MEDICO-LEGAL SOCIETY OF QUEENSLAND

SEMINAR, BRISBANE, 14 MAY 1981

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The Hon. Mr. Justice M.D. Kirby
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MYTH VERSUS REALITY

We live in an age of big government and big legislation. Razors occasionally do a little pruning. But the phenomenon of a burgeoning statute book is one abiding feature of our time that seems to be immune to correction. It is a phenomenon of all modern Western communities. It is a feature of the complex inter-relationships of modern society and the need to lay down rules to govern those relationships and to deal with conflicts, actual and potential, among them.

One of the problems facing the law reformer in such a world is the persistence of myths and symbols which defy close examination and yet which persist nonetheless, whatever the lawmaker may do: whatever the statute book may say.[1]

One of the abiding myths which almost certainly persists in the Australian community is that a patient may disclose intimate confidences to a medical practitioner free of any risk of their subsequent revelation without consent of third parties:

> Contrary to popular belief, the courts do not recognise a right to refuse to answer questions on the grounds of professional privilege except in the case of a legal adviser.[2]

Another myth that is hard to dispose of is that everything said to and every document deposited with a lawyer (barrister or solicitor) is protected by an absolute professional privilege against the inquisitive eye of police or other officials or persistent questions in a court of law. Misconceptions about the scope of the lawyer's privilege in respect of protection for medical practitioners against compulsory disclosure are not confined to the lay public: clients and patients dealing with the professional advisers. There is a general lack of understanding in our two professions themselves concerning the current state of

the law. Reform of the law can only begin when there is a detailed knowledge of current rules which may then be tested against modern perceptions of justice and fairness before any modification or changes are proposed.

During the past year or so, events have occurred in both the medical and legal professions in Australia which have required examination, in parliaments, courts and law reform inquiries, of the exact limits of the protection of professional confidences. In the medical profession, allegations that medical practitioners have been involved in various frauds on the revenue (either solely to their own benefit or in fraudulent conspiracy with 'patients') has led to the unhappy spectacle of police or Health Department officials arriving unexpectedly at the doctor's surgery, interrupting consultations, seizing all records and examining them for details relevant to the suspected crimes. Less dramatic, but no less novel, is the use of official departmental computers to 'match' prescription patterns to identify those doctors who are prescribing, beyond the average, drugs which are either expensive or which may have undesirable side effects.

Lawyers' offices have not been immune from official examination and search. The Queensland Law Society Journal discloses a number of cases over recent years where the opinion of counsel has been sought and recorded concerning the power of various officials to require production for inspection of documents received by lawyers in circumstances in which legal professional privilege would otherwise apply.[3] In 1976 it was recorded that the attention of the Council of the Law Society of Queensland had been drawn to 'more than one instance' in which a police officer had sought a search warrant in terms of the Criminal Code against the office of a solicitor. Advice was tendered to solicitors concerning their rights and duties when confronted in their offices with a search warrant.[4]

More recently, cases have come before the courts involving the restrictions which exist in relation to a search of a solicitor's office by police. In Victoria, a firm of solicitors, in March 1981, sought an injunction in the Supreme Court to prevent the Victorian Fraud Squad from searching client files as police waited in the firm's offices ready to execute a search warrant.[5] This case was later abandoned when the client waived his privilege in relation to the disclosure to police of documents held by the solicitors. Later in March 1981, a Full Court of the Federal Court of Australia delivered its judgment, dismissing an appeal in which police had sought, pursuant to warrant, to search third party files in a solicitor's office as a 'negative' search to ensure that no documents described in the warrant had not been produced to them.[6]

Typically, the powers of police, Health Department officials and other officers (Commonwealth and State) are broadly expressed. In the lastmentioned case, which arose out of an attempt to search a Canberra law firm, the statute relied upon was the Commonwealth Crimes Act 1914. Under that Act, a Justice of the Peace, who may or may not be legally qualified[7] is empowered to seize:

(a) anything with respect to which any offence against the law of the Commonwealth or of a Territory has been or is suspected on reasonable grounds to have been committed;

(b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

(c) anything as to which there is reasonable grounds for believing that it is intended to be used for the purpose of committing any such offence.[8]

The language is wide. The section embraces a wide range of material. It is not essential that the warrant should specify the particular things to be seized nor even the person suspected of the offence nor any period for the execution of the warrant.[9]

In the nature of their callings, doctors and lawyers tend to receive many confidences. For the effective performance of their professional functions, it is important that they should continue to do so. Yet plainly society has an interest in the detection and punishment of breaches of its laws. Likewise, society has an interest in ensuring that the best possible evidence should normally be available to courts so that they can determine issues before them without having some vital material kept from them.

How should the law deal with the resolution of these desirable social ends, when they come into conflict? Should different principles govern the confidences given to a lawyer, on the one hand, and those shared with a doctor, on the other? Whatever may be the law with respect to professional confidences now, what should it be and what should be the guideposts for reform?

THE AUSTRALIAN LAW REFORM COMMISSION

I have been invited to express views on these topics because I am Chairman of the Australian Law Reform Commission. That Commission is a Federal agency of law reform. It enjoys close professional relationships with State bodies working for the improvement of the legal system, including the Law Reform Commission of Queensland under the distinguished chairmanship of Mr. Justice Andrews.

The Federal Commission is a permanent authority established by Commonwealth Parliament to help the Commonwealth Attorney-General and Parliament with what I might call the 'too hard basket' of large and difficult legal problems. Though it is a permanent institution, it is a small one. There are 11 Commissioners, four of them full-time. There is a research staff of eight. The Commission is established in Sydney. At any given time it is working on about eight major projects of national law reform. The Commission receives its tasks from the Federal Attorney-General. It may not initiate its own programme. In this sense, it works upon projects of legal reform which have been identified as necessary by the elected representatives of the people. Because all save one of the Commissioners are lawyers, the practice has been developed of collecting an interdisciplinary team of consultants to help in every project. The Commission publishes tentative suggestions for reform in discussion papers which are distributed for expert and public comment. The issues are then debated in the public media and exposed in seminars and public hearings throughout Australia. In its six years of operation, the Commission has reported on a wide range of topics from complaints against police and criminal investigation, to Breathalyzer laws, insolvency laws, defamation law reform, reform of the law of insurance, the rules that should govern the census, the principles controlling the sentencing of convicted Federal offenders and so on.

A number of our reports have seen close co-operation between the lawyers of the Commission and the Australian medical profession. We were asked, for example, to devise a law which should govern human tissue transplantation. In that project, the Commission had the participation of Sir Zelman Cowen and Sir Gerard Brennan, two of Australia's finest lawyers, each associated with Brisbane. The report faced many hard questions. When delivered, it was praised in the British Medical Journal and the Lancet. The draft legislation attached to the report has been adopted, in substance, in three Australian jurisdictions, including in Queensland. I understand that it is shortly to be adopted in another State. It is under consideration in the rest. This report shows what can be done in law reform by co-operation between doctors and lawyers of top talent and by participation of the general community. The Australian Law Reform Commission is a catalyst for action by short-term parliaments. It helps our political representatives to face profound, long-term problems. A number of the Commission's projects are relevant to the issue of professional confidentiality:

- The report on Criminal Investigation dealt in detail with the rules which should govern the powers of entry, search and seizure by Federal Police.[10]

. The project on privacy protection, which is still current, is concerned with the regime which should govern personal data including medical records, as more and more of these are computerised and as the old intimacy of the medical relationship is diminished in the search for greater efficiency and economy in the use of medical records.

. Our project on child welfare laws in the A.C.T., upon which we are about to report, has required us to consider the question of compulsory reporting of suspected cases of child abuse. The duty of confidentiality to the patient may be diminished by a duty compulsorily to report particular diseases or suspected signs such as child abuse. Without such a report, the multi-disciplinary attack on the problem may never be possible.[11]

. Finally, our current inquiry, directed towards the development of a Federal law of evidence for the Federal courts in Australia, requires us to re-examine the scope of professional privilege, including that for the doctor and the lawyer. Should courts of law in criminal and civil cases suffer no barrier to the disclosure of all relevant facts in the search for truth? Or should the laws of evidence, and other rules, acknowledge that there are competing social interests which, even at the loss of the discovery of truth, must be upheld, for example, to defend confidences shared with a professional person.

LEGAL PROFESSIONAL PRIVILEGE

Let me deal, first, with the case of legal professional privilege. I do so with some diffidence for the Australian Law Reform Commission is not conducting an inquiry into the rules which should govern professional legal privilege as such. Under the Constitution, that subject remains overwhelmingly a matter of State concern and State regulation. Furthermore, in New South Wales and Western Australia, specific inquiries are being conducted into various aspects of the law governing the legal profession. The Australian Law Reform Commission's connection with this subject is limited to the Federal sphere and then only in the matters referred to us by the Attorney-General. Our inquiries into privacy law and evidence law in Federal Courts are clearly relevant.

The most recent decision in a superior court which examines the limitations of legal professional privilege is that of the Federal Court of Australia in the case of the Canberra law firm to which I have referred. Let me recapitulate briefly the facts of that case. On Tuesday 30 October 1979 a search warrant was issued by a Justice of the Peace authorising a policeman to enter a solicitor's office and to seize documents relating to possible offences by a client of the solicitors under the companies law of the A.C.T.

It was never suggested that the solicitors themselves were implicated in the alleged breaches of the companies law. At about 4.55 p.m. on the day the warrant was issued, doubtless as most of the staff were departing into the warm Spring afternoon, the authorised police officer, with other police, attended at the solicitor's office. According to the evidence, the police officer contended that he had a right to search 'willy nilly' through the office. He claimed the right to inspect all the documents as he 'saw fit'. The solicitor identified a bundle of documents as referred to in the warrant. But as to the claim to search his office, he said:

> I am not prepared, and was not prepared, to allow the defendant and his officers to conduct a general search of our office otherwise.[12]

In respect of all other files, the solicitor claimed professional legal privilege.

The matter came before Mr. Justice Blackburn in the Supreme Court of the Australian Capital Territory. The solicitors sought an injunction to restrain the police from further searching their premises. The injunction was refused. An appeal was lodged to the Full Federal Court. The three judges of that Court concurred in dismissing the appeal. In doing so, they severally examined the extent to which the claim for professional privilege could withstand the authority of the police constable in the search warrant. After citing Australian, New Zealand and English authorities, Mr. Justice Franki concluded:

> [T]he the principle of law to be taken from these authorities is that where a statute provides for access to documents to be available to a person, the fact that those documents are held by a solicitor and were entrusted to him by a client, does not provide a ground for the solicitor to refuse access to the documents. ... I am satisfied that neither the contractual obligation existing between solicitor and client nor any question of professional privilege is relevant in considering the extent of the search authorised under the warrant.[13]

The case is unsatisfactory in some respects. There was no challenge to the validity of the warrant, though it contained at least one error. The evidence was abbreviated and in parts obscure. The precise nature of the proceeding was not clear.[14] Nonetheless, the decision makes it plain that, at least in respect of a reasonable search authorised under the Commonwealth Crimes Act, the warranted searcher will not be obliged simply to accept the 'assurance and undertaking' of a solicitor. He will be entitled to look at files and documents of perfectly innocent third parties, to the extent that it is necessary to identify and exclude those which are not within the warrant. He must conduct his search

reasonably. But a clear warrant, issued under the authority of a statute, against even so enduring a privilege as that of the client with his lawyer, will not protect from inspection the confidences of other clients though they have nothing to do with the case in hand.

Reading the judgments of the Federal Court, it seems plain that the result aroused, as one may expect, anxiety in the Court. In a pointed comment, Mr. Justice Franki observed:

> It must be remembered that a Justice of the Peace, unqualified in the law, may issue a search warrant under s.10 of the Crimes Act 1914. It is not the function of this Court to question the desirability of such a provision.[15]

Mr. Justice Northrop emphasised the need to limit the searcher 'to do no more than is reasonably necessary' to answer the terms of the warrant. Mr. Justice Lockhart referred to the persistence of the notion of the inviolability of a person's home, person and property, as an enduring feature of the English law which we have inherited in Australia.[16] The only exception to the common law rule was that of a warrant. But now increasing numbers of statutes ranging from the Apple and Pear Levy Collection Act 1976[17] to the Historic Shipwrecks Act of the same year[18] and the National Health Act 1953[19] authorise a diverse range of officials to enter property and search and seize goods. In the endeavour to ensure that in executing search warrants, police should follow proper procedures, sensitive to the rights of the accused as well of innocent third parties, Mr. Justice Lockhart proposed certain rules of general guidance. The power must be exercised in good faith for the purpose for which it was conferred. It must be exercised fairly. It must have regard to the rights of those affected by its exercise. It must strictly follow the directions contained in the warrant.[20]

Turning to warrants to search the offices of solicitors, the Mr. Justice Lockhart said:

> [I] t is a misconception to regard the doctrine of legal professional privilege as operating to prevent the grant or execution of warrants to search the premises of solicitors and the records contained in the affairs of their clients. Where a solicitor is himself implicated in the alleged offence, either alone or together with his client, plainly he is in no different position to any other citizen and is subject to the issue and execution of a search warrant in the same way.

> Where a solicitor is not himself implicated in the alleged offence, and the documents to be searched are held by him pursuant to the solicitor/client relationship, the officer executing the warrant does not have carte blanche to open and read the files and papers of clients of the solicitor having no connection with the alleged wrongdoing in the hope of finding something that might be of probative value. There must be some limits to the search.[21]

Nevertheless, Mr. Justice Lockhart felt unable to identify those limits, indicating that this was a practical problem which would vary with the circumstances of a particular case and with changing times. It is here that his Honour addressed the law reformer:

> The permissible ambit of search and seizure today may be very different a decade or more hence. There is today a growing concern in our community at the extent of encroachment upon the inviobility of a person's person, home and other premises by statute, administrative action and the effects of burgeoning modern technology. Whether this will result in legislative definition of restraints on the issue and execution of search warrants, remains to be seen.[22]

LEGAL PRIVILEGE: THE LIMITS?

Legal professional privilege is the right to maintain confidences which have passed between a person and his legal adviser in connection with litigation or to enable the giving of legal advice.[23] Though originally the rule developed because lawyers, as men of honour, would not betray the confidences entrusted to them, and judges (also being men of honour) would not ask them to do so[24], by the 18th Century it had been rationalised as being based on the need to ensure that the client should feel able to consult his lawyer without any apprehension as to the confidentiality of their communications. In the High Court of Australia, the explanation of this rule, which may sometimes prevent a court getting to the truth of the matter, was put thus:

> [I]t 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 complex and complicated discipline. ... The existence of the privilege reflects (to the extent to which the privilege is upheld) ... the paramountcy of this public interest over a more general public interest, that which requires that, in the interests of a fair trial, litigation should be conducted on the footing that all relevant documentary evidence is available.[25]

Thus, whilst getting all the relevant facts before the independent decision-maker must normally be taken to be the paramount principle of public policy, there is a recognition here that a competing principle of public policy occasionally justifies withholding from the decision-maker relevant material because to do so promotes, in the end, a greater quality of aggregate justice.

When, however, the detail of legal professional privilege is examined, it is certainly not as wide as most members of the public probably think. Indeed, it is rather narrower than many lawyers expect. And in Australia, it is narrower than in other countries of the common law:

- To secure the privilege, it must be shown that documents claimed to be privileged or other communications are brought into existence for 'the sole purpose' of securing legal advice.[26] Thus company records and other material simply deposited with a lawyer when litigation is pending or a prosecution threatened do not, for that reason, acquire protection by the mere act of deposit.

- The privilege may not extend to communications relating to administrative or quasi-judicial proceedings.[27]

- The privilege does not arise when the communication between the client and the lawyer was itself a step in the commission of a crime.[28]

- The privilege does not protect the mere identity of a lawyer's client.[29]

- The privilege will not arise where, though in fact lawyer and client, the parties' communications arose in another relationship, e.g. relative or friend.[30]

- The privilege of confidentiality will be lost if the communication to a lawyer was made consensually in the presence of a third party.[31]

- Above all, as has been recently demonstrated, the privilege will be lost where legislation expressly or by very clear implication abrogates it or contemplates procedures which clearly over-ride it.[32]

Courts have resisted attempts to expand both the cover and scope of the privilege.[33] But there have been some who have urged that the privilege should be abolished altogether:

> Bentham, consistently with his general policy of removing obstacles to the discovery of truth [in the trial] used two main arguments against the privilege. One was that its abolition would enhance professional standards by removing any power to hide the accused's guilt. ... Secondly, Bentham argued that if abolition meant that clients repose less confidence in their lawyers 'wherein will consist the mischief?' The man by the supposition is guilty; if not, by the supposition there is nothing to betray.[34]

Such recent reports as have examined legal professional privilege have not suggested any significant alteration in the law, though it must be conceded that these inquiries have been uniformly conducted by lawyers, brought up in the present tradition.[35] Nevertheless, one can detect in recent judicial pronouncements an attempt more strictly to define the limits of the privilege and assertions of a refusal to extend it. Clearly there is a recognition that it can sometimes stand in the way of the investigation of the true merits of a case or the discovery of truth. Thus the High Court of Australia, in Grant v. Downs, pointed out that the privilege:

> does little, if anything, to promote full and frank disclosure of truthfulness .... [and] there is much to be said for the view that the existence of the privilege makes it more difficult for the opposing party to test the veracity of the party claiming privilege by removing from the area of documents available for inspection documents which may be inconsistent with that case. To this extent the privilege is an impediment, not an inducement, to frank testimony, and it detracts from the fairness of a trial.[36]

Defenders of the privilege assert that the very procedures of the adversary system would be destroyed if an opposing party could secure open access to the instructions given to his opponent's lawyer. Furthermore, some say that the 'search for truth' is not the absolute obligation of the legal system but one which must be tempered out of respect for other competing social policies, including the social value of free and frank exchanges between lawyer and client:

> Truth like all other good things may be loved unwisely, may be pursued too keenly, may cost too much. ... [T]he general evil of infusing reserve and dissimulation, uneasiness, suspicion and fear into those communications which must take place and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for the truth itself.[37]

But if the client's privilege of confidential advice from his lawyer rests on no firmer ground than legal tradition and the desirability of assisting the professional lawyer to give advice without the impediments which disclosure might threaten, the question is inevitably raised: why should that privilege be confined to communications with a lawyer? Why should it not extend equally to communications with the medical and other professions? In balancing the public policy in securing the trial of issues upon the best available evidence against the public policy in promoting the alleviation of suffering, the treatment of disease and the provision of skilled medical and psychiatric advice, is it so self evident that the balance should be struck in favour of the rights of the trial? Is this merely a lawyer's contempt for confidences shared with other professions and a self-interested defence of his own traditions and professional privileges?

MEDICAL PROFESSIONAL PRIVILEGE

At present, under Australian law, a communication by a person to a doctor is not generally protected from disclosure except by the Evidence Acts in Victoria, Tasmania and the Northern Territory.[38] In the other jurisdictions of Australia, a communication by a patient to a doctor is not protected from a court subpoena addressed to the doctor. If relevant to the issues before a court, a doctor must, if so ordered, disclose his patient's confidences, whether the patient or the doctor wants it or not. Courts do not like forcing people who receive information in confidence to disclose them to the court without consent. However, at present in most jurisdictions of Australia (and in Federal Courts sitting in those jurisdictions[39]) the doctor can be compelled, against his wishes and the patient's desires, to disclose the relevant medical history in open court.

Arguments against this present position are based in part upon matters of principle and ethics and in part upon the practical consideration of maximising the effectiveness of the doctor/patient relationship. In summary, the argument for changing the current law in most parts of Australia and providing an enforceable privilege to medical practitioners could be expressed as follows:

- The ethical obligation of doctor confidentiality is ancient. It dates back at least to the Hippocratic Oath. Patients give their confidences to doctors upon a reasonable expectation that they will be protected by the law. They do so at a time when they are vulnerable and highly dependent on doctors for help. Perhaps they give little thought then to possible later use in courtrooms. Certainly their overwhelming concern is to get treatment and help.

. Other relationships are currently protected and will not be interfered with by courts, except in the most extreme cases. The relationship of a client and his lawyer or of an informer and the police are no more needing of protection by society than the relationship of a patient and his doctor.

. Unless persons suffering from illness can approach doctors with a lawfully supported right to privacy and confidentiality, they may withhold information or even refrain from seeking treatment. The effective medical treatment of the public is at least as important as the due administration of justice. It should be given equal treatment and protection against non-consensual disclosure to courts.[40]

. Some medical data contains specially sensitive and intimate details, the disclosure of which would positively harm either the subject's medical treatment or his reputation in society.

On the other hand, opponents of the grant of a special legal protection for medical confidences have listed a number of considerations which must be weighed by the Law Reform Commission in reaching its conclusions on this issue:

. Courts should generally have access to all relevant facts which will help it to just conclusion of the issues before them. The exceptions which prevent a court thoroughly investigating a relevant issue may reduce its capacity to ascertain the truth and thereby hinder the courts in one of their primary tasks.[41]

. The categories of absolute privilege are few and exist for very long established reasons of public policy. Police informers secure privilege because disclosure of their identity could destroy this source of information and even sometimes endanger the life of the informer. Clients of lawyers secure it so that the very business of adversary litigation may be done. The claims by journalists to a privilege against disclosing sources have recently been rejected by the Supreme Court of the United States[42], the House of Lords[43] and recent law reform reports.[44] It is claimed that the categories of privilege should not be extended for they impede courts doing the essential task of resolving disputes in society. If courts cannot do this successfully, social tranquility is threatened and this has a significance beyond the particular concerns of individual doctors and patients.

. Already, it is claimed, there are too many impediments in the way of courts getting at the truth of matters. Extension of another impediment by way of privilege for doctors would lead on to claims by dentists, hospitals and other health providers. It would not finish there. There would be claims by others who receive information in confidence: bankers, insurers, accountants. This could result in a society in which courts were deprived of an important range of critically relevant evidence. In justifying privilege for doctors, it is necessary to distinguish others who receive information in confidence. Yet if they cannot be treated differently, we will be left with a system which results in courts deciding cases on part only of the relevant factual base. That would be bad for society which should not have to depend on whether a party consents to relevant evidence going before the court.

. Finally, critics of the claim for medical privilege point out that although it is available in some states of Australia, it is not available in others. Yet there is no evidence that the lack of an enforceable medical privilege against non-consensual disclosure has diminished the capacity of doctors in some jurisdictions of Australia to receive precisely the same information as their counterparts in those jurisdictions where the privilege exists.

How do we resolve the conflict between these competing claims, each of which has merit? A recent report by the Institute of Law and Medicine in New South Wales has suggested that one way is to provide a broader discretion for weighing the claim for medical confidentiality against the claim for a trial on all relevant facts. An alternative approach is to confer on medical practitioners precisely the same privilege as is enjoyed by lawyers.[45] Of course, there is nothing a lawyer likes so much as a precedent. But the precedents in this area are themselves conflicting. The self-same House of Lords which refused to extend the law of privilege to journalists in respect of their sources not long since declared that confidential communications to child welfare agencies to prevent child abuse were entitled to a new privilege.[46]

The growth of professional counselling, and the advantage taken of it by ordinary citizens, has led to pressure to re-examine the existing privileges for confidential communications. A number of law reform reports refused to recommend any legislative change.[47] Others recommend modest legislative changes, such as extension of privilege to patent agents.[48] The Canadian Law Reform Commission proposed a broad 'general professional privilege' in its report on Evidence[49]:

> 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.

However, a recent Task Force, set up to endeavour to reconcile the conflicting proposals on this subject in Canada, was not convinced that the public interest would be served by enacting a privilege for communications during any professional relationship. It also rejected privilege for clerical communications. One member dissented, proposing a special privilege in respect of patient consultation with a psychotherapist.[50]

In the United States, uniform Federal Rules of Evidence were adopted in January 1975, culminating nearly 30 years of effort directed to secure reform and modernisation of this area of the law. The final draft proposed to Congress by the US Supreme Court suggested privileges to include trade secrets, lawyer-client, husband-wife, doctor-patient (but applicable only to psychotherapists), the identity of informers, secrets of state and official information. However, when the draft came before the House of Representatives these proposed provisions were deleted and the law on privilege was one of the few items left to be dealt with by different State laws, as distinct from the single uniform Federal law. The Congressional Report notes:

> From the outset it was clear that the content of the proposed privilege provisions was extremely controversial. Critics attacked, and proponents defended, the secrets of state and official information privileges. ... The husband-wife privilege drew fire as a result of the conscious decision of the Court to narrow its scope from that recognised under present Federal decisions. The partial doctor-patient privilege seemed to satisfy no-one, either doctors or patients; ... Since it was clear that no agreement was likely to be possible as the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated ... leaving the law in its current condition to be developed by the courts of the United States utilising the principles of the common law.[51]

There the matter rests today in the United States. Although nearly half of the States of that country have now adopted the Federal Rules of Evidence, and though it constituted a major achievement, it is sobering to think that the whole ship nearly foundered on the physician-patient privilege issue. In more than two-thirds of the states of the United States and in Puerto Rico and the District of Columbia, a physician-patient privilege has been created by statute. The terms of these statutes vary. In some, the privilege applies only in civil cases. In some it is made expressly inapplicable in actions against a physician for malpractice. In some there are provisions for waiver. In about half the States, narcotics legislation specifically over-rides the privilege.[52]

The net results of this analysis is that the law on the subject of the privilege of medical confidences is in confusion in Australia as elsewhere. At the very least, the inquiry by the Law Reform Commission should provide an appropriate vehicle to allow us to assess the competing social values at stake. It is an issue which should not be approached from a narrow viewpoint: 'the lawyers have it, therefore so should we'. The implication of the privilege should not be exaggerated. It does not exist in many Australian jurisdictions. Yet the patients still trust their doctors with intimate confidences. Courts will usually seek to protect confidential information, if this can be done. Even where privilege exists, it may be over-ridden by the relevance of facts to criminal or fraudulent conduct. Nonetheless, an important debate remains. Upon that debate we seek the views and advice of medical practitioners in Australia. I hope these views will not be tendered in a selfish spirit of narrow concerns which overlook the community's legitimate interest in courts resolving disputes normally on the basis of the best available relevant material. Specifically, we would welcome information on:

- Cases where doctors have been forced unwillingly to disclose medical confidences with serious consequences for the health care relationship with the patient or for the treatment of the patient.

- Cases where doctors suspect that patients have not disclosed information important for health care, for fear of prosecution, compulsory reporting or subsequent subpoena of the doctor and his records by a court or tribunal.

- Cases where doctors have deliberately not recorded relevant data for fear that medical records may subsequently be subpoenaed by a court or tribunal and disclosure of the relevant confidence would do disproportionate damage to the patient or his treatment.

. Cases in ethnic or other isolated or close-knit patient groups where disclosure, either under compulsory reporting provisions or pursuant to subpoena, has led not merely to embarrassment but to positive harm in the treatment of the patient or positive damage to the practice of the doctor.

Sound law reform, like sound medical progress, must be based on empirical data. I invite the professions in Queensland to provide that data to the Australian Law Reform Commission to assist it in its tasks.

THE PROBLEM OF ENTRY AND SEARCH

Although the issue of legal and medical professional privilege raises more routine and everyday problems of confidentiality, it is necessary also to address the exceptional problem of entry and search of medical and legal files as police and other official raids upon professional premises become more common than once they were. Against a clear provision in a statute authorising such entry and search, the privilege of a lawyer's client and the desirability of medical confidentiality will not, in law, amount to an effective shield. The growing computerisation of medical records, the increasing number of compulsorily reported diseases and the likely centralisation of many of these records will doubtless promote calls, in the future, for 'exceptional' powers of search 'in the public interest'.

If, for example, there had been a computerised medical data base with relevant intimacies of sexual proclivities of people in the Yorkshire region prior to the apprehension of the so-called 'Yorkshire Ripper', one can imagine police and public pressure for access to such data and for the identification by computer 'matching' techniques of possible suspects. If in Atlanta, Georgia, there were such data base now, even with the lively respect for privacy and medical confidences that exist in the United States, we could not under-estimate the pressure for access in the name of a greater 'public interest'. When the respect for professional confidences is broken down, in extreme cases, the pressure soon mounts to make the exception the ordinary rule. Thus legal telephonic interception in Australia began for the grossly exceptional case of national security. Now it has been extended for narcotic surveillance. Calls are made for its extension to other crimes and to other police services. A point is plainly reached where so many completely innocent callers are 'roped in' to expanding surveillance powers, that the result is a 'chilling' effect upon personal freedoms.

The need for limits and procedural checks appears from a consideration of the recent searches of doctors' surgeries[53] and lawyers' offices.

Section 10(b) of the Commonwealth Crimes Act authorises the issue of a search warrant to a constable permitting him to enter and seize, amongst other things:

> anything as to which there is a reasonable ground for believing that it will afford evidence as to the commission of any ... offence.[54]

An admission by a client to his lawyer, contained in instructions given to the lawyer would, on the face of things, fall within the ambit of that provision. If the statutory provision authorises the issue of a warrant that over-rides the old common law protecting the client's privileged communications with his lawyers, what is there to prevent the seizure, not only of documents and other material that came into existence before the litigation but also of the full file of a solicitor's instructions, including client statements containing, possibly, admissions?

Is all that prevents the seizure of such material a respect for the traditions of lawyerly confidences? Is it a police respect for the sporting contest and the rules of 'fair play' in the adversary trial? Should confidences of this kind rest upon such a flimsy basis? Will it be enough, as in the protection of medical records, to establish voluntary guidelines agreed between professional bodies and the police? Will such guidelines be effective in controlling the wide and proliferating powers of entry and search of numerous other non-police officials?

The Australian Law Reform Commission's proposals on privacy protection have included the suggestion of a new uniform regime of control over entry, search and seizure by all Commonwealth and Territory officials. It is suggested that such intrusions represent a serious invasion of privacy and require legal controls against abuse or excessive use. It is proposed that such powers should normally be exerciseable only on the basis of a warrant granted by a judicial officer, that the warrant should be granted only on reasonable grounds of suspicion related to specific matters and that the warrant should be detailed and particular in its terms.[55] Although provision for search without warrant should be made, minimum procedures should be required, including the review within a short period, by a judicial officer, who should have power to refer the matter the relevant disciplinary authorities.[56] In general, these proposals follow earlier suggestions in the Commission's

Criminal Investigation report. It is encouraging to read the explanatory memorandum which has been issued to accompany the new Companies Bill 1981 in which amendments to the original draft have been incorporated, based on the proposals of the Australian Law Reform Commission and designed to place appropriate safeguards on the issue of warrants to search for and seize company books.[57] It would seem no less important, and possibly more important, to ensure that similar procedural safeguards are introduced to defend the confidences of patients and legal clients.

CONCLUSIONS

Few people assert nowadays that confidential communications with doctor, lawyer or other professional adviser should be absolutely privileged for all time and as against all persons. Lord Moran, the medical adviser to Churchill during the War, felt he was entitled to breach his famous patient's confidentiality because of the historical value of the disclosures and the public interest in them. As recently as last week the Economist declared the publication of Lord Moran's diaries 'improper', 'breaking the rigid convention of his profession'. The comment was made in a book review upon yet another memoir of Churchill by one of his wartime public servants. In the course of the book review the writer criticised Lord Moran for his disclosures. But this criticism led the reviewer to ask a question of his own:

> The professional convention does ... linger in the reader's mind. The revelation in this book is that Sir John [Colville] himself kept 'detailed diaries — during most of the time he served with Churchill'. Inevitably, one asks whether the convention that 'professional men do not write about their clients and customers' will apply in any sense to these?[58]

To discover the Yorkshire Ripper, the Atlanta murderer or even the humble child abuser, does society's greater interest overwhelm and displace its interest in maintaining professional confidences? To discover the company cheat or vicious criminal should we permit a breach of the old rules of legal privilege?

So far, the law has given pride of place to confidences shared in certain circumstances, with its own officers. Now it is suggested that the net should be cast more widely to protect confidences shared with medical advisers. But if this is done, how, in principle, will we exclude confidences offered to bankers, insurers, physiotherapists, dentists, social workers and others? Does this track lead to a legal regime which puts such a high score on guarding confidences that it prevents or discourages the resolution of disputes upon the best available evidence? In such a world, would the courts, deprived of vital evidence, continue to command the respect and acceptance of the community?

As the powers of authority to enter and search professional premises become wider and clearer and as the facility of computer searching becomes more tempting to authority, will it be enough to rely upon tradition and respect for the rules of 'fair play'? Are procedural safeguards such as judicial authorisation of searches adequate? Should there be legislative assurances to protect the confidences of entirely innocent third parties? Is the occasional court scrutiny of the scope of a warrant and the manner of its execution enough to ensure that the valuable attributes of confidential professional communication survive?

All of these are questions vital to the future of legal and medical practice in Australia. Until recently the game has largely been played by gentlemanly rules. There is now evidence that the rules are changing. It will be important to ensure that the proper vigour with which unprofessional conduct by lawyers and doctors is pursued by authority does not, in its enthusiasm, destroy the valuable features of trust and confidence which the ordinary citizen expects he will enjoy when he takes his problem to the doctor's surgery or the lawyer's office. The years ahead will see a growing debate about the scope of professional privilege, the protection of confidences and limitation of official powers to invade the privacy of the professional relationship. The Australian Law Reform Commission has been assigned a number of tasks relevant to these issues. It is my hope that the Commission will be able, in consultation with the professions, officials and the public generally, to develop new rules and institutions that will be sensitive to enduring professional values but also responsive to rapidly developing technology and the changing place of the professional in the world.

FOOTNOTES

1. B. Brown, 'Popular Legal Symolism and Criminal Law Reform', [1979] 3 Crim.LJ 133.

2. R. Else-Mitchell, 'Medical Evidence', Paper delivered to Sydney Hospitallers, 11, cited R.H. Woellner, 'The Law and Medical Confidentiality', The James McGrath Foundation Institute of Law and Medicine, December 1980, mimeo.

3. See e.g. the Opinion of B.H. McPherson QC, Queensland Law Society Jl., Feb. 1980, 27 and the Opinion of F.G. Brennan (as he then was), cited ibid.

4. See e.g. Queensland Law Society Jl., October 1976, 163. The recent case inmvolving the limits of legal professional privilege before the Family Court, where a client is defying an order of the court in a custody dispute is Re Bell; ex parte Lees (1980) 54 ALJR 412, discussed (1980) 54 ALJ 746.

5. Reported, Australian Financial Review, 13 March 1980.

6. Crowley & Ors. V. Murphy, Full Court, Federal Court of Australia (F.C. 43 of 1979), 19 March 1981, mimeo.

7. Franki J. in Crowley v. Murphy, 16.

8. Crimes Act 1914 (Cwlth), s.10.

9. Fox J. in The Queen v. Tillett; ex parte Newton (1969) 14 FLR 101.

10. Australian Law Reform Commission, Criminal Investigation (ALRC 2) (Interim), 88ff.

11. id., Child Welfare: Child Abuse and Day Care (Discussion Paper No. 12), 25ff.

12. Crowley v. Murphy, Northrop J., 8 (citing cross-examination of Mr. Chamberlain).

13. id., Franki J, 9, 10.

14. id., 12. Cf. Northrop J., 11.

15. id., Northrop J., 16.

16. id., Lockhart J., 5.

17. Section 10.

18. Section 23.

19. Section 82V.

20. Crowley v. Murphy, Lockhart J., 21.

21. id., 27-8.

22. id., 28-9.

23. Wheeler v. Le Marchant, (1881) 17 Ch.D. 675.

24. See, for example, the NSW Bar Association's submission to the Law Reform Commission of New South Wales on Confidentiality. For a most useful discussion of the limits of legal professional privilege, see Woellner, 10ff.

25. Grant v. Downs (1977) 11 ALR 577 per Stephen, Mason and Murphy JJ., 579.

26. The 'sole purpose' test was preferred by the majority in Grant v. Downs. Cf. Barwick CJ, who accepted the English 'dominant purpose' test.

27. Crowley v. Murphy, Lockhart J., 19.

28. Varawa v. Howard Smith & Co. Ltd (1910) 10 CLR 382, 386.

29. Cook v. Leonard [1954] VLR 591.

30. Disney et al, Lawyers, 572.

31. J.D. Heydon, 'Legal Professional Privilege and Third Parties', (1974) 37 Mod.LR 601.

32. Commissioner of Inland Revenue v. West-Walker, [1954] NZLR 191.

33. Constable v. Constable & Johnson (1964) SASR 68, 69 (Bright J.). (Social workers).

34. J. Bentham, 'Rationale of Judicial Evidence' (Bowring ed., 1827), cited in Heydon.

35. See e.g. New Zealand, Torts & General Law Reform Committee, Professional Privilege in the Law of Evidence, 1977, 15 (where several other reports are cited).

36. Grant v. Downs (1977) 11 ALRC 577, 578 (Stephen, Mason and Murphy JJ).

37. Knight-Bruce LJ in Pearce v. Pearce, 1 De & Sm. 18.

38. Australian Law Reform Commission, Reform of Evidence Law (Discussion Paper No. 16), 1980, 5. See Evidence Act 1958 (Vic), s.28; Evidence Act 1910 (Tas), s.96; Evidence Act 1980 (NT), s.12. The Victorian Act is typical:-

> 28(2) No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding (unless the sanity or testamentary capacity of the patient is the matter in dispute) any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient.
>
> 28(3) Sub-section (2) shall cease to have any application in —
> (a) an action brought under Part III of the Wrongs Act 1958 to recover damages for the death of the patient; or
> (b) proceedings brought under the Workers Compensation Act 1958 to recover compensation for the death of the patient —
> if the person bringing or continuing the action or proceedings calls as a witness any physician or surgeon who has attended the patient.

39. Federal courts apply generally the laws of evidence of the State or Territory in which they happen to be sitting. This is the result of s.79 and 80 of the Judiciary Act 1903 (Cwlth).

40. Woellner.

41. id., 30.

42. Bransburg v. Hays; in re Papas: United States v. Caldwell, 408 US 665, 690 (1972). Cf. in re Farber, 99 S.Ct. 598 (1978).

43. British Steel Corporation v. Granada Television Limited [1980] 3 WLR 774.

44. Law Reform Commission of Western Australia, Privilege for Journalists, Project No. 53, Perth, 1980. Cf. New Zealand, Torts and General Law Reform Committee, 'Professional Privilege in the Law of Evidence', Wellington, 1977.

45. Woellner, 5.

46. D. v. National Society for the Prevention of Cruelty to Children [1978] AC 171.

47. Canada, Report of the Special Senate Committee on Mass Media, The Uncertain Mirror, Ottawa, 1970, 105-6; Ontario Law Reform Commission, Report on the Law of Evidence, 1976, 144-6; English Criminal Law Revision Committee, 11th Report, Evidence (General), Cmnd. 4991 (1972), 157-61.

48. English Law Reform Committee, 16th Report, Privilege in Civil Proceedings, Cmnd. 3472 (1967).

49. Law Reform Commission of Canada, Report on Evidence, 1975 (Draft Evidence Code, cl. 40-41).

50. Canada, Federal/Provincial Task Force on Uniform Rules of Evidence, Report, 1981, Uniform Law Conference of Canada, 491, 493.

51. United States Code, Congressional and Administrative News. Federal Rules of Evidence with Official Legislative History, West, 1975, No. 12A, 42.

52. E.M. Morgan, 'Basic Problems of State and Federal Evidence', 5th ed (J.B. Weinstein), 115.

53. See e.g. Mr. E. Sikk, Magistrate, Tasmania, in Younger v. Whyte, 30 May 1980. unreported.

54. Crimes Act 1914 (Cwlth), s.10(b).

55. Australian Law Reform Commission, Privacy and Intrusions (Discussion Paper No. 13), 1980, paras. 67-71.

56. id., para. 71.

57. Explanatory Memorandum on the Companies Bill 1981 (Cwlth) circulated by the authority of the Minister for Business & Consumer Affairs, the Honourable J. Moore MP, (ref. 12096/81), 1981, 59 (clause 13).

58. Book review, J. Colville, The Churchillians in The Economist, 2 May 1981, 103, 104.