

## Professional Privilege for Confidential Communications

### Terms of Reference

In 1990 the Commission was asked to consider 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. In particular, the Commission was asked to recommend 'whether clause 109 of the draft Evidence Bill in Appendix A to the 38th Report of the Australian Law Reform Commission, or any variation thereto, should be adopted in Western Australia'.

### Background of Reference

The issue was referred to the Commission following a situation where a newspaper journalist refused to disclose the source of certain relevant information in Western Australian judicial proceedings.<sup>1</sup> The same issue had been raised in incidents involving journalists in other jurisdictions.

The Commission had previously considered whether a professional privilege for journalists should be introduced in its 1980 report on *Privilege for Journalists*.<sup>2</sup> In that report, the Commission recommended that there should be no statutory privilege for journalists and that any development in this regard should be made only at common law.<sup>3</sup>

Although this issue was revisited in the current reference, the review was intended to cover not only the relationship between journalists and their informants, but all professional and other relationships where confidential communications are a relevant basis of the relationship.<sup>4</sup>

In December 1991 the Commission issued a discussion paper which considered whether particular professionals should be granted a statutory privilege to refuse to disclose in judicial proceedings confidential information obtained in the course of that professional relationship.

### Nature and Extent of Consultation

In considering the primary options for reform the Commission invited a wide variety of professional and other organisations and individuals to make submissions upon the reference.<sup>5</sup> The reference generated debate in print and radio media and at public seminars and meetings with interested persons. The Commission's final report was submitted in May 1993.<sup>6</sup>

### Recommendations

The Commission recommended against the creation of a privilege<sup>7</sup> that would allow individuals to refuse to reveal information to judicial proceedings on the basis that they were confidential communications made within a particular professional relationship. Instead, the Commission recommended:

- That Parliament enact a statutory judicial discretion allowing courts to excuse witnesses from disclosing information in breach of a confidential relationship in judicial proceedings.<sup>8</sup>

1 *DPP v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989, No 27602 of 1989 (committal proceedings); *DPP v Luders* (unreported) District Court of Western Australia, 7–8 August 1990, No 177 of 1990. Both courts were exercising federal jurisdiction because the charges were under the *Crimes Act 1914* (Cth).

2 Law Reform Commission of Western Australia, *Privilege for Journalists*, Project No 53 (1980).

3 *Ibid* para 5.25. In Project No 90, the Commission commented that the common law relating to professional privilege had not developed as anticipated, see Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993) para 1.30.

4 For instance, the relationships of doctor-patient, penitent-cleric and accountant-client as well as relationships between nurses, researchers, social workers, private investigators and private individuals.

5 Submissions received are listed at Appendix I of the Commission's final report.

6 Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993).

7 "Privilege" defined as a legal right.

8 The Commission considered that the appropriate location for the proposed discretion would be the *Evidence Act 1906* (WA).

- That in exercising such a discretion the court should consider whether or not the public interest in disclosure of the evidence is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relevant positions of the confidant and witness and the encouragement of free communication between such persons.
- That, for reasons of clarity, the statutory discretion be based upon a similar working provision in the New Zealand *Evidence Act*<sup>9</sup> rather than that proposed by the Australian Law Reform Commission in clause 109 of its draft Evidence Bill.<sup>10</sup>

### Legislative or Other Action Undertaken

In 1996, the Standing Committee on Uniform Legislation and Intergovernmental Agreements tabled its *Evidence Law* report before the Legislative Assembly.<sup>11</sup> The report addressed the question whether Western Australia should support national uniform evidence legislation by the adoption of legislation similar to that already existing in the federal sphere. The Standing Committee agreed, in principle, that Western Australia should enact new legislation convergent with the Commonwealth *Evidence Act 1995* but incorporate current Western Australian provisions worthy of retention.<sup>12</sup> In respect of the creation of privileges for protection of confidential communications the Standing Committee indicated that it rejected the grant of any form of blanket privilege attaching to specific relationships.<sup>13</sup> Instead, the Committee expressed its preference for enactment of a general judicial discretion in matters of confidential communications.<sup>14</sup>

To date no legislative action has been taken to implement the Commission's recommendations.

### Currency of Recommendations

The Commission's recommendations remain current. The need for legislation addressing the area of confidential communications is demonstrated by recent action in other Australian jurisdictions to create statutory privileges in relation to specific professional relationships.<sup>15</sup> A structured judicial discretion similar to that recommended by the Commission (though specific in the type of communication it protects) was inserted into the South Australian *Evidence Act* in 1999.<sup>16</sup>

### Action Required

Implementation of the Commission's recommendations requires the enactment of a statutory judicial discretion that identifies the appropriate balance between the competing public interests in the protection of confidential information in the hands of professionals and the maintenance of public confidence in the

<sup>9</sup> *Evidence Amendment Act [No 2] 1980 (NZ)* s 35.

<sup>10</sup> Australian Law Reform Commission, *Evidence*, Report No 38 (1987) app I.

<sup>11</sup> Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Evidence Law* (13 November 1996).

<sup>12</sup> *Ibid* para 8.8. The Commission confirmed the desirability of uniformity of evidence legislation in its *Review of the Criminal and Civil Justice System in Western Australia*, Project No. 92 (1999) 171. In that report, the Commission commented that the existence of different federal and state evidentiary regimes in Western Australia are inefficient and unfair as the same case potentially can be prepared and conducted on the basis of the two inconsistent regimes.

<sup>13</sup> *Ibid* para 5.5.

<sup>14</sup> *Ibid*. The Standing Committee made specific reference to cl 109 of the draft Evidence Bill: Australian Law Reform Commission, *Evidence*, Report No 38 (1987) app I. However, there is no evidence that the Standing Committee had before it, in consideration of this question, the recommendations made by the Law Reform Commission of Western Australia in its report on Project No 90.

<sup>15</sup> Victoria, Tasmania and the Northern Territory have created statutory privileges relating to confidential communications between doctors and patients; Victoria, Tasmania, the Northern Territory, New South Wales and the Commonwealth have created privileges relating to certain confidential communications between clerics and penitents.

<sup>16</sup> Section 67E of the *Evidence Act 1929 (SA)* provides that a communication relating to a victim or alleged victim of a sexual offence is, if made in a therapeutic context, protected from disclosure in legal proceedings by virtue of a public interest immunity. Section 67F sets out the exercise of the judicial discretion. These sections were inserted by the *Evidence (Confidential Communications) Amendment Act 1999 (SA)*.

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justice system.<sup>17</sup> It is possible that this could occur as part of an initiative towards uniform evidence legislation based on the model of the Commonwealth *Evidence Act 1995*.<sup>18</sup>

### Priority – High

Implementation of a general statutory judicial discretion enacted to protect disclosure of certain confidential communications in legal proceedings will enhance public confidence in the justice system. It will also enhance efficiency of judicial proceedings and assist in eradicating unnecessary or perceptibly unfair actions for contempt of court.

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<sup>17</sup> A detailed draft of the proposed statutory provision may be found at page 44 of the Commission's final report.

<sup>18</sup> See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* Project No 92 (1999) Chap 20.