the Maine Constitution would be no different because nothing in the language or history of the free-press clause in the Maine Constitution warranted a different analysis from the analysis under the federal constitution.

In this case, the court emphasized that Letellier was a publicly identified, nonconfidential source who voluntarily responded to the reporter's questions about an

ongoing criminal investigation concerning alleged corruption in law enforcement. No disclosure of confidential sources would be involved, nor would the subpoena amount to a fishing expedition. The court also doubted that disclosure of the nonconfidential outtakes would chill newsgathering. The court then emphasized the importance of grand jury proceedings and the uniqueness of the outtakes in allowing the grand jury to assess the context of Letellier's statements. WCSH's paraphrase of Letellier's remarks did not serve as an alternative source, and no witnesses were present beyond the reporter. Lastly, the corruption of the law enforcement process is a matter of grave public concern. The court concluded that the Superior Court had correctly refused to quash the subpoena.

MARYLAND

Shield Law: Md. Cts. & Jud. Proc. Code Ann. Section 9-112 (1989)

Maryland's shield law has been construed as follows: (a) it applies only to sources (Lightman, infra); (b) it does not apply to the identity of persons observed engaging in criminal activity (Lightman, infra); (c) it applies to both confidential and non-confidential sources (Jenoff, infra); (d) disclosure of non-confidential sources does not waive the privilege with respect to confidential sources (Jenoff, infra); (e) the decision whether to disclose belongs to the reporter; (f) shield law protects disclosure of "the source" but publication of sources waives shield law protection, and the reporter can be compelled to testify before the grand jury (Tofani). In 1984, however, a bill was introduced to amend the shield law to specify that a reporter cannot be compelled to disclose any "unpublished information" related to the published material. This would broaden the shield law's protection beyond the Tofani reading. An opinion of the Maryland Attorney General states that only sources of information actually published are protected, although the statute specifically refers to information obtained for the "purposes of publication." Op. Att'y Gen., infra.

In the WBAL decision, the Maryland Court of Appeals ordered a video interview of a criminal defendant produced after applying the three-part test, while declining to decide whether reporters enjoy a qualified constitutional privilege. The tone of the opinion is ominously anti-press.

Qualified privilege: Not recognized. Lightman (observation of criminal activity).

1. State v Sheridan, 248 Md. 320, 236 A.2d 18 (1967)
2. Lightman v State, 15 Md. App. 713, 294 A.2d 149 (Ct. Spec. App. 1972), aff'd per curiam, 266 Md. 550, 295 A.2d 212, cert. denied, 411 U.S. 951 (1973)
3. Agnew, 73-965 (D.C. Md. 1973). In re Proceedings of Grand Jury Impaneled, December 5, 1972
4. Kapiloff v Dunn, 27 Md. App. 514, 343 A.2d 251, cert. denied, 426 U.S. 907 (1976) (Md. Spec. App. 1975)

5. Jenoff v Hearst Corp., 453 F. Supp. 541 (D. Md. 1978), aff'd, 644 F.2d 1004 (4th Cir. 1981)
6. 63 Op. Att'y Gen. 325 (1978)
7. Bilney v Evening Star Newspapers Co., 43 Md. App. 560, 406 A.2d 652 (Md. Ct. Spec. App. 1979) aff'd 4 Med. L. Rptr. 1924 (Prince George's Co. 1978)
8. D'Alfonso v A.S. Abell Co., 9 Med. L. Rptr. 1015 (D. Md. Jan. 4, 1983)
9. Tofani v Maryland, Summarized in News Media & The Law at 44 (Sept. – Oct. 1983); 297 Md. 165, 465 A.2d 413 (Ct. App. 1983)
10. In re State of California for County of Los Angeles, Grand Jury Investigation, 57 Md. App. 804, 471 A.D.2d 1141, cert. denied sub nom., Rees v County of Los Angeles, 104 S. Ct. 2388 (1984)
11. WBAL-TV Division, the Hearst Corporation v Maryland, 300 Md. 233, 477 A.2d 776 (1984)
12. State v Makofski, summarized in News Media Update (Ap. 22, 1985) at 2

MASSACHUSETTS

Shield Law: None.

The Massachusetts Supreme Judicial Court rejected a rule for a reporter's privilege recommended by a Governor's Press Shield Law Task Force. Petition for the Promulgation of Rules, 11 Med. L. Rptr. 2307 (1985)

Qualified Privilege: In the Matter of A John Doe Grand Jury Investigation, 1991 Mass. LEXIS 353 (Supreme Judicial Court, July 9, 1991). A grand jury issued a subpoena ordering two reporters to divulge the identity of confidential sources of certain published information. A Superior Court judge allowed motions to quash the subpoena and a single justice of the Supreme Judicial Court affirmed.

On appeal, the Supreme Judicial Court relied on the balancing principles stated in Petition for the Promulgation of Rules. The court weighed the low likelihood of benefit to the grand jury against the public interest in encouraging dissemination of information and concluded that the decision to quash the subpoenas should be affirmed.

Massachusetts has historically declined to recognize a reporter's privilege, either absolute or qualified, emanating from the Federal Constitution, the Massachusetts Declaration of Rights or the common law. See, eg., Dow Jones & Co v Superior Court, infra. Although this pattern has been consistent, recent cases decided by Massachusetts courts had at least suggested the possibility that some reporter's privilege will be recognized in the near future. In In re Roche, infra the court ended its opinion by intimating that it would attempt to develop a common law privilege of some kind in upcoming cases, in dictum so unequivocal that a separate concurrence

called it “a current commitment to a future equivalent of a so-called press ‘shield’ law” and urged the majority to wait until the next case arose. However, in recently rejecting a proposed judicial rule for a reporter’s privilege, the Supreme Court noted that it had refused to recognize a common law or constitutional privilege, and gave no indication that it was about to reconsider that holding. But in Sinnott v Boston Retirement Board, the Supreme Judicial Court upheld as within the discretion of the trial court a decision granting a subpoena issued to force revelation of a reporter’s sources. The court said that even if not of a constitutional right, the court could consider the reporter’s First Amendment interests and apply the principles of exhaustion of alternative sources and need set forth the 1985 petition as a basis for denying the access to the reporter’s material.

In Commonwealth v Corsetti, *infra*, the Supreme Judicial Court found no constitutional or common law privilege “where the source is disclosed and the testimony sought from the reporter concerns information already made public.” Corsetti had refused to testify in a murder trial. He was placed in contempt and on August 30, 1982, Corsetti became the first reporter to be jailed in Massachusetts. His 90-day sentence was commuted by the governor to time served on September 7, 1982.

1. In re Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971), *aff’d sub nom.*, Branzburg v Hayes, 408 U.S. 665 (1972)
2. Dow Jones & Co. v Superior Court, 364 Mass. 317, 303 N.E.2d 847 (1973)
3. Grand Jurors of Middlesex County v Wallace (Mass. Super. Ct. Middlesex Co. Nov. 21, 1974)
4. In re Suffolk County Grand Jury, Superior Ct., Suffolk Co. Mass. 1976
5. Christie v City of Gloucester et al., C.A. 76-1963-M (D.C. Mass. 1976)
6. Zamagni v Yawkey, No. 13288 (Mass. Super. Ct. Suffolk Co. 1976)
7. In re Roche, Mass. Adv. Sh. (1980) 2203, stay entered, 448 U.S. 1312 (1980)
8. Massachusetts v McDonald, 6 Med. L. Rptr. 2230 (Super. Ct. Nov. 12, 1980)
9. Commonwealth v Corsetti, 387 Mass. 1 (1982)
10. Commonwealth v Belluci, Crim. No. 81-4155 (Mass. Superior Ct. Hampden Co. Aug. 30, 1982) (unpublished)
11. Hanify v Jacobs, Civ. Action No. 2066 (Mass. Super. Ct. Dukes Co. Jan. 8, 1982) (unpublished); see News Media & the Law, June-July 1982 at 35
12. Commonwealth v Greenberg, Nos. 81-2709, 81-2173 (Super. Ct. Middlesex Co. Mass. Mar. 2, 1983) (unpublished)
13. Russo v Geagan, 35 Fed. R. Serv. 2d 1403 (D. Mass.); *aff’d*, No. 82-3823-Mc, No. 83-558-Mc (D. Mass. Aug. 17, 1983)

14. Globe Newspaper Co. v Braemoor East of Marlborough, Mass. Appeals Court No. 83-0089C (Mar 1, 1983) (unpublished).
15. Commonwealth v Wornick, summarized in News Media Update (June 17, 1985) at 1
16. Sinnott v Boston Retirement Board, 402 Mass. 581 (Mass. 1988), cert. denied, 488 U.S. 980 (1989)
17. In the Matter of a John Doe Grand Jury Investigation, 1991 Mass. LEXIS 353 (Supreme Judicial Court, July 9, 1991)

MICHIGAN

Shield Law: Mich. Comp. Laws Section 767.5a (1982 & 1991 Cum. Supp.).

After the Michigan shield law was held not to protect a broadcast journalist, the statute was amended to expand its coverage to include the broadcast media and to shield absolutely against disclosure of confidential sources, except in criminal proceedings where the maximum sentence is life imprisonment, where only a qualified privilege is extended. News Media Update, Feb 2, 1987 at 4.

Qualified Privilege: “Public policy” to protect confidential sources recognized. Schultz, infra (libel action applying substantive law of Michigan). Decision reserved in Smith, infra.

In Marketos v American Employers Insurance, 1990 Mich. App. Lexis 341 (Mich. Ct. App. Aug. 29, 1990), a newspaper asserted a qualified privilege to decline to produce to an insurance company unpublished nonconfidential photographs of a fire taken by a newspaper photographer. The court of appeals affirmed the trial court’s order to produce the photographs on the ground that there is no qualified privilege under the federal or Michigan constitutions not to produce nonconfidential relevant material in the context of a civil litigation. The court criticized other courts that had construed Branzburg v Hayes so as to create a qualified reporter’s privilege. The court concluded that the administrative burden on newspapers of responding to such discovery requests was speculative. The court noted that the newspaper had a prior long-standing practice of providing such photographs upon request. The newspapers could seek a protective order if such discovery requests become abusive. The court also held that Michigan’s Shield Law, even as amended, did not protect disclosure of nonconfidential materials.

One judge dissented, noting that Branzburg v Hayes did not foreclose recognition of a qualified reporter’s privilege because that case did not involve civil litigation. The dissenting judge also thought that the newspaper’s past practices were irrelevant because the privilege was the newspaper’s to waive in particular cases.

1. People v Smith, No. 78-416 (Mich. Cir. Ct.), aff’d sub nom.; Stocking v Kalkaska County Circuit Judge, No. 78-4264 (Mich. Ct. App.), leave to app. denied, LC 78-416 (Mich. Sup. Ct. 1978)

2. People v Hoag, 89 Mich. App. 603, 281 N.W.2d 137 (Ct. App. 1979)
3. Schultz v Reader's Digest Ass'n, 468 F. Supp. 551 (E.D. Mich. 1979)
4. Stocking v Kalkaska Circuit Judge No. 70-3921 (Ct. App., State of Michigan Sept 29, 1978)
5. McArdle v Hunter, 7 Med. L. Rptr. 2294 (E.D. Mich. Nov 5, 1981)
6. In Re Photo Marketing, 120 Mich. App. 527, 327 N.W.2d 515 (Ct. App. 1982) (released for publication Jan 6, 1983)
7. In re Subpoena Brad Stone, News Media Update, March 31, 1986 at 1, 8
8. Michigan v Storer Communications, 13 Med. L. Rptr. 1901 (Mich. Ct. App. 1986) (review denied). See Sixth Circuit decision on writ of habeas corpus
9. Marketos v American Employees Insurance, 460 N.W.2d 272 (Mich. Ct. App. 1990)
10. Leiserman v Wyandotte Bd. of Educ., 16 Med. L. Rep. 2429 (Mich. St. Tenure Comm. Aug. 11, 1989)

MINNESOTA

Shield Law: Minn. Stat. Ann. Sections 595.021-025 (1988)

The shield law explicitly protects unpublished information which would tend to reveal sources; provides for a divestiture procedure incorporating exhaustion, relevance, and compelling interest requirements. By judicial interpretation, the law also protects unpublished information from a nonconfidential source. Aerial Burials, infra.

Qualified Privilege: No reported decisions.

1. Thompson v State, 284 Minn. 274, 170 N.W.2d 101 (1969)
2. Aerial Burials, Inc. v Minneapolis Star and Tribune Co., 8 Med. L. Rptr. 1653 (Minn. Dist. Ct. Hennepin Co. April 15, 1982)
3. Cohen v Cowles Media, 457 N.W.2d 199 (Minn. 1990) (source cannot sue for breaching pledge of confidentiality), rev'd, 111 S. Ct. 2513 (1991)

MISSISSIPPI

Shield Law: None.

Qualified Privilege: Although there are no reported decisions, a pair of unreported cases in 1983 recognized for the first time a privilege in both civil and criminal cases based on the U.S. Constitution and the Mississippi Constitution, section 13. (Hawkins, Harden *infra*).

1. Hawkins v Williams, Civ. No. 2900054 (Miss. Cir. Ct. 1st Jud. Dist. Hinds Co. Mar 16, 1983) (unpublished)
2. Mississippi v Harden, Crim. No. 3858 (Cir. Ct. of Yalobusha Co. Mar 23, 1983) (unpublished)

MISSOURI

Shield Law: None.

Qualified Privilege: A trial court found a qualified privilege to protect unpublished photographs subpoenaed for use in a civil trial. Jorgensen v City of Kansas City, News Media Update, Nov. 4, 1985 at 4. A qualified privilege was implicitly recognized, though found inapplicable, in CBS, Inc. v Campbell, 645 S.W.2d 30 (Mo. Ct. App. 1982).

MONTANA

Shield Law: Mont. Code Ann. §§ 26-1-901-903 (1989).

Montana's shield law provides an absolute privilege for any information gathered by a reporter in the course of his employment. In re Investigative File, *infra*, held that the privilege embodied in a predecessor statute was personal to the reporter. An Associated Press reporter had recorded a telephone call with a kidnapper. The AP, not the reporter, was in possession of the tape. The District Judge held that the AP could not claim the privilege. Montana v Louquet, *infra*, held that by the terms of the current statute the privilege could only be waived by disclosure before a judicial, legislative, administrative, or other body having subpoena power. Voluntary testimony in a libel action is a waiver. Sible.

Qualified Privilege: No reported decisions.

1. In re Investigative File, No. 40SPL (Ist Dist. Mont. Oct 2, 1978)
2. Montana v Louquet, 7 Med. L. Rptr. 1410 (D. Mon. Jan 6 1981)
3. Sible v Lee Enterprises, 13 Med. L. Rptr. 1738 (Mont. 1986)

NEBRASKA

Shield Law: Neb. Rev. Stat. Sections 20-144 to –147 (1987).

Under the statute, unpublished materials explicitly protected.

Qualified Privilege: No reported decisions.

NEVADA

Shield Law: Nev. Rev. Stat. § 49.275 (1986).

The Nevada shield law grants a privilege to reporters, former reporters and others to refuse to disclose any sources of unpublished or published information. In Newton v NBC and Laxalt v McClatchy, federal district courts stated that no state had a shield law more protective of journalists than Nevada, and thus applied it to protect the confidential sources of the respective libel defendants. The only Nevada case construing this law found that the privilege had been waived. Newburn v Hughes Medical Institute, *infra*, held that a reporter waived his privilege regarding information by voluntarily disclosing it to third parties. A Nevada statute, NRS 49.385, stated that voluntary disclosure of “any significant part of the [privileged] matter” constituted waiver.

Qualified Privilege: Not recognized. Newburn v Hughes Medical Institute, *infra*.

1. Newburn v Howard Hughes Medical Institute, 95 Nev. 368, 594 P.2d 1146 (1979)
2. Newton v NBC, 11 Med. L. Rptr. 1950 (D. Nev. 1985)
3. Laxalt v McClatchy, 14 Med. L. Rptr. 1199 (D. Nev. 1987), rev'q 13 Med. L. Rptr. 1199 (D. Nev. 1986) (Mag. Atkins)
4. Las Vegas Sun Inc. v The Eighth Judicial District Court, 761 P.2d 849 (Nev. 1988)

NEW HAMPSHIRE

Shield Law: None.

Qualified Privilege: Qualified privilege recognized.

The Supreme Court of New Hampshire has held that the provision of the state constitution which states that “liberty of the press” is “essential to the security of freedom” establishes a qualified reporters’ privilege. Opinion of the Justices, *infra* (in a civil statutory proceeding for the removal of the Director of Probation a reporter who was not a party could refuse to disclose confidential sources). The Court expressly reserved decision on the scope of the privilege, whether it was absolute, the definitions

of “reporter” and “press”, and whether the privilege would apply in defamation actions or criminal proceedings. In Downing v Monitor Publishing Co., *infra*, a defamation action, the New Hampshire Supreme Court held that disclosure of confidential sources would be ordered upon a showing of a genuine issue as to the falsity of the allegedly defamatory publication (representations of counsel being sufficient to establish such an issue). The court also held that if a media defendant chose to go to jail rather than reveal its sources, a presumption would arise that no sources existed. This presumption would be removed only if the sources were revealed a reasonable time before trial. Finally, in New Hampshire v Siel, *infra*, the New Hampshire Supreme Court held that the qualified privilege applies in criminal cases.

1. Opinion of the Justices, 117 N.H. 386, 373 A.2d 644 (1977)
2. Downing v Monitor Publishing Co., 120 N.H. 383, 415 A.2d 683 (1980)
3. New Hampshire v Siel, 7 Med. L. Rptr. 1904 (Super. Ct. June 18, 1981)
4. New Hampshire v Siel, 122 N.H. 254, 444 A.2d 499 (1982)

NEW JERSEY

Shield Law: N.J. Stat. Ann. §§ 2A:84A-21, -21.1 to 21.8, -21a, -29 (1976, 1991 Cumm. Supp.).

Reporters have received steadily increasing protection from both the legislature and the courts in New Jersey. In a 1972 case, In re Bridge, *infra*, the court declined to weigh a subpoenaed reporter’s First Amendment interests against a party’s need for information and held that under the 1960 shield law the reporter’s privilege was entirely waived when the source of information was revealed. Since then, amendments to the shield law and corresponding changes in judicial attitudes have eliminated Bridge’s refusal to balance First Amendment concerns against the defendant’s desire to obtain confidential materials. In re Farber, *infra*, agreed with Bridge’s refusal to balance First Amendment concerns against the defendant’s desire to obtain confidential materials. On the other hand, it found that the reporter’s information was clearly privileged under New Jersey’s revised shield law. Concern for the defendant’s rights under the Sixth Amendment and its New Jersey counterpart led the court to conclude that the confidential communications could be disclosed, but only after certain protections had been afforded. Before any materials were released for in camera review, defendants would have to show that the desired material was relevant, necessary, and unobtainable from alternative sources.

The New Jersey legislature once again amended its shield law in 1979 to codify the procedural protections mandated by Farber and also to provide that the information sought must bear substantially on the issues of guilt or innocence to outweigh the newsman’s qualified privilege. In State v Boiardo, *infra*, the court reaffirmed the importance of the new law’s protections stressing that the burden of establishing the right to reporters’ evidence falls on the criminal defendant and that even in camera review presents a substantial and unnecessary encroachment on reporters’ rights when material is available from nonmedial sources. The Court in In re Vrazo, *infra*, also

supported a broad construction of the shield law's protection, holding that a partial disclosure of confidential sources did not amount to a waiver requiring full disclosure, and that reporters who witnessed crimes involving non-violent theft by deception did not have to testify about what they had observed.

In Maressa, *infra*, a libel action, the New Jersey Supreme Court held that the state shield law affords journalists an absolute right not to disclose confidential sources or editorial processes in a libel action. And in Resorts International, *infra*, it held that neither partial disclosure nor an assertion of separate defenses operated to waive the law's protection.

In In re Woodhaven Lumber, the New Jersey Supreme Court rejected an argument that unpublished photographs of a suspicious fire fell within the "eyewitness exception" of the shield law. It reasoned that the photos were not related to the criminal act of possible arson, but only of the result of that act. A contrary result would make reporters on crime-beats hard-pressed to claim shield law protection.

In a lower court case decided one month before Maressa and Resorts International, however, the Superior Court held that the shield law does not preclude state of mind inquiries in a libel action. Central New Jersey Home, *infra*. This holding was arguably overruled by the editorial process protection granted in Maressa and Resorts International.

Qualified Privilege: Recognized in dicta. Boiardo, *infra* (criminal context); Resorts International, *infra* (libel context).

1. Brogan v Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956), over'd, 89 N.J. 176, 445 A.2d 376, cert. denied, 459 U.S. 907 (1982)
2. Beecroft v Point Pleasant Printing & Publ. Co., 82 N.J. Super. 269, 197 A.2d 416 (Law Div. 1964)
3. In re Bridge, 120 N.J. Super. 460, 295 A.2d 3 (App. Div.), cert. denied, 62 N.J. 80, 229 A.2d 78 (1972), Cert. denied, 410 U.S. 991 (1973)
4. In re Farber – State of New Jersey v Jascalevich, 78 N.J. 259, 394 A.2d 330 (1978), cert. denied, 439 U.S. 997 (1978)
5. Lawrence v Bauer Publishing & Printing Ltd., 78 N.J. 371, 396 A.2d 569 (1979)
6. State v Boiardo, 82 N.J. 446, 414 A.2d 14 (1980), 83 N.J. 350, 416 A.2d 793 (1980)
7. In re Vrazo, 176 N.J. Super. 455, 423 A.2d 695 (1980)
8. Central New Jersey Home v New York Times Co., 8 Med. L. Rptr. 1456 (N.J. Super. Ct. Middlesex Co. Apr. 5, 1982)
9. Maressa v New Jersey Monthly, 85 N.J. 176, 445 A.2d 376, cert. denied, 459 U.S. 907 (1982)

10. Resorts International Inc. v New Jersey Monthly, 89 N.J. 212, 445 A.2d 395, cert. denied, 459 U.S. 907n (1982)
11. In re Schuman, 114 N.J. 14, 552 A.2d 602 (1989)
12. In the Matter of Woodhaven Lumber and Mill Work, 123 N.J. 481, 589 A.2d 135 (N.J. 1991)
13. New Jersey v Franks, 19 Med. L. Rptr. 2006 (N.J. Super. Ct. 9/24/90)

NEW MEXICO

Shield Law: N. Mex. Stat. Ann. § 38-6-7 (1978 & Supp. 1987); original shield law held unconstitutional in Ammerman, *infra*; replaced with New Mexico Supreme Court Rule of Evidence 11-514, effective Nov. 1. 1982.

The New Mexico shield law was held unconstitutional under the state constitution in Ammerman. The Court held that the statute “did nothing more or less than attempt to create a rule of evidence”, *id.* at 1356, and that the state constitution vested the power to create such rules in the court alone. In 1982 the New Mexico Supreme Court filled the gap left by Ammerman by adopting a court rule giving a privilege of confidentiality to reporters. The privilege applies to both sources and information not to be disclosed to persons other than those in the media. To overcome the privilege, a litigant must show that the news organization has relevant information which is not available from any other source. Furthermore, the state legislature has reasserted its original shield statute as it applies to nonjudicial governmental proceedings.

Qualified Privilege: Not recognized.

New Mexico courts have developed no common law protection for confidential information and have rejected an argument that any special speech of press rights are reposed in newpeople. In Ammerman, *infra*, the state Court of Appeals stated that: “[t]he First Amendment does not grant a broadcaster any privilege, qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding.” 3 Med. L. Rptr. at 1622.

Despite its resistance to the idea of reporter’s privilege, the Court of Appeals, at least, has shown some sensitivity to the issue of confidentiality. It decided, on purely evidentiary grounds, to uphold a trial judge’s order of in camera inspection to determine whether the sought-after identity of the informants would “lead to persuasive evidence”, *id.* at 1623. Such consideration was not shown defendant newspapers in Marchiondo v Brown, *infra*, a libel action. There the trial judge summarily denied all their objections based on privilege. In New Mexico v Bobbin, the Court of Appeals rejected on non-privilege grounds a criminal appellant’s argument that he had been denied discovery from a reporter, the opinion indicating that the trial court had ordered the reporter to testify.

1. Ammerman v Hubbard Broadcasting Inc., No.7-75-03366 (D.C.N.M.) (unreported), appeal from discovery order reversed, 89 N.M. 307, 551 P.2d 1354 (1976), judgement reversed, 572 P.2d 1258 (N.M. Ct. App. 1977), cert. denied, 572 P.2d 1257 (N.M. 1977), cert. denied, 436 U.S. 906 (1978)
2. Marchiondo v Brown, et al., Cause No. 75-02838 (2d Jud. Dist. 1979), writ of prohibition denied, Cause No. 12,488 Sup. Ct. of New Mexico 1979, cert. denied sub nom., Brown v Traub, 444 U.S. 979 (1979). All decisions reported at 5 Med. L. Rptr. 2041
3. New Mexico v Bobbin, 12 Med. L. Rptr. 1292 (N.M. Ct. App. 1985)

NEW YORK

Shield Law: N.Y. Civ. Rights Law § 79-h (McKinney 1981, 1991 Supp.)

The New York legislature strengthened the Shield Law in 1990 and overruled Knight-Ridder Broadcasting v Greenberg, 70 N.Y. 2d 151 (1987), in which the New York Court of Appeals had held that the Shield Law only protected journalists against forced disclosure of confidential sources. The new amendments to New York Civil Rights Law § 79-h protect a journalist from contempt charges for failing to disclose non-confidential sources as well. With non-confidential sources, the privilege is qualified, and can be defeated by proof that the information is (1) highly material and relevant, (2) critical or necessary to maintaining a claim or defense, and (3) not obtainable from an alternative source. The new law also gives “absolute protection for confidential news” notwithstanding that the confidential source or material is highly relevant and notwithstanding that the reporter did not solicit the information. Governor Cuomo signed the bill March 23, 1990, and it became effective Nov. 1, 1990.

New York previously amended its Shield Law effective October 6, 1981. The amendments extended the 1970 law’s protection to freelancers, still and moving photographers, authors of books, employers of journalists, and individuals connected with non-establishment media. They also instruct courts to apply the privilege notwithstanding that the information obtained by the reporter was not solicited or is highly relevant to the judicial proceeding.

In libel cases, the original shield law was construed to protect against disclosure of confidential sources as long as the confidential sources are not relied upon as evidence of verification. Greenberg v CBS Inc., infra. See Karaduman v Newsday Inc., infra.

However, the Court of Appeals has ruled that when a newspaper refuses, against a court order to do so, to reveal the identity of a person who wrote a letter to the editor, the trial court may not impose the harsh sanction of striking defendant’s answer and granting summary judgment to plaintiff. Rather, less burdensome sanctions should be used. Oak Beach Inn Corp. v Babylon Beacon Inc., 62 N.Y.2d 158 (1984). In Sharon v Time inc., infra, the court hinted that sanctions might not be imposed if the plaintiff was sufficiently able to probe actual malice by questioning about the source, its information and its reliability without having defendant identify the source. In another libel action, the Southern District interpreted the New York shield law as not protecting a CBS report of an internal investigation conducted to defend a libel suit.

Westmoreland v CBS, Inc., 9 Med. L. Rptr. 1521 (S.D.N.Y. Apr. 21 1983). In a separate ruling, the court ordered production of drafts of the internal investigation report as well as investigation materials, to the extent that confidential sources were not revealed. 9 Med. L. Rptr. 2316 (S.D.N.Y. Oct. 12, 1983). CBS then sought in camera review of the materials ordered produced. The court reviewed them and ordered that some, not all, be produced. 10 Med. L. Rptr. 1215.

The Court of Appeals recently reversed the Appellate Division's reversal of the grant of a motion to quash in a case calling for a reporter's testimony before the grand jury. Beach v Shanley, 94 A.D.2d 542, 466 N.Y.S.2d 725 (3d Dep't 1983), rev'd, 62 N.Y.2d 241, 476 N.Y.S.2d 304 (1984). The Court stated that the shield law gave broad protection, even where its protection might thwart a grand jury investigation. Cf. In re Ziegler, 9 Med. L. Rptr. 1013 (W.D.N.Y. Nov. 2, 1982) (requiring a reporter to testify to a crime he saw).

Qualified Privilege: Recognized.

In O'Neill v Oakgrove Construction Inc., the New York Court of Appeals issued a sweeping affirmation of the reporter's privilege both under the First Amendment and the New York State Constitution, holding it applicable to non-confidential materials and adopting the three-part test. In Knight-Ridder Broadcasting v Greenberg, supra, the Court of Appeals had held that, whatever qualified privilege may exist under the First Amendment did not protect a reporter from being compelled to testify before a grand jury, citing Branzburg.

One court in a defamation case has interpreted the First Amendment to require a preliminary showing of need for the reporter's material, compelling public interest, and the absence of any other realistic source of the needed information. In re Dack, 101 Misc. 2d 490, 421 N.Y.S.2d 775 (Sup. Ct. Monroe Co. 1979). The alternative source requirement was upheld in Greenleigh Assoc. Inc. v New York Post Corp., 79 A.D.2d 588 (1st Dep't 1980).

1. In the Matter of CBS Inc., Supreme Court Ontario County, New York (unreported) (Order, June 25, 1971) In re WBAI-FM, 42 A.D.2d 5, 344 N.Y.S.2d 393 (3d Dept. 1973)
2. Schwartz v Time Inc., 71 Misc. 2d 769, 337 N.Y.S.2d 125 (Sup. Ct. N.Y. Co. 1972)
3. In re Wolf, 39 A.D.2d 864, 333 N.Y.S.2d 299 (1st Dep't 1972)
4. People v Dan, 41 A.D.2d 687, 342 N.Y.S.2d 731 (4th Dep't 1973), appeal dismissed, 32 N.Y.2d 764, 344 N.Y.S.2d 955, 298 N.E.2d 118 (1973)
5. People v Bonnakemper, 74 Misc. 2d 696, 345 N.Y.S.2d 900 (City Ct. Rochester 1973)
6. People v Shea, Indictment No. 1719 (N.Y. Sup. Ct. Kings Co. Ruling June 10, 1974)
7. People v Monroe; People v Smith, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (Sup. Ct. Bronx Co. 1975)

8. People v Marahan, 81 Misc. 2d 637, 368 N.Y.S.2d 685 (Sup. Ct. Kings Co. 1975)
9. People v Barnes, 47 A.D.2d 722, 365 N.Y.S.2d 17 (1st Dep't 1975)
10. People v Dupree, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (Sup. Ct. N.Y. Co. 1976)
11. Davis v Davis, 88 Misc. 2d 1, 386 N.Y.S.2d 992 (Fam. Ct. Rensselaer Co. 1976)
12. People of the State of New York v Arif Kamal Abdullah Alikili, No. 2897 76, 2897A/76, 2897B/76 (Sup. Ct. Co. of New York May 25, 1977)
13. Andrews v Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (Sup. Ct. Onondaga Co. 1977)
14. Mackay v Driscoll, No. 77 3975 (Sup. Ct. Suffolk Co. 1978)
15. New York v Zagarino, 97 Misc. 2d 181, 411 N.Y.S.2d 494 (Sup. Ct. Kings Co. 1978)
16. In re O'Shaughnessy, 71 A.D.2d 676, 419 N.Y.S.2d 17 (2nd Dep't 1979)
17. Greenberg v CBS Inc., 69 A.D.2d 693, 419 N.Y.S.2d 988 (App. Div. 2d Dep't 1979)
18. In re Dack, 101 Misc. 2d 490, 421 N.Y.S.2d 775 (Sup. Ct. Monroe Co. 1979)
19. New York v LeGrand, 4 Med. L. Rptr. 2524 (N.Y. App. Div. Apr. 6, 1979)
20. In re Haden-Guest, 5 Med. L. Rptr. 2361 (N.Y. Sup. Ct. Bronx Co. Jan. 21, 1980)
21. Greenleigh Assoc. v New York Post, 79 A.D.2d 588, 434 N.Y.S.2d 388 (1st Dep't 1980)
22. Karaduman v Newsday Inc., 51 N.Y.2d 531 (1980)
23. Oak Beach Inn Corp. v Babylon Beacon Inc., summarized in Editor & Publisher Dec. 5, 1981 at p.10 (N.Y. Sup. Ct.)
24. People v Davoli, summarized in News Media Update Jan. 11, 1982 at p. 3
25. New York v Innaccone, 8 Med. L. Rptr. 1103 (N.Y. Sup. Ct. N.Y. Co. Jan. 28, 1982)
26. Capital Newspapers v Harris, 8 Med. L. Rptr. 1607 (N.Y. App. Div. Apr. 22, 1982)
27. Lawless v Clay, 9 Med. L. Rptr. 1223 (N.Y. Sup. Ct. Dec. 21 1982)
28. Wilkins v Kalla, 9 Med. L. Rptr. 1334 (N.Y. Sup. Ct. Feb. 25, 1983)
29. New York v Bova, 9 Med. L. Rptr. 1329 (Sup. Ct. Feb. 19, 1983)
30. In re Grand Jury Investigation, 118 Misc. 2d 195, 460 N.Y.S.2d 227 (N.Y. Co. Ct.), rev'd, 94 A.D.2d 542, 466 N.Y.S.2d 725 (3d Dep't 1983), rev'd motion granted, 62 N.Y.2d 241 (1984)

31. Westmoreland v CBS Inc., 97 F.R.D. 703 (S.D.N.Y. Apr. 21, 1983); 9 Med. L. Rptr. 2316 (S.D.N.Y. Oct 12, 1983)
32. Oak Beach Inn Corp. v Babylon Beacon Inc., 92 A.D.2d 102, 459 N.Y.S.2d 819 (2d Dep't 1983) (per curiam); aff'd, 62 N.Y.2d 158, 476 N.Y.S.2d 269 (1984)
33. Beach v Shanley, 94 A.D.2d 542 (1983); rev'd, 62 N.Y.2d 241, 476 N.Y.S.2d 765 (1984)
34. New York v Korkala, 99 A.D.2d 161, 472 N.Y.S.2d 310 (1st Dep't 1984) (opinion below reported in N.Y.L.J Sept. 19, 1983)
35. In re Grand Jury Subpoena Dated January 4, 1984, 583 F. Supp. 991 (E.D.N.Y. 1984)
36. Millicom v Giallanza, 10 Med. L. Rptr. 1591 (S.D.N.Y. Apr. 19, 1984)
37. CBA Electronics Ltd v Ellenberg, 10 Med. L. Rptr. 1095 (N.Y. Civ. Ct. Dec. 9, 1983)
38. Westmoreland v CBS Inc., 10 Med. L. Rptr. 1215 (S.D.N.Y. Jan. 24, 1984)
39. First United Fund v American Banker, 11 Med. L. Rptr. 1699 (Sup. Ct. Nass. Co. 1985)
40. New York Times v Troiano, 11 Med. L. Rptr. 1896 (Cty. Ct. Suff. Co. 1985)
41. Nulty v Pennzoil Co., 11 Med. L. Rptr. 1647 (1st Dep't 1985)
42. Sharon v Time Inc., 559 F. Supp. 538 (S.D.N.Y. 1984)
43. O'Neill v Oakgrove Construction, 13 Med. L. Rptr. 1143 (4th Dep't 1986)
44. Knight-Ridder Broadcasting v Greenberg, 70 N.Y.2d 151, 518 N.Y.S.2d 595, 511 N.E.2d 1116 (1987) aff'd 13 Med. L. Rptr. (3rd Dep't 1986)
45. New York v Hennessey, 13 Med. L. Rptr. 1109 (Dist. Ct. Nass. Cty. 1986)
46. O'Neill v Oakgrove Construction Inc., 71 N.Y.2d 521 (1988)
47. In re Gina C., 527 N.Y.S.2d 334 (Fam. Ct. 1988) rev'd 138 A.D.2d 77, 531 N.Y.S. 2d 86 (1st Dept. 1988)
48. New York v Martin, 14 Med. L. Rptr. 2349 (Dutch. Cty. Ct. January 25, 1988)
49. New York v Palese, 15 Med. L. Rptr. 1416 (Nass. Cty. Ct. May 20, 1988)
50. New York v Chambers, 15 Med. L. Rptr. 1151 (Sup. Ct. N.Y. Cty. 1988)
51. Sands v News America Publishing Inc., 161 A.D.2d 30 (1st Dep't 1988)
52. Mason v CBS, 15 Med. L. Rptr. 2126 (N.Y. Sup. Ct. 1988)
53. Dooley v Boyle, 531 N.Y.S. 2d 158 (Sup. Ct. 1988)

54. In re Guess? Inc., 17 Med. L. Rep. 1313 (N.Y. Sup. Ct. Dec. 15, 1989)
55. In the Matter of Subpoenas Issued to Jackie Majerus, 1991 N.Y. Misc. LEXIS 348 (Cty. Ct. Cayuga Cty. May 17, 1991)
56. Sands v News America Publishing Inc., 161 A.D.2d 30, 560 N.Y.S.2d 416 (1st Dep't Sept. 11, 1990)
57. New York v Doe, 18 Med. L. Rptr. 1641 (N.Y. Sup. Ct. 1990)
58. People v Lyons, 1991 N.Y. Misc. LEXIS 435 (City Ct. Buffalo Erie Cty. 1991)

NORTH CAROLINA

Shield Law: None.

Qualified Privilege: Recognized under U.S. and North Carolina Constitutions.

1. North Carolina v Rogers, 9 Med. L. Rptr. 1254 (N.C. Super. Ct. Feb. 17, 1983)
2. Chappell v Brunswick Board of Education, 9 Med. L. Rptr 1753 (N.C. Super Ct. May 18, 1983)
3. North Carolina v Hagaman, 9 Med. L. Rptr. 2525 (Gen. Ct. Just. 1983)
4. Johnson v Skurow, 10 Med. L. Rptr. 2463 (Mecklenburg Co. Super. Ct. 1984)
5. Locklear v Waccamaw Shovan Dev. Ass'n, 12 Med. L. Rptr. 2391 (No. Car. Gen. Ct. Just. 1986)
6. North Carolina v Smith, 13 Med. L. Rptr. 1940 (No. Car. 1987)

NORTH DAKOTA

Shield Law: N.D. Cent. Code Section 31-01-06.2 (1978 & 1991 Supp.). The N.D. Supreme Court refused to use the shield law to stop disclosure of a newspaper's unpublished photographs. Grand Forks Herald v District Court, 8 Med. L. Rptr. 2269 (N.D. Sup. Ct. Aug. 12, 1982). The statute's legislative history was read not to include an exhaustion requirement.

Qualified Privilege: No decisions reaching issue.

1. North Dakota v Bergman, 11 Med. L. Rptr. 1868 (Stark Cty. Ct. 1985)

OHIO

Shield Law: Ohio Rev. Code Ann. Sections 2739.04 & 2739.12 (1981 & 1990 Supp.).

Ohio's shield law protects any person working for or with a television or radio station or a "newspaper or press association" from being required to disclose the "source" of information obtained in the course of his employment. From the start, Ohio courts have read the statute narrowly. In 1960, a United States District Court found that a bi-monthly commercial publication was a periodical, and held that periodicals fall outside the statute's terms. Deltec Inc. v Dun & Bradstreet, *infra*. The information deemed privileged has been limited to the identity of the newsgroup's informant. Forest Hills Utility Co. v City of Heath, *infra* (a civil case), Ohio v Geis, *infra* (a criminal case). And the privilege, while "absolute" in its terms, *id.* at 1680, may be overridden by a criminal defendant's Sixth Amendment rights. *Id.*, In re McAuley, In re Rutti.

The procedures and standards to be used for determining which confidential sources must be disclosed are presently uncertain. The Ohio Supreme Court has not addressed the issue. In camera review by the trial judge is prohibited by the "plain grammar" of the shield law according to one Court of Appeals, In re Rutti, *infra* at 1516; according to two other Courts of Appeals, such review is vital to the trial judge's decision. See Ohio v Geis, In re McAuley. In camera review is not permitted in civil cases, even a libel case according to Weiss v Thomson Newspapers, *infra*. The court in Ohio v Geis would order disclosure when the specific criminal defendant's Sixth Amendment right to confront the informant overrides the dictates of the state shield law. By contrast, the court in In re McAuley would see the trial judge balancing these rights against the statute and a newsgroup's First Amendment rights.

McAuley referred to the First Amendment to establish a constitutional basis for extending reporter's privilege beyond the narrow bounds of Ohio's shield law. Slagle recognized the privilege to protect unpublished photographs of an auto accident sought for use in a civil litigation.

In State ex rel. National Broadcasting Co. v Court of Common Pleas, 52 Ohio St 3d 104 (1990), the Ohio Supreme Court did not recognize a qualified reporter's privilege and stated that Branzburg only prevents "harassment" of a news organization by the subpoena process.

At a widely publicized cult murder trial, Judge Martin O. Parks of the Lake County Court of Common Pleas ordered television stations to preserve all news and commentary tapes, including outtakes related to the trial. News media argued that the order was issued in anticipation of a subpoena duces tecum, chilled their ability to gather the news, and consequently violated the qualified privilege of reporters.

The court discussed Branzburg and doubted that it established a qualified privilege. Justice Powell's concurrence was primarily concerned with harassment of the news media, and "a court may enforce a subpoena over a reporter's claim of privilege, so long as it is persuaded that the subpoena has been requested or issued for a legitimate purpose, rather than for harassment." The first amendment will not shield news media from responding to a subpoena, although the media will be able to move to quash an overbroad subpoena. The court also held that Ohio's Shield Law did not apply because it only protects against forced disclosure of sources, which was not an issue in this case.

1. Deltec Inc. v Dun & Bradstreet, Inc. 91 Ohio Abs 478 (U.S.D.C. N.D. Ohio 1960)
2. Stokes v Lorain Journal Co., 26 Ohio Misc. 219, 266 N.E.2d 857 (Ct. Comm. Pl. Cuyahoga Co. 1970)
3. Forest Hills Utility Co. v City of Heath, 37 Ohio Misc. 30, 302 N.E.2d 593 (Ct. Comm. Pl. Licking Co. 1973)
4. Greenwood Village Inc. and Marchetti v First Federal Savings and Loan Association, In Bankruptcy No. B73-996 (N.D. Ohio, ruling, Feb. 2, 1976)
5. In re McAuley, 63 Ohio App. 2d 5, 408 N.E.2d 697 (Ct. App. Cuyahoga Co. 1979)
6. People v Monica, No. 39950 (Court of Appeals, 8th District, April 12, 1979)
7. In re Rutti, 5 Med. L. Rptr. 1513 (Ohio Ct. App. July 13, 1979)
8. Ohio v Geis, 2 Ohio App. 3d 258, 441 N.E.2d 803 (Ct. App.), on remand 7 Med. L. Rptr. 2379 (Ct. Comm. Pl. Dec. 2, 1981)
9. Weiss v Thomson Newspapers Inc., 8 Med. L. Rptr. 1258 (Ohio Ct. Comm. Pleas Licking Co. Nov. 27, 1981)
10. Slagle v Coca Cola, 12 Med. L. Rptr. 1911 (Ohio Ct. Comm. Pleas. Montg. City 1986)
11. Ohio v Hamilton, 12 Med. L. Rptr. 2135 (Ohio Ct. Comm. Pleas Montg. Cty 1986)
12. Schreiber v Multimedia of Ohio Inc, slip op. No. C-860454 (Ohio Ct. App. Oct. 21, 1987)
13. State ex rel. National Braodcasting Co. v Court of Common Pleas, 52 Ohio St. 3d 104 (1990)
14. Ohio v Daniel, 1990 Ohio App. LEXIS 5877 (Ct. of App., 11th App. Dist. Dec. 31, 1990)
15. Ohio v Anaga, 18 Med. L. Rptr. 1527 (Ct. of Common Pleas, Montgomery Cty. Jan. 3, 1991)

OKLAHOMA

Shield Law: Okla. Stat. Ann. Title 12, Section 2506 (1980 & 1991 Supp.).

The Oklahoma shield law protects all private professional news gatherers from being required to disclose (1) the “source” of published or unpublished information, or (2) unpublished information unless a court has found that “such information or identity is relevant to a significant issue in the action and would not with due diligence be obtained by alternate means.” (The difference between “source” and “identity” is not clarified elsewhere in the statute.) Exempt from the privilege is allegedly defamatory information where the defendant “asserts a defense based on the context of such information.” In Taylor v Miskorsky, *infra*, the Oklahoma Supreme Court rule that the shield law barred disclosure of notes and sources where relevance could not be shown.

Qualified Privilege: Recognized. Taylor, *infra*.

1. Taylor v Miskorsky, 640 P.2d 959, (Okla. Sup. Ct. Nov 24, 1981)

OREGON

Shield Law: Ore. Rev. Stat. Sections 44.510-.540 (1989).

In McNabb v Oregonian Publishing Co., *infra*, an appellate court ruled that the state shield law precluded a disclosure order for a purchaser's notes and unpublished materials in a libel action where defendant did not assert any defense erased upon the source of the article, although plaintiff asserts that the disclosure is necessary to prove actual malice.

Qualified Privilege: Not recognized. Buchanan, *infra*.

1. State v Buchanan, 250 Or. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968)
2. Oregon v Knorr, 8 Med. L. Rptr. 2067 (Cir. Ct. July 21, 1982)
3. McNabb v Oregonian Publishing Co., 10 Med. L. Rptr. 2067 (Cir. Ct. July 21, 1982)
4. Oregon ex rel. Meyer v Howell, 86 Ore. App. 570, 740 P.2d 792 (1987)
5. McNeil v Hupy, 18 Med. L. Rptr. 1238 (Cir. Ct. Washington Cty. Oct. 1, 1990)

PENNSYLVANIA

Shield Law: Cite as 42 Pa. C.S.A. § 5942 (1982 & 1991 Supp.).

In In re Taylor, *infra*, the Pennsylvania Supreme Court held that the shield law is to be liberally construed in favor of the press and protects unpublished materials as well as sources. Subsequent cases have treated the statutory privilege construed in Taylor as "well nigh absolute." Hepps v Philadelphia Newspapers Inc., *infra*. Information gathered by reporters has been held privileged under the statute whether it was confidential or non-confidential. Altemose Construction Co v Trades Council, *infra*. The privilege has been deemed unavailable only to the extent that material actually published can be discovered, In re Taylor, so that outtakes are clearly privileged, regardless of whether the sources' identities are known. See Steaks Unlimited v Deaner, *infra*. In libel cases involving media defendants, reporters in Pennsylvania are entitled to withhold both the names of sources and any notes of interviews they have compiled. Hepps; Massella v Philadelphia Newspapers Inc., *infra*. Libel defendants invoking the shield law will also not be precluded from testifying about confidential sources or information gained from them. Hatchard; Sprague. The Third Circuit has implied that in criminal actions Pennsylvania's shield law is limited only by the requirements of the Sixth Amendment. Riley v Chester, *infra*. The Third Circuit also gave a big boost to the Pennsylvania Shield Law when it interpreted the statute's reference to "sources" as including both primary and secondary sources. See LAL v CBS, *supra*.

In Pennsylvania v Banner, 17 Med. L. Rptr. 1434 (C.P. Lehigh County Nov. 13, 1989), a defendant in a murder case gave a jailhouse telephone interview to reporter Terry Mutchler of The Morning Call. In that interview he offered an alibi, although he also revealed possible motives that he might have for murdering his estranged wife. After the interview, Mutchler talked with police detectives and freely told them information from the interview, including information that she did not include in a subsequent article. Prosecutors subpoenaed the reporter in order to disprove the defendant's alibi defense and show that the defendant's alibi defense and show that the defendant had a motive to murder his estranged wife.

The court held that by publishing the source of the statements in the article and by divulging to the police additional information the reporter had waived protection under Pennsylvania's Shield Law. Similarly, the reporter waived her first amendment rights against forced disclosure, as well as any qualified privilege.

But even if no waiver occurred, the privilege would be defeated. Except for the defendant who had asserted his privilege against self-incrimination, only the reporter had access to the information, which was crucial to the prosecution's claim. The motion to quash the subpoena was denied.

Qualified Privilege: First Amendment privilege rejected in In re Taylor, infra.

1. In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963)
2. In re Nomination Paper of C. Joseph Tracy, No. 75-8108-01-6 (Pa. Ct. Com. Pleas Bucks Co. Sept. 3, 1975), appeal dismissed, 464 Pa. 237, 346 A.2d 303 (1975)
3. Altemose Construction Co v Building & Construction Trades Council, 443 F. Supp. 489 (E.D. Pa 1977)
4. Hepps v Philadelphia Newspapers Inc., 3 D.&C. 3d 693 (Chester Co. 1977)
5. Mazzella v Philadelphia Newspapers Inc., 479 F. Supp. 523 (E.D.N.Y. 1979)
6. Riley v Chester, 612 F.2d 708 (3d Cir. 1979)
7. Steaks Unlimited Inc. v Deaner, 623 F.2d 264 (3d Cir.), cert. denied, 449 U.S. 994 (1980)
8. LAL v CBS Inc., 9 Med. L. Rptr. 1112 (E.D. Pa. Nov. 17, 1982), aff'd, 726 F.2d 97 (3d Cir. 1984)
9. D'Alfonso v A.S. Abell Co., 9 Med. L. Rptr. 1015 (D. Md. Jan. 4, 1983) (interpreting Pennsylvania shield law)
10. In re Marita Lowman, Crim. Action No. 595 (Pa. Ct. Common Pleas Luzerne Co. 1983) (no opinion); appeal pending Pa. Superior Ct., No. 00984 PHL (1983)
11. Coughlin v Westinghouse Broadcasting, 603 F. Supp. 377 (E.D. Pa.), aff'd, 12 Med. L. Rptr. 1529 (3d Cir. 1985)

12. Hatchard v Westinghouse Broadcasting Co., 532 A.2d 346 (Pa. 1987), rev'd 350 P.A. Super. 1, 504 A.2d 211 (Pa. Super. Ct. 1986) (en banc)
13. Sprague v Walter, 543 A.2d 1078 (Pa. 1988), aff'd on other grounds 357 Pa. Super. 570, 516 A.2d 706 (Pa. Super. Ct. 1986)
14. Smith v BIC Corp., slip op., No. 87-0795 (E.D. La. October 20, 1987) (Mag. Powers), aff'd (E.D. Pa. May 31, 1988)
15. Pennsylvania v Banner, 17 Med. L. Rptr. 1434 (C.P. Lehigh cty. Nov. 13, 1989)
16. McMenamin v Tartaglione, 590 A.2d 802 (Pa. Commw. Ct. 1991).

RHODE ISLAND

Shield Law: R.I. Gen. Laws Sections 9-19.1-1 to -3 (1985). A proposed amendment to expand the protection to the state constitution was rejected by a constitutional convention. The News Media & the Law, Fall 1986 at 48-49.

Qualified Privilege: No privilege recognized in defamation cases.

In Capuano v Outlet Co., 1990 R.I. Lexis 149 (Sup. Ct. Aug. 16, 1990), a television station reported that plaintiffs were involved with organized crime in an interstate waste hauling scheme. Plaintiffs sued for defamation and sought to force disclosure of confidential sources by television reporter. The trial court denied two motions to compel disclosure, one on the basis of qualified first amendment privilege and another based on Rhode Island's Shield Law.

The Rhode Island Supreme Court discussed Branzburg and found that no qualified privilege was recognized. The court stated that Justice Powell's concurrence only stood for the proposition that grand jury subpoenas must be issued in good faith. There is no qualified privilege to refuse to divulge confidential sources in a defamation action, nor should a plaintiff be forced to engage in futile investigations and depositions of other individuals before questioning the reporters themselves.

The court then turned to Rhode Island's Shield Law, which specifically states that the privilege shall not apply when plaintiff seeks disclosure of confidential source in defamation action. The trial court's grant of summary judgement was vacated, and the case remanded.

1. Fisher v McGovern, C.A. No. 83-04815, slip op. (D.R.I. Apr. 13, 1984)
2. Capuano v Outlet Co., 579 A.2d 469 (R.I. Sup. Ct. 1990)
3. Outlet Communications Inc. v State, 588 A.2d 1050 (R.I. 1991)

SOUTH CAROLINA

Shield Law: None.

Qualified Privilege: No reported decisions.

TENNESSEE

Shield Law: Tenn. Code Ann. Section 24-1-208 (1980 & 1990 Supp.).

The Tennessee shield law prohibits any person gathering information for publication or broadcast from being required to disclose such information or its sources. Allegedly defamatory information is exempted where a defense is based on its source. The privilege may be divested upon application to the Court of Appeals where it is shown that the information (1) “is clearly relevant to a specific probable violation of law”, (2) “cannot reasonably be obtained by other means”, and (3) is subject to “a compelling and overriding public interest”. See Austin, infra. The statute has been found not to violate the state Constitution. Taylor, infra.

The shield law has been given a very broad reading. The Tennessee Supreme Court has held that the shield law protects against disclosure in civil or criminal litigation of a journalist’s confidential and non-confidential sources. Austin.

In Tennessee v Shaffer, 17 Med. L. Rptr. 1489 (Tenn. Ct. App. Jan. 19, 1990), the defendant in murder case gave a jailhouse interview with television reporter in which he confessed to two murders. The interview lasted more than two hours, but only ten minutes were broadcast. The prosecutor subpoenaed the outtakes of the interview in order to rebut the defendant’s insanity defense and discover the identities of the victims who were only known by nicknames. The lower court ordered the reporter to produce the outtakes for in camera inspection in order for the court to determine whether the information could be obtained by other means.

Tennessee’s shield Law requires the party seeking disclosure to show by clear and convincing evidence that the information sought (1) is relevant to a probable violation of the law, (2) cannot be obtained by alternative means, and (3) there is a compelling public interest in the information. Here the trial court found elements (1) and (3) established by clear and convincing evidence, but could not be certain the information was unavailable from other sources.

The Court of Appeals held that nothing in the statute allows an in camera inspection to determine whether the elements have been established. The lower court’s order thus violated the Shield Law. Permitting such inspections would allow the court to indulge in “fishing expeditions” in an attempt to aid the prosecution.

Qualified Privilege: Tennessee has developed no common law reporter’s privilege. See Taylor, infra.

1. Taylor v State of Tennessee Democratic Executive Committee et al. No. 79507-1 R.D., Chancery Ct. Shelby Co. Tenn. (Memorandum Opinion, June 24, 1975)
2. Austin v Memphis Publishing Co., 655 S.W.2d 397 (Tenn. Ct. App. 1981)
3. Austin v Memphis Publishing Co., 655 S.W.2d 146 (Tenn. 1983)
4. Benson v McCunkey, 11 Med. L. Rptr, 1711 (Tenn. Ct. App. 1985)
5. Tennessee v Curriden, 14 Med. L. Rptr. 1797 (Tenn. 1987)
6. Tennessee v Shaffer, 17 Med. L. Rptr 1489 (Tenn. Ct. App. Jan. 19, 1990)
7. Dingham v Harvell, 1991 Tenn. App. LEXIS 110 (Ct. of App. Feb. 15, 1991)
8. Tennessee v Lane, 18 Med. L. Rptr. 1624 (Tenn. Cir. Ct. Jan. 10, 1991)

TEXAS

Shield Law: None.

Qualified Privilege: Recognized.

In Dallas Oil and Gas, Inc. v Mouer, *infra*, a civil case in which a subpoena was served on a non-party newsman, the Court of Civil Appeals held that disclosure “will not be compelled in [the] absence of a concern so compelling as to override the rights of freedom of speech and press.” The court accordingly found the trial judge to have been “justified in requiring a strict showing that the testimony would be relevant and admissible before requiring [such] disclosure.” *Id.* at 77, 78. In 1979, a lower court held Dallas Oil to be applicable to testimony before a grand jury or (in dictum) in a criminal trial. In re Grand Jury Subpoena, *infra*. Only where “the State shows a compelling need for such testimony” will “the general public interest in effective law enforcement” override the “interests of a free press.” *Id.* at 1153.

1. Dallas Oil and Gas, Inc. v Mouer, 533 S.W.2d 70 (Ct. Civ. App. 1976)
2. In Re McKinnon (Austin, Texas) (unreported)
3. In re Grand Jury Subpoena, 5 Med. L. Rptr. 1153 (Tex. 105th Dist. Ct. Nueces Co. May 24, 1979)
4. Suede Originals v Aetna Casualty, 8 Med. L. Rptr. 2565 (Tex. Dist. Ct. Nov. 19, 1982)
5. Trautman v Dallas School Dist., 8 Med. L. Rptr. 1088 (N.D. Tex. Sept 2, 1981; Nov. 3, 1981; Jan. 26, 1982), vacated sub nom. In re Selcraig, 705 F.2d 789 (5th Cir. 1983)
6. Ex Parte Grothe, 687 S.W.2d 736 (Tex. Ct. Crim. App. 1984), cert. denied, 474 U.S. 944 (1985)

7. State v Olafson and State v Berryhill, News Media Update, August 12, 1985 at 1, 4.
8. Channel Two Television v Dickerson, 13 Med. L. Rptr. 2133 (Tex. ct. App. 1987)

UTAH

Shield Law: None.

Qualified Privilege: No reported decisions.

VERMONT

Shield Law: None.

Qualified Privilege: Recognized

Recognizing the news media's First Amendment interests, the Vermont Supreme Court has required a criminal defendant deposing a reporter as third-party witness to demonstrate that there is no other adequate source for the information sought and that the information is relevant and material to the issue of guilt or innocence. State v St. Peter, *infra*. A subpoena duces tecum will be quashed if the defendant cannot demonstrate in affidavits that the materials are relevant, restricted to evidentiary material, and not otherwise procurable, and that the application is made in good faith. Moreover, under both the federal and state constitutions, the documents must be relevant and material to the issue of guilt or innocence. Vermont v Blais, *infra*. However, the First Amendment will not shield reporters from being required to appear and answer questions relevant to a good-faith criminal investigation. In re Powers, *infra*.

1. State v St Peter, 132 Vt. 226, 315 A.2d 254 (1974)
2. Petition of Green Mountain Power Corp., 136 Vt. 170, 385 A.2d 1110 (Dist. Ct. 1978)
3. Vermont v Blais, 6 Med. L. Rptr. 1537 (Dist. Ct. Orleans Co. July 7, 1980)

VIRGINIA

Shield Law: None

Qualified Privilege: Recognized

The Virginia Supreme Court has held that a reporter has a First Amendment privilege to refuse to disclose confidential information and sources. The Court ruled in a criminal context that the privilege would yield only "when the defendant's need was essential to a fair trial," which the court limited to situations where the information was reasonably believed to be material to proof of an element of the crime or an

asserted defense, reduction in the seriousness of the crime or mitigation of the penalty. Possible use as impeachment evidence was found not sufficiently material to warrant disclosure. Brown v Commonwealth, *infra*. In the context of civil litigation, a federal district court held that the qualified privilege could be abrogated only in “rare and compelling circumstances,” necessitating a showing that the only practical access to crucial information needed to develop the case was through the reporter’s confidential source information. However, discovery of non-confidential material, including draft scripts and outtakes, was found to be outside the scope of the First Amendment privilege. Gilbert v Allied Chemical Corp., *infra*.

1. Brown v Commonwealth, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974)
2. Gilbert v Allied Chemical Corp., 411 F. Supp. 505 (E.D. Va. 1976)
3. In re Robin Traywick, summarized in News Media & The Law at 46 (Nov. 1982 [?]) (Richmond Cir. Ct., Div. 1, July 28, 1982)
4. In re Subpoena Issued to David Goldberg, summarized in News Media Update, March 25, 1985) at 1.

WASHINGTON

Shield Law: None.

Qualified Privilege: Common law privilege recognized.

The Washington Supreme Court has ruled that a qualified reporter’s privilege exists under the common law to withhold the names of confidential sources when requested to disclose them during the pretrial discovery stages of a libel action. Senear v The Daily Journal American, *infra*. The court held that a showing of confidentiality is a prerequisite to the establishment of the privilege, and that the privilege can be defeated if the underlying claim is nonfrivolous, the information goes to the heart of the claim and reasonable alternative sources have been exhausted. On remand in Senear, the Washington Superior Court denied the motion to compel production in an opinion very favorable to reporters. The Washington Supreme Court recently held that the privilege applied in criminal cases as well. Washington v Rinaldo, *supra*.

In Washington v Terwillinger, a trial court held that a qualified privilege under the First Amendment protected non-confidential, unpublished information in a criminal trial and that the defendant had not met the tests necessary to overcome that privilege.

1. Senear v The Daily Journal American, 97 Wash. 2d 148, 641 P.2d 1180 (1982)
2. Senear v Daily Journal American, 8 Med. L. Rptr. 2489 (Wash. Super. Ct. Nov. 17, 1982) (on remand from 8 Med. L. Rptr. 1151)
3. Washington v Rinaldo, 102 Wash. 2d 749, 689 P.2d 392 (1984)
4. Clampitt v Thurston County, 9 Med. L. Rptr. 1206 (Wash. Sup. Ct. Feb. 3, 1983)

5. State v Terwilliger, 11 Med. L. Rptr. 2463 (Wash. Sup. Ct. 1985)

WEST VIRGINIA

Shield Law: None

Qualified Privilege: Recognized in State ex rel. Hudok v Henry, 389 S.E.2d 188 (1990).

In State ex rel. Hudok v Henry, 389 S.E.2d 188 (1990), a newspaper reporter and a radio reporter interviewed a magistrate's clerk who was later discharged from her job. At an administrative hearing to contest the dismissal, the judge who fired the clerk subpoenaed the reporters to support his case for her dismissal. Both reporters refused to testify and were held in contempt.

The supreme court of West Virginia discussed Branzburg and found that it established a qualified privilege under the first amendment. This privilege applies to both confidential and nonconfidential information and can be defeated if the opposing party shows that the information is highly material and relevant, necessary to the maintenance of the claim, and not obtainable from other available sources. Applying this privilege, the court found that the information sought was too tenuous to the hearing to warrant disclosure.

1. State ex rel. Hudok v Henry, 389 S.E.2d 188 (1990).

WISCONSIN

Shield Law: None.

Qualified Privilege: Recognized

The Wisconsin Supreme Court has firmly upheld the right of newsmen under the U.S. and Wisconsin constitutions to refuse to disclose confidential sources absent a showing of compelling need and the lack of alternative sources. Zelenka v Wisconsin, *infra*; State v Knops, *infra*. Zelenka suggests that, despite Branzburg, the Wisconsin Constitution affords such a privilege even during an appearance before a grand jury. The same balancing test will be applied in civil litigation, and factors to be considered are (1) whether the party seeking the information has attempted to obtain it elsewhere; (2) whether the information goes to the heart of the matter; (3) whether the information is of a certain relevance; and (4) the type of controversy. Amato v Fellner, *infra*.

In Green Bay Newspapers (*infra*) the Supreme Court set forth strict requirements to be met before an order for in camera inspection can be issued.

1. State v Knops, 49 Wis. 2d 647, 183 N.W.2d 93 (1971)

2. Zelenka v State, 83 Wis. 2d 601, 266 N.W.2d 279 (1978), ovrl'd, 103 Wis. 2d 228, 307 N.W.2d 628 (1981)
3. Amato v Fellner, 4 Med. L. Rptr. 1552 (Wis. Cir. Ct. Sept. 13, 1978)
4. Wisconsin ex rel. Green Bay Newspapers Co. v Circuit Court, 113 Wisc. 2d 411, 335 N.W.2d 367 (1983)
5. Wisconsin v Sievertsen, 18 Med. L. Rptr. 2175 (Wis. Cir. Ct., 5/13/91)

WYOMING

Shield Law: None

Qualified Privilege: No cases reported.

APPENDIX 4

AUSTRALIAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS 1989

"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 learnt in his professional relationship with the patient.

6.2.2 The complications of modern life sometimes create difficulties for the doctor in the application of the principle, and on certain occasions it may be necessary to acquiesce in some modification. Always, however, the overriding consideration must be the adoption of a line of conduct that will benefit the patient or protect his interests.

6.2.3 The principle of professional secrecy still applies as between husband and wife but there are times when consent if not actually given by a spouse could be reasonably inferred. The decision whether to divulge the information to the other spouse, when consent has not been obtained, would be a matter for the discretion of the attending practitioner which he must exercise with the greatest care and for which he must accept full responsibility at all times. He must adopt a line of conduct that will benefit the patient and protect the patient's interest. Moreover, if he does anything which damages the patient's interest he renders himself liable to an action at law.

6.2.4 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.

6.2.5 Generally speaking, the State has no right to demand information from a doctor about his patient save when some notification is required by statute, as in the case of infectious

disease. When in doubt concerning matters that have legal implications a doctor may also wish to consult the medical defence organization of which he is a member.

6.2.6 The greater concern of Government with the welfare of the community has brought doctors into close contact with government departments, hospitals boards and many other bodies composed partly or wholly of non-medical persons, with the result that requests are made by medical or lay officials for clinical records or other information concerning patients.

6.2.7 Other parties who frequently seek information from a doctor are employers who request reports on the medical condition of absent of (sic) sick employees, insurance companies requiring particulars about the past history of proposers for life assurance or deceased policy holders and solicitors engaged in threatened or actual legal proceedings.

6.2.8 In all such cases, where medical information is sought, the doctor should make it a rule to refuse to give any information in the absence of the consent of the patient or the nearest competent relative.

LAW REFORM COMMISSION OF WESTERN AUSTRALIA

DISCUSSION PAPER

ON

**PROFESSIONAL PRIVILEGE FOR
CONFIDENTIAL COMMUNICATIONS**

QUESTIONNAIRE

Please complete any or all of the following questions and return to:

**PETER HANDFORD
EXECUTIVE OFFICER AND DIRECTOR OF RESEARCH
KPMG HOUSE
11th FLOOR
214 ST. GEORGE'S TERRACE
PERTH WA 6000**

**TEL NO: (09) 481-3711
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YOUR NAME:

PROFESSION: (if appropriate)

ORGANISATION: (if appropriate)

ADDRESS:

TEL NO:

FAX NO:

PART A

**STATUTORY PRIVILEGE FOR ALL
PROFESSIONAL RELATIONSHIPS**

QUESTION 1

Should there be a privilege relating to all confidential communications within *all* professional relationships?

QUESTION 2

If yes to 1, what, if any restrictions should there be (eg in particular types of proceedings only; restrict definition of “professional relationship”; restrict definition of “confidential communications”.)

QUESTION 3

What public or other interest would be promoted by providing such a privilege?

QUESTION 4

Would the interest promoted by creating a privilege relating to all professional relationships outweigh the public interest in as much relevant information as possible being available in judicial proceedings?

PART B

**STATUTORY PRIVILEGE FOR
PARTICULAR RELATIONSHIPS**

QUESTION 5 – GENERAL

What, if any, injustice or unfairness has resulted from the current law in Western Australia (or elsewhere) which denies a professional privilege to confidential communications in all relationships other than the lawyer-client relationships? Anecdotal evidence or references to actual cases would be particularly appreciated.

QUESTION 6 – CLERICS – GENERAL

- (a) Are you able to describe any actual instances, not referred to in this Paper in which a cleric has been required to provide evidence in judicial proceedings which would have involved him or her breaching the confidentiality of a communication with a person with whom they have a professional relationship? If so, please provide as many details as possible, including the personal, professional and social ramifications:
- (b) What practical difficulties or consequences have there been as a result of the absence of a professional privilege relating to clerics in Western Australia?

QUESTION 7 – CLERICS – PARTICULAR

If a privilege were to be created by statute for confidential communications between clerics and people with whom they have a professional relationship:

- (a) What type of communications should attract the privilege (eg confessions according to an acknowledged ritual of the Church; all confidential communications; communications involving spiritual guidance etc)?

- (b) How should “clerics” be defined? – (eg by reference to religiously-ordained officials of *particular* churches; by reference to a person in authority in any religious organisation, etc.)

- (c) Should the privilege be *absolute*, that is, available in all cases? Or should it be qualified? If *qualified*, please note what qualifications or exceptions would be appropriate (eg available in civil proceedings only; available in less serious criminal cases, etc.)

- (d) Should the privilege extend to information relating to the fact of whether or not a confession or other confidential communication took place (ie in addition to the actual information exchanged during the communication)?

- (e) What, if any, public or other interest would be promoted by the creation of a privilege for clerics?

- (f) Would the interest promoted by creating a privilege for clerics outweigh the public interest in as much relevant information as possible being available in judicial proceedings?

QUESTION 8 – DOCTORS – GENERAL

- (a) Are you able to describe any actual instances not referred to in this Paper in which a doctor has been required, against his or her will, to provide evidence in judicial proceedings which would have involved him or her breaching the confidentiality of a communication with a patient? If so, please provide as many details as possible, including the personal, professional and social ramifications.
- (b) What practical difficulties or consequences have there been as a result of the absence of a professional privilege relating to doctors in Western Australia?

QUESTION 9 – DOCTORS – PARTICULAR

If a privilege were to be created by statute for confidential communications between a doctor and his or her patient:

- (a) What type of communications should attract the privilege (eg communications relating solely to medical treatment or advice; all confidential communications, etc)?

- (b) How should “doctors” be defined? (eg by reference to those registered under the Medical Act)

- (c) Should the privilege be *absolute*, that is, available in all cases? Or should it be qualified? If *qualified*, please note what qualifications or exceptions would be appropriate (eg available in civil proceedings only; available in less serious criminal cases, etc).

- (d) Should the privilege extend to information relating to whether or not a consultation or other confidential communication took place (ie. in addition to the actual information exchanged during the communication)?

- (e) What, if any, public or other interest would be promoted by the creation of a privilege for doctors?

- (f) Would the interests promoted by creating a privilege for doctors outweigh the public interest in as much relevant information as possible being available in judicial proceedings?

QUESTION 10 – JOURNALISTS - GENERAL

- (a) Are you able to describe any actual instances not referred to in this Paper in which a journalist has been required to provide evidence, in judicial proceedings, relating to the confidential identity of his or her source of information or relating to any other confidential information? If so, please provide as many details as possible, including the personal, professional and social ramifications.
- (b) What practical difficulties or consequences have there been as a result of the absence of a professional privilege relating to journalists in Western Australia?

QUESTION 11 – JOURNALISTS – PARTICULAR

If a privilege were to be created by statute relating to the confidential identity of the source of a journalist's information or relating to the confidential communications between a journalist and a person with whom they have a professional relationship:

- (a) How should "journalist" be defined? (eg in terms of membership of a particular professional journalist organisation; by reference to the type of work which represents their primary source of income; by reference to the publication of their work in a newspaper – or other medium or media etc?)

- (b) Should the privilege be *absolute*, that is available in all cases? Or should it be qualified? If *qualified*, please note what qualifications or exceptions would be appropriate (eg available only if the "interests of justice" permit; available in civil matters only; available only if a "Privilege Referee" has determined that the source is reliable etc)

- (c) What, if any, public or other interests would be promoted by the creation of a journalist's privilege?

- (d) Would the interest promoted by creating a privilege for journalists outweigh the public interest in as much relevant information as possible being available in judicial proceedings?

QUESTION 12 – OTHER PROFESSIONS – PARTICULAR

Confidential communications in relation to what, if any, other professional relationships should be the subject of a statutory professional privilege?

Professional Relationship	Privilege Y or N	Absolute Privilege Y or N	Rationale	If not absolute what, if any restrictions
----------------------------------	-----------------------------	--	------------------	--

Accountant/Client

Banker/Client

Academic/Subject of Study

Social Workers &
Psychologist/Clients

Nurse/Client

Others (name relationships)

QUESTION 13 – OTHER PROFESSIONS – GENERAL

- (a) Are you able to describe any actual instances in which a professional other than a cleric, doctor or journalist has been required to provide evidence in judicial proceedings relating to confidential communications between the professional and his or her client, against the professional's will?

- (b) What practical difficulties or consequences have there been as a result of the absence of a professional privilege relating to professionals other than clerics, doctors and journalists?

- (c) What public or other interests would be promoted by the creation of the privileges you would want created?

- (d) Would the interest promoted by creating such privileges outweigh the public interest in as much relevant information as possible being available in judicial proceedings?

PART C

JUDICIAL DISCRETION

QUESTION 14

Should courts be given a general statutory discretion to grant a privilege on a case-by-case basis?

QUESTION 15

If yes to 14, above.

(a) Should such a discretion be absolute (eg Canada), or

(b) What criteria should be developed upon which the discretion should be exercised?
The following list may assist you in answering this question:

Note 1

New Zealand Criteria:

- * having regard to the special relationships existing between the professional and the person from whom he or she obtained the information.
- * 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 confidence between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such parties, 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.

Australian Law Reform Commission Criteria:

- (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 proceedings;
 - (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 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 abuse of power, was committed; 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 the 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 whom, about whom or on whose behalf the communication was made or the record prepared.

PART D

PRIVILEGE REFEREE

QUESTION 16

Under what, if any circumstances, should a “privilege referee” or similar body be established, and for what purpose?

- (d) For each of the relationships referred to below, please indicate which, if any, of the “Wigmore Conditions”¹ you believe are satisfied, giving reasons or comments, if appropriate:

Professional Relationship	Wigmore Conditions (indicate “Yes or No”)			
	1	2	3	4
Doctor/Patient comments				
Cleric/Penitent comments				
Journalist/Informant comments				
Accountant/Client comments				
Banker/Client comments				
Academic/Subject of Study comments				
Nurse/Patient comments				
Psychologist-Counsellor/Clients comments				
Others (Please name)				

¹ **Wigmore Conditions**

1. The 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 enure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.
- 5.

PART F

OTHER COMMENTS

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