UNIVERSITY OF SOUTHAMPTON

THE PROTECTION AND DISCLOSURE OF CONFIDENTIAL INFORMATION

VOLUME 2 OF TWO

BY PENELOPE ANN PEARCE B.A.(LAW)

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PART III

CHAPTER 7

DUTY TO GIVE INFORMATION FOR PUBLIC PURPOSES

General Introduction

There is a clear public interest in ensuring that all relevant[1] information is given to a body making an investigation for public purposes, whether it be a Parliamentary inquiry into a matter of general public importance, a court of law adjudicating between parties or a specific inquiry set up, usually under statutory authority, to investigate a particular disaster or disquieting state of affairs.

There may also be a public interest in the information being given in public rather than privately; so that the public can see what the issues are or what went wrong; so that justice can "manifestly and undoubtedly be seen to be done,"[2] so that no lingering doubts of a 'cover up' or 'whitewash' shall remain.[3] The public interest in free speech favours a right to publish the information widely and to comment upon it. On the other hand, there may be public interests which favour the information being given in private or even not at all. The nature of the information may be such that its disclosure is not in the public interest, for example if it may be damaging to national security or injurious to public morality; disclosure of confidences might be thought damaging to particular relationships whose stability is in the public interest; sometimes it is argued that witnesses will speak more frankly in private, or that it is better for the public not to know the true situation. Furthermore, the public interest in ensuring that every defendant gets a fair trial requires that the information against him should not be publicly rehearsed before his trial. These opposing public interests may produce different results depending upon their respective weight. The information may be heard in private and not published at all; or its publication may be restricted or delayed; or the information may not be given at all. In an extreme case, the need for public knowledge of the information may result in immunity from prosecution for witnesses.

There is also a public interest in ensuring that witnesses are sufficiently protected so that they will not be deterred from coming forward with evidence. The common law has responded in a flexible way with the concepts of absolute and qualified privilege against an action

for defamation; it may be that the defence of disclosure in the public interest in an action for breach of confidence will be extended in this area. Contempt of court also serves the purpose of protecting the witness and Parliament has evolved similar protection, though it may be doubted whether either the courts or Parliament can sufficiently protect a witness against subsequent reprisals. In some circumstances a more realistic protection may be to allow the witness to give his evidence privately; this must be balanced against the general public interest in openness and the interests of other individuals.

In addition to the various public interests, there are also personal interests to be considered. For various reasons a person may wish not to give information and would not voluntarily have given it to another without promise of confidentiality. He may fear that it will incriminate him or enable people to 'fish' for causes of action against him; it may be personal information which he wishes to keep secret or would be embarrassed to disclose; the information may be his commercial secret the disclosure of which to his rivals would cause him financial loss; the information may show him to be an incompetent administrator or allow others to question a decision which it was his function to make. All these personal interests are in conflict with the public interest in getting all relevant information, but cannot be ignored if witnesses are to readily come forward. If torture is unacceptable as a way of acquiring information, co-operation is the only alternative. Thus both courts and other investigatory bodies generally recognise a need to give protection against self incrimination or a restriction against subsequent use of the information, and find ways of safeguarding commercial secrets; acknowledgement of other grounds for non-disclosure has a patchy history, depending whether the ground is seen as one of public interest, as with some governmental information, or merely a personal whim.

Another important personal interest which must be considered is that of a person who may be criticised by the findings of the inquiry. A defendant in court proceedings has many safeguards. He is able to know all the information which may be used against him, he can cross-examine witnesses and he can answer any allegations which are made. In relation to other inquiries a person may be equally in need of protection. His career and reputation may be blasted as much by the report of a tribunal or an investigation under the Companies Acts as by a court decision.[4] The implications of this situation are receiving increasing recognition. Statute may

give him the same protection as he would have in court, thereby formalising the procedure of the inquiry, or the courts may give him a more limited protection by the rules of natural justice where his interests must be balanced against the need to protect other witnesses and perhaps the need for flexibility in the use of sources of information[5] and speed in producing a report. He may be allowed to know allegations and answer them before a draft report is finalised; or to know the gist of what is alleged and give general explanations; or the report may not be made public but only a summary of findings be made generally known.

In this chapter the detailed outworking of the balancing of those various interests is considered in court proceedings and in relation to information given to Parliament. Three types of statutory inquiry, namely an inquiry set up by Parliament under the Tribunals of Inquiry (Evidence) Act 1921, an inspection of the affairs of a company ordered by the Secretary of State for Trade under the Companies Act 1948 and a formal inquiry into an industrial disaster ordered by the Health and Safety Commission under the Health and Safety at Work etc. Act 1974, are considered and contrasted to show the varying importance attached by the different statutes to the public and private interests involved, and the question of subsequent admissibility of evidence given under statutory compulsion is considered in a wider context.

A. DISCLOSURE OF CONFIDENTIAL INFORMATION IN COURT

1. Court Proceedings in Public

The general rule is that courts administering English law sit in public, so that anything which a witness or a party to proceedings says becomes public knowledge. Trial in public is seen as a basic guarantee of justice. Blackstone compared the English system favourably with that of the civil law.

> "This open examination of witnesses viva voce in the presence of all mankind is much more conducive to the clearing up of truth than the private and secret examination [in the civil law] ... a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."[6]

More recently Lord Salmon tersely commented to like effect

> "Secrecy increases the quantity of evidence but tends to debase its quality."[7]

Bentham, typically, was more concerned about the position of the judge, and found open trial equally important in that light

"Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."[8]

The disadvantages, for participants and perhaps even for the public, of open trial, have also been recognised.

"The hearing of a case in public may be, and often is no doubt, painful humiliating or deterrent both to parties and witnesses and in many cases especially those of a criminal nature the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured because it is felt that in public trial is to [be] found, on the whole, the best security for the pure impartial and efficient administration of justice, the best means for winning for it public confidence and respect."[9]

Lord Loreburn pleaded for a liberal use of hearings in private, in the leading case of Scott v Scott

"because justice will be frustrated or declined if the court is made a place of moral torture."[10]

Nevertheless, the House of Lords were unanimous that whatever grounds there might be for holding judicial proceedings in private

"the power of an ordinary court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private."[11]

The European Convention on Human Rights emphasises the importance of "a fair and public hearing" but recognises that there must be exceptions. It states[12]

"Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances, where publicity would prejudice the interests of justice."

The Convention would seem to give wider scope for judicial discretion than the House of Lords has done.

2. Court Proceedings In Private

The Franks Committee on Tribunals and Enquiries was of opinion that open hearings were as important for tribunals as for courts. It saw three grounds for holding proceedings in private namely national security, the disclosure of personal or financial circumstances and preliminary, informal hearings.[13]

a) National Security

On the ground of national security it is obvious that a court must be able to sit in private since this is a public interest which outweighs any other.[14] In proceedings under the Official Secrets Acts, where this is most likely to arise, there is statutory authority to exclude the public from part or all of the proceedings, except the passing of sentence, on application by the prosecution.[15] In other proceedings, just as the appropriate Minister, or even the court itself,[16] may intervene to claim that documents or oral testimony are privileged from disclosure on the ground of the public interest, so an order may be made to hear the evidence in private.[17] (In a criminal case, refusal to produce the evidence may result in the prosecution having to be withdrawn,[18] so it may be preferable to receive the evidence but in private.) For example in a court-martial information relating to the design of a submarine was said to be potentially useful to an enemy, so the court heard the evidence in camera.[19]

b) Personal Circumstances

The Franks Committee's second ground included such matters as disclosure of a taxpayer's financial affairs and medical inspection or report, showing a respect for individual privacy analogous to that shown in various statutes, and sometimes by the courts, for personal information held by government departments.[20] Normally no such restraint is shown in respect of the personal affairs of either a party or a witness in court, since the public interest in open court outweighs the private interest of an individual concerned in the litigation merely not wanting his personal affairs disclosed.[21]

> "The general advantage to the country of having *[court]* proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings."[22]

It has, however, been suggested that if the witness is not directly concerned in the litigation his right to secrecy of his private affairs may be the paramount consideration and he may be allowed not to give the evidence at all.[23]

But in some circumstances another public interest may coincide with the private interest and so allow for evidence to be given in private. Thus the public interest in upholding marriage and family life[24] is the justification for the rule that Domestic Proceedings Courts are not open to the public (though the press may normally be present[25]). Personal and private matters are just as likely to be raised in divorce proceedings but the public interest requiring privacy is no longer applicable; divorce courts are held in public.

Statute may indicate that in particular circumstances the public interest in allowing a witness to give embarrassing evidence in private or protecting the public from moral outrage overrides the public interest in publicity. Thus the Matrimonial Causes Act 1973 provides[26]

> "In any proceedings for nullity of marriage, evidence on the question of sexual capacity shall be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court."

The Act thus reverses the actual decision in Scott v Scott[27] though the principle of law there laid down remains intact. There is no general rule that evidence of sexual capacity must be heard in private; for example it will still be given in open court in a criminal action. So it cannot be said that the risk of injury to public morality, or protection of a witness from embarrassment, is a public interest which normally outweighs the public interest in open courts.[28]

There is also a public interest in the protection of children and the mentally ill.[29] Matters concerning wards of court[30] and proceedings of the Court of Protection[31] are held in private; here

> "the broad principle [of open courts] yields to the paramount duty, which is the care of the ward or lunatic."[32]

Juvenile Courts also are not open to the public, though the press may be present.[33] The public may be excluded from a court when a child gives evidence in relation to "an offence against ... decency or morality."[34] Children are also sometimes protected by proceedings relating to their status being held in private. Thus the Court may sit in private on a hearing for a declaration of legitimacy.[35] In Barritt v Attorney-General[36] Wrangham J balanced the personal interest of the applicant and witness against the public interest in open proceedings and decided that public policy does not now require publicity in matters of status as rigidly as

it did in Scott v Scott. He ordered the hearing to be in private. The case is significant in that the applicant and witness were no longer children and so a merely personal interest was allowed to override the general public interest in openness. It is suggested that the case is wrongly decided.

But the court has no power to hear a matter in private simply because the court considers that it would be for the benefit of the child. In B(LA) v B(CH)[37] Payne J heard the issue of whether a child was a child of the family in open court but recommended that a judge should have a discretion to refer such a matter to Chambers. He argued that

> "the reasons advanced[38] as to the necessity of protecting children from the disturbing experience resulting from unwelcome publicity applied as much to issues of paternity as to legitimacy proceedings."

Thus it cannot be said that there is a general rule that the public interest in protection of children overrides the public interest in courts being held in public. But the courts do exercise a discretion to interview a child (or other person) alone in Chambers. In Official Solicitor v K[39] the House of Lords approved of this practice in a custody suit concerning a ward of court. Wardship cases are exceptional in many ways (and anyway are normally held in private) but the practice has also been approved in other cases. The Court of Appeal, in H v H[40], has said

> "It is of course often most desirable in matters of this sort [a custody case] that the judge hearing the case should see the children ... otherwise than in open court."

However in Re T (a Minor)[41] Sir George Baker P. "was not satisfied that the procedure adopted by judges of the High Court was a rule of law to be applied by magistrates." The problem in these cases is not so much protecting the children from publicity in general but that

> "the children may be reluctant to express themselves freely and frankly when there is the possibility that what they say may be made known ... to their parents."[42]

The ordinary rule of natural justice that a party to proceedings should know and be able to comment on any evidence which may affect him must be balanced against the welfare of the child. In Official Solicitor v K the House of Lords accepted that the court might receive a confidential report from the Official Solicitor, which probably included things said by the children to a doctor, and refuse to show it to the mother. But the discretion should be sparingly exercised and only when the reliability

of the report was ascertained (perhaps by seeing the children privately[43]) and the judge was "fully satisfied judicially that real harm to the infant must otherwise ensue."[44]

Lord Devlin stated that

> "the basis of the discretion is probability that harm would result to the ward from the disclosure."[45]

which is an easier test to apply than that of Lord Evershed. Even in exceptional cases the court felt that disclosure to a party's legal advisers should be made.[46] The court is similarly able to receive information held by an adoption society or local authority as a confidential report in wardship or guardianship proceedings if disclosure "would be harmful to the infant."[47] The importance of the parties, or at least their legal advisers, being able to see information[48] led the Court of Appeal to disapprove of the action of a county court judge who had seen the children privately and promised them that nothing which they said would be disclosed to anyone.[49] At least counsel must know what was said to be able to advise about an appeal and the court was unable to decide the appeal on its merits as the judges were unable to see vital material. It would seem, however, that if the promise were more limited, for example, not to disclose the information to the parents themselves, what would probably be sufficient both to allow the children to speak freely and to allow unhindered legal process. But even such a promise should not be given unnecessarily since the parents might

> "go from the court with a sense of grievance which may well be to the real disadvantage of the infant."[50]

The courts have shown themselves rather ready to keep information about a child away from his parents for the protection of informants and local authority officials;[51] it is all too easy to say that disclosure might injure the child whereas knowledge of the child's true feelings may be most valuable to the parent-child relationship, though painful at first.[52] However, the interest of the child should be paramount and if a promise of confidentiality is necessary to obtain his frank evidence the judge should be at liberty to make such a promise. And if the power to see the child privately is a valuable aid to making the right decision, as both Court of Appeal and House of Lords have stated, there is no justification for magistrates being unable to exercise such a power.

c) Preliminary Hearings

The third group of hearings which the Franks Committee[53] considered should be held in private are preliminary hearings of an informal nature

which might lead to a formal disciplinary hearing. Perhaps the most analogous court proceedings are the investigations concerned with the winding up of a company or settling the affairs of a bankrupt, where statute allows for private examination of witnesses[54] or public examination of company officials or the bankrupt.[55] The problems of what evidence must be given and what use may subsequently be made of it in these circumstances are discussed below.[56] The reasons for wishing preliminary hearings to be held in private are that the inquiry may not lead to any further proceedings, and so publicity may be unnecessarily damaging; an informal inquiry may make use of evidence which would be inadmissible in formal proceedings, and subsequent inadmissibility is meaningless once the material has been made known; an informal procedure may ignore the safeguards of fairness which apply in court proceedings, the "rocks on which freedom from oppression and tyranny have been established in this country for centuries,"[57] and so may produce a provisional decision which is unfair to an individual; in the inquiry an individual may be treated as a witness and so be given no opportunity to answer his critics although the hearing may result in criticism of him and perhaps proceedings against him; the publication of evidence and decisions may prejudice a fair trial.

Some of these considerations, but not all, apply to committal proceedings before magistrates.[58] These hearings are not a complete analogy with the Franks category since they are formal hearings and they do observe procedural rules for court hearings. Nevertheless evidence may be produced at committal hearing which is not produced at the trial,[59] or as to which there is doubt about admissibility,[60] or which is so sensational that if it is widely publicised it may cause future jurors to have prejudged the case.[61]

The Tucker Committee on Proceedings before Examining Justices[62] stated that before 1848 "the examination of witnesses was normally held in private." Dr. Marjorie Jones[63] has shown that, although judges from time to time criticized the practice,[64] in fact committal proceedings were widely reported in newspapers which indicates that reporters were not excluded. By the Magistrates Courts Act 1952, a consolidating Act, examining magistrates were not obliged to sit in open court,[65] though the power to sit in private was not widely used. The Tucker Committee rejected the idea of holding committal proceedings always in private on the general ground that

> "there is a general distaste for the idea of justice being administered in a court of law behind locked doors"

and in particular that dismissal of a charge might lead to suspicion of favouritism. The present law provides[66]

> "Examining justices shall sit in open court except where any enactment contains an express provision to the contrary and except where it appears to them as respects the whole or any part of committal proceedings that the ends of justice would not be served by their sitting in open court."

In introducing the provision the Home Secretary pointed out that now magistrates would have to be "positively convinced that the ends of justice make [a private hearing] necessary" and they should

> "be prepared to give their reasons for this, or otherwise always to sit in open court."[67]

So now, instead of an unfettered right to sit in private, examining magistrates have a discretion similar to that suggested by Lord Haldane L.C. where

> "by nothing short of the exclusion of the public can justice be done,"[68]

but considered dangerous by other members of the House of Lords.[69] A suggested circumstance for holding part of committal proceedings in private is where a witness is in genuine fear of intimidation[70] but there are no reported cases on the sub-section and a very experienced Magistrates Clerk[71] has said that

> "Courts are properly reluctant to depart from the normal requirement to sit in open court and will be moved to do so only by the weightiest reasons."

But the Criminal Justice Act 1967 took steps to protect the defendant from a future prejudiced jury by allowing for committal evidence to be given in the form of written statements rather than orally[72] and by restricting the matters which may be reported after the hearing.[73] One unexpected result of this has been that although such proceedings are technically held in public there is often no member of the public present.[74]

d) Trade Secrets

Another reason for a court hearing to take place in private, not mentioned by the Franks Committee[75] but recognised in Scott v Scott is where open hearing would result in the disclosure of a trade secret. Lord Shaw said

> "It has long been undoubted that the right to have judicial proceedings in public does not extend to a violation of that secret which the court may judicially determine to be of patrimonial value and to maintain."[76]

It is clear that the basis of the exception here is protection of the secret as property, rather than the personal secrets of a person's private life, but it appears from Badische Anilin und Soda Fabrik v Levinstein[77] that the secret need not be one which is necessarily protected by law. In that case the plaintiff claimed infringement of his patent and the defence was first that the patent was invalid and second that the defendant was using a secret process which did not infringe the patent. The defendant was allowed by the judge to refuse to answer questions which would disclose his process since, as the judge said

> "It was plain to me that if he were called upon to state in open court what that secret process was, it might turn out eventually, if I should come to the conclusion that the patent was bad, and if I called upon him then to state to the public a secret which he ought to be at liberty to confine within his own breast, that I might do him irreparable mischief."[78]

Having decided that the patent was valid, the judge allowed the defendant to give evidence about his process in closed court, the public and press being excluded.[79] It was held that the defendant, although using a different process, was infringing the plaintiff's patent. Nevertheless in his judgment the judge stated that he was carefully not disclosing the defendant's secret process and he also ordered the shorthand notes of that part of the evidence and all printed copies in the hands of the plaintiffs or their agents to be sealed up and impounded in court. It was possible that the defendant might be able to use his process for some other purpose, but he clearly could not use it for the purpose for which it had been designed, and the plaintiff's scientific advisers who had been in court throughout were not enjoined from experimenting on the basis of what they had heard.[80] Thus his secret was not likely to be of much value to him, but the court nevertheless took steps to protect it from disclosure to the public.[81]

3. What a Witness Must Say

Even if a court hearing is in public, confidential information will not be disclosed if the person giving evidence is allowed to refuse to divulge it. It was seen above that in some circumstances the court may sit in private to hear the witness; this has the advantage that the evidence is given and may be used in the decision. But the tradition of open courts is an ancient one and some protection of witnesses has arisen rather by allowing them not to disclose certain matters at all.[82]

The privilege against self-incrimination is such a protection, imported into the American Constitution and described as one of the

> "principles of natural justice which had become permanently fixed in the jurisprudence of the mother country."[83]

The classic statement of the rule is that of Lord Goddard L.J.[84]

> "no-one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty or forfeiture[85] which the judge regards as reasonably likely to be preferred or sued for."

The privilege now also applies to answers liable to incriminate the deponent's spouse.[86] It does not apply to a defendant in a criminal trial in respect of the crime charged[87] (though he may refuse to give evidence at all).

Although the privilege is seen as an important protection, English courts show a marked bias in favour of admitting relevant evidence if it can be obtained.[88] So it is not surprising that if the witness chooses to waive the privilege no-one can object; if it was not claimed when it could have been the deponent cannot later complain; if a claim is wrongly rejected by the court that is not a ground of appeal;[89] and the judge is under no duty to warn the deponent of the existence of the privilege.[90] The effect of certain statutory provisions on the privilege are discussed below.[91]

The common law went even further in the case of spouses. One spouse was not a competent witness against the other in criminal proceedings, except for charges of injury by one spouse to the other. Counsel in Leach v R[92] argued that this was based on the "fundamental principle" that husband and wife were one person in law. Various statutes have made inroads on this general rule by making a spouse competent, but not compellable, for example in most sexual offences and offences against children, bigamy and National Insurance offences. The House of Lords has held that a spouse is not compellable for the prosecution in a charge of violence by one spouse against the other even before their marriage.[93] The Criminal Law Revision Committee[94] has recommended that a wife should be compellable in charges of violence or sexual offences against children in the same household. A divorced former spouse is in the same position as a spouse in relation to matters which took place during the marriage.

Thus the common law rule which prevented any evidence at all being

given by spouses against each other was clearly a public policy rule designed to protect marital relationships and the harmony of family life by a total blanket of silence; the erosions of that rule have been mostly in cases where family harmony is already broken. One might have expected the public interest in the protection of children might lead the spouse to be compellable in any case of injury to any child; indeed it is arguable whether the privilege serves a useful purpose which outweighs the disadvantage of loss of evidence.[95]

Both this privilege and the privilege against self-incrimination may incidentally prevent the disclosure of confidential information but confidentiality is not in itself a necessary factor in the protected information.[96] It is, however, often a crucial factor in legal professional privilege[97] and it may be indirectly significant in public interest privilege.[98]

The judge has a general discretion to ensure that parties do not abuse their right to call witnesses.[99] Thus a subpoena ad testificandum may be set aside by the judge if he is satisfied that the subpoena has not been issued bona fide for the purpose of obtaining relevant evidence and that the witness cannot give relevant evidence.[1] An example is R v Baines,[2] a prosecution of a suffragette who subpoenaed the Prime Minister and the Home Secretary to give evidence. But one party cannot challenge the calling of the other party's witness on the ground of the witness's bona fides in giving evidence.[3] This may go to the weight to be attached to his evidence[4] but is not a ground for discharging him.

The court has a discretion to set aside a subpoena duces tecum on the ground that it is oppressive[5] and a similar discretion in relation to oral testimony which may be used (though rarely is[6]) to set aside a subpoena ad testificandum, but it is more readily used to allow a witness to refuse to answer particular questions. The court may sit in private to decide whether such permission may be given[7] or the judge may see the witness privately to ascertain why he does not wish to give the evidence.[8] The common law allows 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."[9]

Many of these cases are ones where a relationship of confidence has led the witness to obtain the information and he wishes not to disclose

it in the interests of preserving the relationship, or other similar relationships. Doctors and social workers will refuse to disclose information about their patients or clients without a court order but are usually ready to abide by such an order[10]; journalists asked to disclose their sources of information sometimes are not, and may go to prison for contempt of court.[11] As Lord Diplock said in D v NSPCC[12]

> "The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law."

Occasionally the interest in non-disclosure is a purely personal one. In Re Paget the bankrupt declined to state his true name in court. The judge interviewed him privately and decided he need not do so as it might injure him and would not help his creditors. He was later[13] criticised for failing to take sufficient account of the public interest in public examination of the bankrupt. In Morgan v Morgan[14] the father of the successful petitioner in divorce proceedings was subpoenaed by the respondent to give evidence of his assets and testamentary intentions to show the financial resources which the petitioner would be "likely to have in the forseeable future."[15] The judge held that the evidence was both relevant and admissible but set aside the subpoenas on the ground that it would be oppressive to make him give the evidence. The judge asked

> "Is the privacy of a person to be so invaded? Must he reveal, when he may not desire it, his testamentary dispositions and details of his wealth?"

and held that

> "the paramount consideration (although I bear in mind the importance of the evidence to the respondent) is the right of the individual. I do not see why a stranger to this suit should be forced to divulge evidence of this kind against his will."

This is the first case in which "oppression" has consisted solely of invasion of a person's privacy. In Senior v Holdsworth, on which the judge relied,[16] oppression consisted of being asked to give much more

information (untransmitted television film) than was needed for the case, as well as the fear of future intimidation of television cameramen. It is submitted that a better ground for the decision would have been that, even within the wide terms of the Act, the information was irrelevant. Calder v Calder[17] which was cited in favour of relevance concerned a vested and a contingent interest under a trust. Even in relation to the contingent interest this case is distinguishable. A beneficiary with a contingent interest has an immediate "connection" with the trust fund whereas a prospective beneficiary under a will has none. A contingent beneficiary may sue for breach of trust to prevent the fund being lost;[18] a prospective inheritor can do nothing to prevent dissipation of the estate. A contingent beneficiary may have income applied for his benefit if he is an infant or even paid to him if he is adult,[19] and advancements of capital may be made to him;[20] a prospective inheritor has no such interests. A trust may not be varied (in the absence of a special provision) without the consent of contingent beneficiaries;[21] it is clearly accepted that a will may be changed at any time until death (or testamentary incapacity). Even a contract not to change a will cannot make the will irrevocable.[22] So any statement as to testamentary intentions would be meaningless[23] if it could be changed. But if a testator changed his will after making a statement in court, might he be in danger of an action for perjury or contempt of court? Might he have to give an undertaking not to change his will? The words of the section should be read restrictively and should not include likely acquisitions by the wills of third parties still alive any more than actuarial chances of winning football pools or premium bond prizes.

So the case provides a satisfactory result in not requiring evidence of a person's testamentary intentions to be given, but the ground of the decision is unsound. Many private matters have to be disclosed in court and there is no reason to say that a person's financial circumstances are more private than, for example, his state of health. Where the question of whether relevant evidence should be excluded from a court of law is in issue, it is only a more important public interest which can override the public interest in the evidence being available. The statement of Lord Diplock quoted above is correct; that of the judge in Morgan is inconsistent with it and is wrong.

4. What May Be Done With The Information

a) Publication

Publication of the results of a court hearing or the evidence there produced, either by word of mouth or by newspaper or broadcast, may be

an additional form of punishment to a convicted defendant[24] or may be a form of vindication which a party is glad to be able to use. The public interest generally favours publication and qualified privilege against libel applies.

> "A fair statement of what takes place in a court of justice is privileged, and it is a most beneficial law that it should be so, as the public have a great interest in knowing what occurs there, and the inconveniences which can arise from such a publication are infinitesimally small in comparison with the benefits which result from it."[25]

The Home Office has said[26]

> "It is one of the purposes of holding criminal trials in open court that results should be widely known."

The Press Council has spoken[27] of the "duty as well as the right" of the Press to publish information about court hearings and the Home Office speak of "their function of reporting proceedings."[28] Nevertheless it has been pointed out[29] that newspapers are under no duty to attend court or to report cases, and the various restrictions on reporting have had the effect that there may not be a reporter available in court even if publicity is wanted. (In earlier times, the courts paid for matters to be inserted in newspapers if they felt the public needed to know; now they expect to get their publicity at no cost![30])

It might be expected that there would be no restrictions on the right to publish open court proceedings, since what has been said in open court cannot any longer be said to be confidential, and a ban on publication on court proceedings held in private since publication would seem to defeat the purposes of the private hearing. The law is not, however, so simple and in some respects it is not clear.

i) Open court proceedings.

The public interest in the administration of justice may require that matters stated in open court be not published. Thus reporting of committal proceedings by way of written publication or broadcasting is severely limited.[31] Nothing more than the identities of the participants, the charges and the decision may normally be given and the law is strictly applied. The Eastbourne Herald was prosecuted in 1973 for such matters as describing the defendant as "bespectacled and dressed in a dark suit" and stating when and where he had been married.[32] There is, however, no restriction on what an individual who was in court may tell others. The

Tucker Committee[33] felt that

> "the possibility of rumour of this sort is a danger in no way comparable with the danger inherent in the widespread publicity that often results from newspaper reports of committal proceedings."

It is possible for the restrictions to be lifted if the defendant (or one of several defendants being tried together[34]) wishes.[35] If he does so, and no reporters are present, a short adjournment should be granted to allow them to attend![36] The purpose of these restrictions is to ensure that a future jury is not prejudiced, so the restrictions are not needed, and do not apply, if the defendant is discharged or, if tried, after his trial.[37]

Similarly, although a plea of guilty to certain charges was given in open court it was contempt of court to publish that fact during the accused's trial on other matters. Non-disclosure to the jury of his previous convictions is not simply a matter of protection of the individual to be outweighed by the public interest in the free reporting of court proceedings. In R v Border Television ex parte Attorney-General[38] the court stated that the conflict was between two public interests, that of free speech on the one hand and that of preventing interference with the administration of justice on the other. The Lord Chief Justice quoted with approval the words of Lord Reid[39]

> "Freedom of speech should not be limited to any greater extent than is necessary, but it cannot be allowed where there would be real prejudice to the administration of justice."

Other aspects of the public interest may require that though a case is heard in public there is no widespread publicity for it. Thus the protection of public morality is a major purpose of the Judicial Proceedings (Regulation of Reports) Act 1926. It provides a general rule prohibiting the printing or publication of

> "any indecent matter ... the publication of which would be calculated to injure public morals".[40]

But the Act goes further and restricts the publication of information about matrimonial cases, prohibiting publication of the evidence or arguments of counsel other than on points of law.[41] It has been held that this part of the Act provides a protection for the parties as well as for the public interest, so that a party to such proceedings may obtain an injunction to prevent later publication.[42] As with the other restrictions discussed these limits to disclosure are imposed in the public interest though

incidentally they also help the individual.

It was suggested to the Younger Committee[43] that it is unfair to defendants, whether acquitted or convicted, that their identities may be published, and that such publication should be totally forbidden, as it is in the case of children.[44] The Committee rejected the suggestion, seeing greater benefits in retention of publicity. Thus

> "they will know for certain when a defendant is discharged, which can be important for him to have known"

and

> "Certainty about a defendant's identity protects the innocent from inaccurate rumours."[45]

The Committee though that magistrates should ask reporters not to name persons where there was a risk of severe mental disturbance. This magistrates have not been prepared to do[46] and anyway such a request is probably not binding.[47] The Sexual Offences (Amendment) Act 1975 makes it an offence after a person has been accused of rape to identify him in a written or broadcast publication unless, and until, he is convicted.[48] Thus an acquitted defendant should not be identified in the press at all. This has led to the anomalous situation that where a person is acquitted of rape but convicted on another charge it is thought that no publicity may be given to his conviction.[49] This indicates the difficulties raised by the exclusion of 'special cases' from the normal rules of publicity. It would be easy enough to think of other equally 'special' cases. The Royal Commission on the Press has called for a consideration of the whole question of anonymity of persons accused.[50] Either we should retain the rule of publicity in spite of its hardship cases, or we should have a general exclusion of publicity until conviction. It is suggested that the arguments of the Younger Committee are persuasive, coupled with the European Convention's emphasis of a 'fair and public' hearing. The provision in the Sexual Offences (Amendment) Act 1975 runs counter to principle and should be repealed.

ii) Matters not made public in court

Sometimes reporting may be restricted for the protection of a witness or (more rarely in the case of open courts) of a party.[51] The protection is seen as being in the public interest as encouraging others to come forward as witnesses.[52] Thus the court may allow a complainant in blackmail charges to write his name rather than to state it openly in court, and direct that he be referred to in a way which will not reveal his identity. Where a judge so directed, a reporter who published, shortly

before the close of the trial, the identity of the witness, was found guilty of contempt of court.[53] The extent of the judge's jurisdiction in this area is uncertain. It could be argued that a general discretion to protect witnesses where

> "the evidence is of such a character that it would be impracticable to force an unwilling witness to give it in public"[54]

might be quite liberally used by judges to allow small amounts of evidence to be given privately and protected from disclosure. As Lord Widgery C.J. said[55]

> "there is such a total and fundamental difference between the evils which flow from a court sitting in private and the evils which flow from pieces of evidence being received in *[private]*."

However, although the public interest in persuading victims of rape to give evidence must be as great as that in relation to victims of blackmail, and

> "a number of people who are victims of rape do not report it because they do not wish to face the appalling publicity in the national press, the neighbourhood and the local papers"[56]

judges have not in the past given such protection against publicity to rape victims as to blackmail victims, and Lord Widgery stated that any such protection would more properly be given by Parliament than by the courts.[57] Thus it cannot be said that the judges exercise a general discretion where the public interest in persuading unwilling witnesses to come forward outweighs the public interest in all the evidence at a trial being open and subject to public scrutiny.

The analogy rather tentatively given in the Socialist Worker case between protecting the blackmail victim's secret and protecting a trade secret is without foundation. The public interest in protecting a trade secret is the interest in protection of property, for disclosure would destroy the commercial value of the secret by releasing it to trade competitors. The private interest of the holder of the secret is one which is recognised and protected by law. The public interest in protecting the blackmail victim who perhaps

> "has done something disreputable or discreditable, and has something to hide and will not come forward unless thus protected"[58]

is the public interest in getting evidence against the blackmailer, not in protecting the victim as such. It is much more akin to the public interest

rule which protects from disclosure the identities of police informers[59] - not because they are particularly worthy of sympathetic treatment but because this is the only way to get vital information which is needed in the public interest.

Thus it may be that the judge's discretion to order non-disclosure of particular parts of evidence in an open court hearing is co-extensive with public interest privilege in the law of discovery. Then the basis of non-disclosure is seen to be that the supply of information from such informers is necessary to the performance of a public function[60] (here the apprehension and conviction of criminals) and if protection is not given the supply of such information is likely to be seriously affected.[61] The Committee[62] has recommended that legislation should provide the specific circumstances in which a court may be empowered to prohibit, in the public interest, the publication of names or other information arising in a trial.[63]

Even if it is clear that a judge had jurisdiction to make an order for non-disclosure it has been pointed out[64] that it is not certain how much publication would be needed to constitute contempt of court. The various statutory restrictions[65] apply only to written and broadcast publication, not to statements made by a person who happened to be in court. Telling his wife might injure the particular witness as much as telling the world, but as it was submitted above that the purpose of the restriction is not so much protection of the individual witness as the public interest in witnesses coming forward it may be argued that no damage is caused to the public interest if such disclosure is not known to other potential witnesses.[66]

Another problem which arises is how long the prohibition on disclosure lasts. In some cases a statutory provision makes it clear; for example restrictions on reporting committal proceedings last only until acquittal or conviction,[67] for they are only needed to ensure a fair trial. Similarly, the Phillimore Committee has recommended that the law of contempt should cease to apply at the end of the court proceedings.[68] This is normally logical since

> "The test of contempt is whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced"[69]

and the risk of prejudice is over once the case has been heard.[70] But it has been held to be contempt of court to intimidate or threaten a witness after he has given evidence[71] or after the case is completed[72] on the ground of jeopardising the attendance or evidence of future witnesses,

the same ground as protects the witness's anonymity. A potential witness, reading the disclosure of identities perhaps months after the trial, might be deterred from coming forward as much as if he read it at the time of the trial. The cryptic statement of Lord Widgery C.J. that

> "if Mr Foot had any real concern for the law of contempt at all, he would have made it his business to see that this article was not published until the jury had returned their verdict and were no longer liable to be affected by it,"[73]

seems to suggest that he could only be liable in contempt until the end of the case, but it was agreed that prejudice to the jury was not the ground for the contempt proceedings in that case. It may be said that the public interest in allowing publication of court proceedings only extends to contemporaneous accounts,[74] and so if a later disclosure would "create a risk that the course of justice would be seriously impeded" by the refusal of witnesses to come forward in other cases it should be a contempt however long after the event. Liability would depend on how closely the disclosure was linked with the previous trial and the protection given in that trial. As well as "gagging writs"[75] and "gagging discovery"[76] we may have "gagging disclosure" - because the matter has been stated in court and the judge has ruled non-disclosure it cannot ever be disclosed by whatever other means it might have been discovered[77] or for whatever purpose its disclosure may be required.

It is suggested that clarification and restriction are needed in this area. Statutory provision should show the limits of the jurisdiction of the judge to order evidence to be given secretly and not disclosed, either by a list of specific instances, as suggested by the Phillimore committee, or by a formula analogous to public interest privilege as suggested above; the statute should provide for criminal liability for written or broadcast disclosure of the information either before the proceedings have ended or in a contemporaneous account. Criminal liability for later publication should arise only under the common law offence of perverting or obstructing the course of justice which, as the law now stands, would require either an actual intention to pervert or obstruct or knowledge that the course of justice will be, or almost certainly will be, obstructed or perverted as a result.[78] The law of contempt should, as suggested by the Phillimore Committee, be confined to the time of court proceedings.

iii) Hearings in private.

In spite of some statements to the contrary,[79] even at common law

there was no general rule prohibiting publication of information about court proceedings held in private. Scott v Scott[80] was a motion to commit for contempt of court a party to a nullity suit (which had at her request been heard in private) who had sent a transcript of the proceedings to several persons. The House of Lords decided that the court had had no power to sit in private but made it clear that even if the proceedings had properly been held in private that would not be sufficient to prevent subsequent disclosure.

> "To extend the powers of a judge so as to restrain or forbid a narrative of the proceedings either by speech or by writing seems to me to be an unwarrantable stretch of judicial authority."[81]

Even Lord Loreburn, who was in favour of a wide power to hold proceedings in private, said that "Mrs Scott has an inalienable right to tell the truth in defence of her own character"[82] and Lord Shaw saw the motion as

> "violating the freedom of Mrs Scott in the exercise of those elementary and constitutional rights which she possessed."[83]

Even where publication is prohibited the parties to proceedings are given a transcript[84] and it would seem that a party is entitled to use the transcript at least in vindication of his own reputation. Lord Loreburn, in Scott v Scott thought that the court could restrain

> "wilful and malicious publication going beyond the necessity"

but that

> "If the communication be made in good faith and in fulfilment of any social or moral duty to oneself or anyone else it cannot be either prohibited or punished."[85]

The general law concerning publication of hearings in private is clarified[86] by the Administration of Justice Act 1960 section 12. Thus the section makes explicit the rule suggested in Scott v Scott that publication of information relating to court proceedings in private is not automatically a contempt of court. The section then sets out circumstances where such publication will "of itself" be contempt,[87] those concerning infants, proceedings under the Mental Health Act 1959, national security,[88] a secret process, discovery or invention and where the court "having power to do so" expressly prohibits the publication. Sub-section 4 provides

> "nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section."

It might appear from the wording of the section that section 12 provides a complete code on contempt in this area and that publication within categories (a) to (e) is absolutely prohibited; on this reading sub-section 4 states that it should not be implied that anything further may be a contempt for which provision has not been made in the section.[89] However, the Court of Appeal has held[90] that the section does not create new offences but merely clarifies existing law and so must be construed in the light of pre-existing case law. Sub-section 4 is to be read as indicating that the section does not extend the circumstances in which contempt would be committed at common law, even within the categories (a) to (e).

Thus, as at common law, there is still a discretion in the judge to allow publication. In Re R.(M.J.) the question arose whether a trustee in bankruptcy could use in the bankruptcy proceedings the transcripts of evidence given in adoption proceedings (held in private) concerning the financial affairs of the bankrupt. A party to the adoption proceedings[91] had apparently sent the transcripts to the trustee in bankruptcy who wished to use them in further examination of the bankrupt. Rees J held that the Act had not removed the judicial discretion to permit publication. Counsel for the Official Solicitor then argued that disclosure should only be authorised if it would be for the benefit of the infant in the particular case or for the benefit of infants generally in future cases;[92] any wider ground of authorisation would harm future proceedings as

> "witnesses will, or may, be deterred from giving evidence with that degree of frankness which is the essential need in cases involving the welfare of minors."

The judge held that although this was a very relevant consideration it was not the only one, and the proposed test of benefit to the infant was too restrictive. He said[93] that the judge

> "will place the interest of the minor in the forefront of his considerations. He will also give considerable weight to the public interest in ensuring that frankness will prevail in such proceedings by preserving confidentiality. The public interest in upholding the law of the land by providing relevant evidence for use in other legitimate proceedings must also be considered together with all the other circumstances of the case."

Disclosure of relevant parts of the transcripts to the trustee in bankruptcy was authorised on his undertaking that he would not permit any use of other parts of the transcripts which he had seen.

The relevance of the old law was seen even more clearly in the case of Re F (a minor)[94] where two newspapers were claimed to have committed "a serious contempt of court" by publishing information about a ward of court based on a welfare officer's letter and a report of the Official Solicitor. At first instance,[95] Tudor Evans J held that section 12 covered any information relating to the welfare of a ward of court so long as the wardship existed and that the offence was absolute so that ignorance of the wardship proceedings was no defence. On appeal, counsel for the Official Solicitor argued that the court's wardship jurisdiction rested "very firmly on confidence for its efficacious working." There were three main heads of confidence in wardship namely between the ward and the judge, between witnesses and the judge and between the ward and her legal guardian, usually the Official Solicitor. He said

> "One wonders if the girl or the social worker would have spoken so freely if they had known that the information was to be publicised."[96]

The Court of Appeal held the section to be more restricted. Information "relating to proceedings before any court sitting in private"[97] included information prepared for use in court (and so included the letter and report used) but

> "in all other respects the ward enjoys no greater protection against unwelcome publicity than other children."[98]

Geoffrey Lane L.J. recognised the need for protecting confidentiality for witnesses by saying

> "The object is to protect from publication information which the person giving it believes to be protected by the cloak of secrecy provided by the court."[99]

Scarman L.J. however saw the purpose of restriction on disclosure differently

> "The true reason was the mischief likely to be done to the ward if familial proceedings, parental in character though conducted by a judge, should be exposed to the glare of publicity."[1]

This justification is, it is submitted, in accordance with the reasoning in Scott v Scott and a more satisfactory argument than the "need for witnesses to speak frankly" argument which has been scotched as a basis for Crown privilege[2] and castigated as "the old fallacy."[3] The Court of Appeal also held that the Act did not create new absolute offences merely by implication, and that defences available before the Act were not excluded.

Thus the newspapers were held not guilty of contempt of court because they had not known that what they were reporting was information relating to wardship proceedings, nor had they acted recklessly in publishing the information.

It is also clear, both from Scott v Scott and from Re F (a minor), that prohibition of disclosure is not perpetual. As Lord Shaw said, in Scott v Scott

> "When respect has thus been paid to the object of the suit, the rule of publicity may be resumed."[4]

So normally when wardship has ended there will be no further bar to publicity, and similarly with the other grounds for prohibiting disclosure under the Act.

On the other hand, the publication of information relating to court proceedings in private may be a somewhat risky undertaking. Whereas everything said in open court is protected by absolute privilege against libel, there is authority[5] to say that there is no privilege against libel for a report of private court proceedings. Certainly the statutory protection for newspaper and radio and television reports which are fair and accurate and published contemporaneously extends only to "proceedings publicly heard".[6] Also there is perhaps a greater likelihood that information disclosed in private may be "indecent matter" within the Judicial Proceedings (Regulation of Reports) Act 1926.[7]

iv) Other grounds for restricting publication.

It may be that the parties themselves may by contract agree not to disclose information about court proceedings. In Duchess of Argyll v Duke of Argyll[8] an interlocutory injunction was granted restraining the Duke from disclosing information relating to a former libel action which had been brought against the Duchess. The court accepted her evidence that she had agreed to an injunction in that action in return for his promise that "she would never hear of the matter again" and granted the injunction even though it was possible that the information was obtainable elsewhere and even though the Duchess herself had made some reference to the case in public. It would appear that Ungoed-Thomas J could have based the injunction on the breach of an order by the judge who heard the matter in chambers, but he expressly based himself instead on the agreement of the parties.

Such an agreement would not, of course, be binding on third parties who obtained the information without knowledge of or participation in the breach of contract. But the court, in granting an injunction against

disclosure by a party to the contract, can also enjoin subsequent use by another, as was done in the Argyll case in respect of the newspaper. Alternatively an action for breach of confidence would lie against the ultimate receiver[9] of information disclosed in breach of a contractual duty of confidence once he became aware of the breach.[10]

b) Use of the information against the witness.

As a general rule, everything said in court is said in public and can be used for any purposes. If the witness did not claim the privilege against self-incrimination, although he could have done, he cannot object to subsequent use of the information against him.[11] The Civil Evidence Act 1968 provides that evidence of a conviction is admissible in civil proceedings and is prima facie evidence of the offence,[12] shifting the burden of proof to the convicted person.[13] Similarly, a finding of adultery or paternity is admissible in other civil proceedings and is prima facie evidence of the facts.[14]

In relation to the Court of Protection subsequent admissibility is taken to remarkable lengths.

> "Except where the court otherwise directs, evidence which has been used in any proceedings relating to a patient may be used at any subsequent stage of those proceedings or in any other proceedings relating to the same patient or to another member of the patient's family."[15]

Thus evidence, which may be evidence which would not have been admissible in a court of law,[16] may be subsequently used, without being further tested, even in different proceedings relating to another person. The justification for this exceptional position must be the difficulty of obtaining evidence, for example from a patient who has only lucid intervals, and the importance of acting informally and speedily for the protection of the patient and his property.

Although a statement made in court is effectively widely published, the maker has absolute privilege against libel for anything said with reference to the inquiry.[17] The privilege

> "was established not for the benefit of witnesses, but for that of the public and the advancement of the administration of justice, to prevent witnesses from being deterred by the fear of having actions brought against them from coming forward and testifying to the truth."[18]

Again, although matters stated in court may have been so well publicized as to be common knowledge that is not sufficient ground for using

such information to deprive a person of his rights. Ridge v Baldwin[19] concerned the dismissal of a chief constable. At the end of a widely publicized 19 day trial in which the plaintiff's conduct had become "a matter of public notoriety,"[20] though he was acquitted of the charges against him, the trial judge made comments about his lack of "professional and moral leadership" and said that the police force needed a leader

> "who will be a new influence and who will set a different example from that which has lately obtained."[21]

The watch committee thereupon dismissed the chief constable without giving him notice of the matters alleged against him or opportunity to make representations. The plaintiff claimed that the dismissal was a nullity and he should have been allowed to resign, thus retaining his pension rights, rather than be dismissed. In the Court of Appeal Harman L.J. said[22]

> "It seems to me apparent that, so far as reinstatement was concerned, both sides recognised that a hearing would have been an empty form, and it hardly seems right to let what is called natural justice, which after all is only fair play in action, be governed by a so-called rule which may have no real pertinance inthe events which have happened."

The Court of Appeal dismissed his appeal, and in the House of Lords, Lord Evershed, who agreed with them, said that to require an additional hearing

> "makes the regulations[23] gravely offend against commonsense."[24]

Nevertheless the House of Lords held that the rules of natural justice are applicable to the dismissal of the holder of an office not held at pleasure,[25] and held his dismissal to be a nullity. Lord Hodson said[26]

> "It would be unrealistic to suppose that the watch committee had not a good idea of what took place at the criminal trial ... but in my opinion it will not do to say that the case was so plain there was no need for the appellant to be heard and that, therefore, the claims of natural justice were satisfied."

Furthermore, although a criminal conviction is a matter of public record and cannot, therefore, be said to be confidential, it is not considered to be in the public interest that people should have unlimited access to other people's criminal convictions. Magistrates' clerks may require authority from a justice before allowing inspection of the register of convictions,[27] and public concern is expressed when individuals are found to have been able to discover such facts from police records.[28] The Rehabilitation of Offenders Act 1974 reflects and extends this attitude

by providing that, subject to exceptions,[29] a person with "spent" convictions[30] is to be treated for all purposes as if he had not had those convictions.[31] Thus he need not disclose them, for example, for purposes of employment or insurance. A concession to freedom of speech is, however, made in that in an action for defamation based on disclosure of a spent conviction the defence of justification is preserved unless the defendant made the disclosure with malice.[32] Disclosure by an official of a "spent" conviction is a criminal offence unless made in the course of his duties or to the rehabilitated person or at his request.[33]

Conclusion

The general public interest in court proceedings being held in public and in all relevant information being made available and publicised nevertheless takes account of the confidentiality of some information. Thus information harmful to national security and trade secrets are protected from further disclosure so far as possible by restricting those who learn them in court. Personal information is protected where protection serves a public interest, for example communications between spouses, information relating to children, some matters concerning the breaking of marriage. These examples also illustrate the different levels of protection necessary for the different public interests - non-disclosure at all, giving the information in private, or simply limiting publicity.

It has been said[34] that if a right of privacy were to be protected by the law of tort it would be necessary to have courts sitting in private or restrictions on publicity. It is suggested, however, that it would be no more right to make such fundamental changes as a general rule than it would be always to hear defamation actions in camera. The purpose of the action would be similar in both cases, and the argument for a secret hearing would be the same, but the purpose of the action is to show disapproval by making the defendant pay and, more importantly, to set standards for general conduct by publicity of the proceedings. The courts have flirted with the protection of individual desires to keep personal information secret; particular hard cases could form dangerous precedents undermining the principle of open courts. Similary if the desire to keep secret information received or given in confidence is merely a personal desire (however commendable) rather than being necessary in the public interest (journalists' sources as opposed to NSPCC informers on battered babies, for example) the courts should not accede to the request. The interest in open courts and the availability of information for legal proceedings is a public interest; it should be countervailed only by another public interest.

B. DISCLOSURE OF CONFIDENTIAL INFORMATION IN PARLIAMENT

A Member of Parliament may disclose in debate in Parliament information which he was given in confidence and no action may be brought against him in court, either for defamation or for breach of confidence. The freedom of speech of Members is based on the law and custom of Parliament as confirmed by the Bill of Rights 1689 Article 9. Individuals who are not Members may be required to give information to either House, or to a committee. Indeed the Commons

> "may inquire into everything which it concerns the public weal for them to know; and they themselves ... are entrusted with the determination of what falls into that category."[1]

Four questions arise, namely is the examination held publicly or in private (for if it is in public the disclosure is wider); may the witness refuse to answer questions; is the witness protected in respect of his disclosures; and what may subsequently be done with the information. The position of the member of the public who volunteers information to a Member of Parliament is somewhat different from that of a witness required to attend the House and so is considered separately, and the position of the Member in relation to disclosures by him outside the House is also discussed.

1. Openness Of The Proceedings

> "By the ancient custom of Parliament, and by orders of both Houses, strangers are supposed not to be admitted while the Houses are sitting."[2]

In practice, strangers are not normally excluded, though by Standing Order 115 if notice is taken that strangers are present the Speaker puts a question that they be ordered to withdraw. So a witness called before the House will probably be examined in public.

Select Committees sit in private unless by resolution the Committee decide that strangers may attend during the examination of witnesses.[3] The Select Committees on Science and Technology, Race Relations and Immigration, and European Secondary Legislation and most of the sub-committees of the Expenditure Committee normally sit in public, though other Select Committees still normally sit in private.[4] It is understandable, perhaps, that the Defence and External Affairs sub-committee should sit in private to protect national security, and perhaps the Select Committee on the Parliamentary Commissioner thereby protects the private affairs of individuals, but it is hard to see why the Public Accounts Committee and the General sub-committee of the Expenditure Committee should usually sit in private. Even

if a Committee has resolved to sit in public, it can go into private session to hear the evidence of a particular witness.[5] For example, the Select Committee on Violence in Marriage in the session 1974-5 heard certain witnesses in private and did not divulge their names as there was fear that they might be injured. Committees always deliberate in private.

2. What The Witness Must Say

Just as either House has an unlimited power to call witnesses, so a committee, if it has been given, as is normal, "power to send for persons, papers and records,"[6] may call anyone to give evidence. If the witness wishes not to answer a question he may ask the chairman to be excused, but must answer if required. Neither privilege against self-incrimination nor legal professional privilege are applicable, nor is it relevant that the witness has sworn an oath not to testify.[7]

Despite the theoretically absolute power to examine witnesses which may be possessed by Select Committees there are in practice limits to their powers to obtain information.[8] Although a Committee may send for any civil servant[9] it will usually protect the convention of a collective Departmental view by issuing an informal invitation to the Department to give evidence

> "In extending such invitations to government departments the Committee will usually rely on departmental co-operation in the selection of witnesses and will not normally summon individual officers."[10]

Power to examine a Minister in committee is a more valuable way of obtaining information which the Minister does not wish to give than the Parliamentary Question, for the Committee may conduct a lengthy examination and there is less room for prevarication.[11] Furthermore the Minister may be prepared to give information on a confidential basis to the Committee which he would not be prepared to state openly in the House.[12] Nevertheless, when the sub-committee of the Expenditure Committee investigating financial arrangements with Chrysler UK wished to consider the different views of two ministers,[13] the Prime Minister refused to allow Harold Lever, Chancellor of the Duchy of Lancaster and the Prime Minister's economic adviser, to give evidence before the committee. The ground given was that he "had no ministerial responsibility whatever in this matter"[14] but the reason was to protect the convention of collective Cabinet responsibility.[15] Another ground for wishing not to disclose information is the risk of prejudicing negotiations, as was seen in the refusal of the chairman of the British Steel Corporation - "short of the Tower of London" - to disclose to the

Select Committee on the Nationalised Industries, even in private session, recent estimates of losses and the alternative proposals to minimise them being discussed with the Minister and the unions[16] though he relented when served with an order of the House.[17] The function of a committee in such circumstances may be to criticise decisions once made but it cannot play an active part in helping to form decisions if the relevant information is not given. Commercial grounds may also be put forward as a reason for refusing information. When shipping orders for Poland, subsidised by public money, were announced, the Minister said that

> "it was against the public interest for the taxpayer to know the amount of subsidy. Official disclosure would only lead to the next customer expecting an even bigger subsidy."[18]

Such reasoning may make good commercial sense but the case is a clear indication of the restrictions on Parliamentary control of the spending of public money.[19]

The right of a Committee to require documents is rather less wide than its power to send for witnesses. An individual cannot refuse to disclose a document on the ground that it is under the control of another who has instructed him not to disclose it.[20] But a committee cannot demand papers which if required by the House would be sought by an Address, nor papers which the House would not itself ask for.[21] Thus a committee cannot demand information from the Privy Council or from a department headed by a Secretary of State. Such innocuous matter as the planning papers of the Department of Education and Science have been refused to a Select Committee.[22]

The Parliamentary Commissioner for Administration may investigate, effectively on behalf of Parliament,[23]

> "any action taken by or on behalf of a government department [or other body or authority whose functions are exercised on behalf of the Crown[24]] being action taken in the exercise of administrative functions of that department or authority."[25]

He may obtain information from anyone including private individuals, Ministers and civil servants. His investigation is held in private.[26] An individual who may be criticized as a result of the investigation has special safeguards. He has an opportunity to comment before the investigation,[27] may be allowed legal representation[28] and is entitled to receive a copy of the report.[29] The Commissioner early initiated procedures to ensure that

such safeguards are not overlooked.[30] Individuals have some protection in what they must say since the privilege against self-incrimination, legal professional privilege and privilege in aid of litigation are preserved.[31] Since the widening of public interest privilege in D v NSPCC[32] a person or body other than the Crown might be able to claim non-disclosure on that ground, but contractual confidentiality or a desire not to disclose information obtained in the course of a relationship are not sufficient grounds for non-disclosure since a person could be compelled to give such evidence in court. Government departments, however, are not protected against disclosure. The Act provides

> "no obligation to maintain secrecy or other restriction under the disclosure of information obtained by or furnished to persons in Her Majesty's service, whether imposed by any enactment or by any rule of law shall apply,"[33]

and the Crown cannot claim privilege against disclosure. The only exception[34] to the openness of information in the hands of the Government is that if the Secretary of the Cabinet, with the approval of the Prime Minister, certifies that information concerns proceedings of Cabinet or Cabinet committee that information may not be disclosed.[35] This provision was applied when the Parliamentary Commissioner investigated the Court Line travel group collapse and a statement by the Minister that the Commissioner "was afforded full access to all the documents and all the reports" was much criticized in Parliament as being misleading. The Minister justified his statement on the ground that Cabinet papers "have never been provided in any previous inquiry."[36] Whether or not the Court Line documents were refused in order to protect the Prime Minister personally, they were refused quite legally. The provision in the Act is an absolute prohibition designed to protect Cabinet collective decisions. Whether such a total ban on information required for an inquiry into "injustice in consequence of maladministration"[37] is in the public interest is a matter which Parliament should have considered before enacting the section rather than when it was used. Professor Wade has said that the Commissioner's

> "high position combined with his ample powers of investigation give him all the authority that an ombudsman needs. Experience in all countries is that the best antidote to maladministration is publicity."[38]

The protection of the convention of collective Cabinet responsibility has been held by Parliament to be a more important consideration.[39]

3. Protection Of The Witness

Parliament has long recognised that its witnesses may need protection. A Commons resolution of 1688[40] stated that witnesses have the same privilege as Members in coming to and going from the House, so that any physical obstruction or attempted arrest would be a breach of privilege. Likewise tampering with a witness or seeking to influence his evidence is a breach of privilege.[41] But protection against reprisals is equally important if the House is to receive all the evidence it needs, and this is the more crucial when hearings are in public and the evidence is published. A Commons resolution of 1818 states

> "That all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House in respect of anything that may be said by them in their evidence."[42]

In 1973 Mr W.A. Grimshaw, a senior official of the National Coal Board, gave to the Select Committee on the Nationalised Industries evidence which was critical of the Coal Board's pricing policy. The Select Committee largely accepted his evidence. In January 1975 Mr Grimshaw was dismissed as redundant. He complained to the House of Commons that he had been injured as a result of his evidence, and this was examined by the Committee of Privileges. Its finding[43] that he was not adversely affected by having been a witness, which was based on written material only, has been criticised by, among others, the chairman of the Select Committee who said

> "The work of the Select Committee will not be helped by this failure to protect its witnesses."[44]

Clearer cases of injury directly resulting from the giving of evidence have been attempted actions for slander. The House may punish anyone who plays a part in such an attempt,[45] and furthermore the court has held absolutely privileged from libel a statement made before a Select Committee. Field J said[46]

> "It may be a hardship upon individuals that statements of a defamatory nature should be made concerning them, but the interest of the individual is subordinated by the law to a higher interest, viz, that of public justice, to the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences."

Furthermore, by the Witnesses (Public Inquiries) Protection Act 1892 it is a criminal offence to "punish, damnify or injure" a witness before a

Parliamentary committee on account of his evidence, unless it was given in bad faith. The defendant may also have to compensate the victim.[47]

A witness before a Select Committee may be required to give information which it would normally be an offence under the Official Secrets Acts for him to disclose. But even if he has not had express authorisation[48] he would be protected against criminal proceedings because such communication is "to a person to whom it is in the interest of the State his duty to communicate."[49]

4. Subsequent Use Of The Information

Article 9 of the Bill of Rights provides

> "That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Information given to Parliament, or a committee, may not, therefore, be used for any purpose which would involve impeaching or questioning the evidence given or the conclusions of the House or committee. There is still no general public right to the publication of proceedings in Parliament just as there is no absolute right to attend.[50]

A publication by order of Parliament has absolute privilege against libel, as does a copy of such publication, and publication of an extract or abstract of such publication has qualified privilege.[51] In Wason v Walter[52] a report in a newspaper of a proceeding in Parliament, and comment in the leading article, was held to have qualified privilege[53] on analogy with the public interest in reporting of judicial proceedings. Lord Campbell L.C. said[54]

> "It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done the welfare of the community depends ... How could the communications between the representatives of the people and their constituents which are so essential to the working of the representative system be usefully carried on if the constituencies were kept in ignorance of what their representatives are doing?"

The public interest in what goes on in Parliament was further emphasised more recently in Cook v Alexander where the Court of Appeal held that

qualified privilege also applied to a 'Parliamentary sketch' designed to give the main impression of a debate. Lord Denning M.R. said

> "such a sketch is privileged, whether spoken at the dinner table afterwards or reported to the public at large in a newspaper. Even if it is defamatory of someone it is privileged because the public interest in the debate counterbalances the private interest of the individual."[55]

But a witness may be able to prevent his evidence being made known to the public. A committee may allow him to give his evidence in private, and if he considers that publication would be "prejudicial to the public interest or injurious to character or undesirable on similar grounds"[56] the committee may refrain from reporting it to the House, but will indicate in the text of its report where material has been omitted.[57] Disclosure of information thus deleted would be a contempt of Parliament.[58] Similarly the Parliamentary Commissioner for Administration has wide powers of receiving information but disclosure by him is restricted.[59]

Any publication of evidence given to a committee before it has been reported to the House is prima facie a breach of privilege but the basic rule is relaxed in respect of committees which sit in public. Thus a fair and accurate newspaper report of the public examination of a witness will not be objected to,[60] and the committee may authorise a witness to publish his evidence.[61] The Speaker may authorise disclosure of one witness's evidence to another. These rules, while protecting the supremacy of the decision of the House, may be unduly restrictive where a committee desires wide public discussion of the issues before it produces its report.[62]

Publication of the report of a select committee before it has been laid before the House is also a contempt of Parliament, though provision is made for Government departments, witnesses and the press to be given copies on a "strictly confidential" basis until publication by the House.[63] In 1975 Mr Schreiber, a journalist on The Economist, published in an article details of a draft report of the Select Committee considering a Wealth Tax. He and his editor were found guilty of contempt of Parliament.[64] The Committee of Privileges said

> "It appeared to us that Mr Schreiber considered that it was for him to decide what confidential information he would treat as secret and what he would not, irrespective of the views of the House. We consider Mr Schreiber's conduct to be wholly irresponsible."

The journalist also refused to disclose his source of information. The

Committee said

> "If it were to be accepted that in cases of contempt journalists could shelter their informants with impunity, not only would journalists be placed above the law but opportunities for abuse of their position by all those who handle confidential material in Parliament would be greatly widened."[65]

The editor pointed out the irony of the situation when a Select Committee is used to stimulate public discussion and debate over a politically controversial matter, and yet no comment is allowed on the proposed report until it has been finalised.[66]

5. The Informal Informant.

An individual may communicate with a Member of Parliament either to give the Member information to help him in doing his job or to seek the Member's assistance. Importance is attached to the right of individuals to have access to Members of Parliament.[67]

The courts recognise the importance of both functions and have held such communications entitled to qualified privilege in subsequent libel actions. In Dickson v Earl of Wilton[68] the defendant had made certain allegations as a result of which the plaintiff was discharged from his regiment. Mr Duncombe, a Member of Parliament, intended to raise the matter in the House of Commons and the defendant went to see him and uttered more slanders. In his charge to the jury, the judge said of the defendant

> "If he went to Mr Duncombe to communicate that which he believed to be true, to enable Mr Duncombe to do his duty as a member of the House of Commons ... it is a privileged communication. But if ... his object was to prevent Mr Duncombe from bringing those proceedings before the House of Commons, and so preventing justice from being done, then the privilege is gone."[69]

Although as a general rule a complaint about misconduct of a public official[70] attracts qualified privilege,[71] if the complaint is made to the wrong official, even though in good faith, there is no privilege.[72] But in relation to communications with a government minister or Member of Parliament this rule seems to be somewhat relaxed. Thus in Harrison v Bush[73] a complaint was made by the inhabitants of a locality to the Home Secretary to have a magistrate removed. The court allowed qualified privilege by a somewhat contorted argument that the Home Secretary was sufficiently the right person to receive the complaint since theoretically dismissal would be by the Crown not by the Lord Chancellor and the Home Secretary was in a position

to raise the matter though he could not redress the grievance. This argument was applied to a Member of Parliament in R v Rule,[74] and the relevant interest of the Minister to whom the Member transmits the information was broadened in Beach v Freeson.[75]

A communication to a Member of Parliament for transmission to the Parliamentary Commissioner for Administration would also attract qualified privilege, though the Member and the Commissioner have absolute privilege.[76]

But a person who, unasked, gives information to a Member of Parliament is not protected by Parliamentary privilege just because he does some act in the House or communicates with a Member.[77]

Furthermore, there is no privilege analogous to legal professional privilege to protect the relationship between Member and constituent. So a Member who receives information from a constituent is not prevented from passing the information to a Government department or other person even without the consent of the constituent. A Member of Parliament received certain documents which he passed to Government departments with the result that criminal proceedings were taken against his constituents. When he raised the question of privilege, the Speaker said that no parliamentary privilege attached to the documents and Members must use their own judgments in deciding what to do with such information.[78]

Similarly Parliament will probably not protect an 'informal' witness against reprisals for having given information. So when a constituent clergyman wrote to his Member of Parliament who sent the letter to the Bishop it was alleged that the clergyman was damnified but the House of Commons refused to treat the matter as a breach of privilege.[79] It is even possible that an informant who gives information to a Member of Parliament may be prosecuted under the Official Secrets Acts. Although it is a defence that the information was given to "a person to whom it is in the interest of the State his duty to communicate it"[80] it has been said that the defendant would have to discharge an onerous burden even in giving it to a Member of Parliament.[81]

On the other hand, a feeling is sometimes expressed that constituents who communicate with their Member of Parliament are entitled to some protection.[82] When a letter which had been passed on to a government department was disclosed to a third party who threatened a libel action[83] the Prime Minister told the House that departments had been reminded to

"exercise great discretion"[84]

in deciding whether to make disclosures. And a Member of Parliament waxed furious in his constituency when letters from constituents alleging social-

security frauds were shown by the Department to a newspaper. The Minister had

> "broken confidence in a way totally contrary to accepted parliamentary practice"

and it was

> "an abuse of ordinary men and women who have the constitutional right to expect that civil servants and ministers should respect their confidence."[85]

Whatever the political value of the disclosures, it is clear that the writers have no constitutional right to confidentiality for such volunteered information, and since the letters were allegations about the financial affairs of others it is probably better that they should be openly seen to have been investigated. Secrecy for informers[86] may increase the quantity of information supplied but does not necessarily ensure its accuracy. The qualified privilege which would almost certainly apply to such communications is sufficient protection against a libel action if the information is incorrect though given without malice.

Nevertheless the refusal of the House to protect informal informants against other loss as a result of giving information is a serious restriction. The Select Committee which considered Parliamentary privilege as a result of the Sandys affair[87] emphasised

> "the great importance of the questions referred to them, which directly affect not only Members of Parliament in the discharge of their duties, but which indrectly concern every individual citizen whose right it is in the last resort to have his grievances ventilated by speech and question on the Floor of the House."[88]

Parliamentary privilege was essentially evolved as a protection against the executive and before the days of universal literacy and mass suffrage. The receipt of a substantial amount of information from constituents[89] is a more recent phenomenon and in many cases the information has proved invaluable in the public interest. Although obviously difficulties of proof arise when allegations of reprisals are made, Parliament should be able to protect the informal witness as it has asserted its right to protect the witness who was summoned by the House.

6. The Position Of The Member Of Parliament

A Member of Parliament may disclose, either in Parliament, or to a Minister, or to his constituents, information which he has received in confidence or learned in the course of his duties as Member. The extent of

his protection from defamation or breach of confidence depends on where and when he makes the disclosure.

The Bill of Rights ensures that a Member is protected by Parliamentary privilege in relation to any "proceeding in Parliament." Thus he may reveal confidential information in the course of a debate or other proceeding and the courts would dismiss any action against him for breach of confidence or defamation,[90] and he could not be charged with an offence under the Official Secrets Acts.[91] Although the privilege is necessary to enable Members to raise important matters in Parliament,[92] there are obvious risks to the rights of others.[93] Therefore the House would treat as an abuse of its procedure a deliberate defamatory statement, known to be false, made by a Member about another for the purpose of giving publicity to the allegation while he himself was protected.[94] It would also be possible to use the protection of Parliamentary privilege to evade the rules of contempt of court[95] which could cause serious hardship to a litigant. Parliament has therefore produced rules forbidding Members to discuss matters which are sub judice.[96] Although contempt of court in civil proceedings has been somewhat relaxed,[97] it was felt that the Parliamentary rules were still unduly rigid when Members wished to question the Secretary of State for Education about the exercise of his discretionary powers in relation to schools in Tameside. As the Times leader said[98]

> "There was understandable chagrin that, whereas every organ of opinion in the land appeared to be free to pass public comment on the case, no such freedom was enjoyed by the Commons, the grand inquest of the nation."

Since Parliamentary privilege applies only to "proceedings in Parliament" it is clearly necessary to ascertain which activities of Members are thereby protected. There is at present the possibility of insoluble conflict between a decision of a court and a resolution of the House of Commons.[99] Perhaps the uncertain area of greatest importance concerns information sent by Members to government departments concerning either national issues (as the Strauss letter) or constituents' own affairs. The opportunities for raising such matters on the floor of the House are limited and

> "the private letter to a Minister is attractive to the Member as he can expound a person's case history at length and is not bound by the strict rules governing the design of Questions; he can also pass on in good faith what proves to be a misguided or unfounded complaint, and receive a courteous private answer putting the matter straight with no public embarrassment."[1]

There is much evidence of the growth of the 'welfare' role of the Member of Parliament and Members' recognition of it.[2] As the functions of Parliament change over the years Parliamentary privilege must reflect those areas where protection is really necessary. At present it is clear that a Member has absolute privilege against defamation in his communications with the Parliamentary Commissioner for Administration;[3] nothing is said about liability for breach of confidence.[4] The Member has Parliamentary privilege for a letter which he writes or transmits at the request of a Minister in the House or as a result of a Question which he has put on the Order Paper. But at present he has only qualified privilege in defamation for other communications, though the courts take a liberal view of a Member's interest or duty in a matter referred by a constituent[5] and of the correlative interest necessary in the person to whom the communication is made.[6] Members are sometimes worried whether they may be tainted with "infected malice" if they do not sufficiently investigate complaints before passing them on. In a debate in the House of Commons arising out of the Strauss affair, R.A.Butler, Leader of the House, stated that he had been advised that Members would be protected provided they acted in good faith.[7] Nevertheless, De Smith, who argued that qualified privilege was sufficient protection in such circumstances, suggested[8] that there should be legislation to ensure that a Member would not be infected with the malice of his informant.

The House of Commons Committee of Privileges has proposed legislation defining "proceedings in Parliament." It would include[9]

> "(b) all things said, done or written between Members or between Members and Officers of either House of Parliament or between Members and Ministers of the Crown for the purpose of enabling any Member or any such Officer to carry out his functions as such provided that publication thereof be no wider than is reasonably necessary for that purpose."

If this were to be adopted there would be little scope for a defence of qualified privilege in relation to Members for if Parliament did not consider an action to be part of his "functions as such" the courts would be unlikely to find that he had an interest or duty in undertaking it. The one exception perhaps is where a Member makes a speech to his constituents. This would not come within the propsed extended definition[10] but it has been said[11] that

> "if a Member were to repeat bona fide to his constituents what he said in the House, for the purpose of explaining his conduct to them, I think he would be protected."

In these circumstances the problem of infected malice could still be of importance.[12]

The question whether a Member may be liable for breach of confidence in a case where he cannot claim Parliamentary privilege has not yet been tested.[13] A person who sends information to a Member of Parliament must normally expect that the Member will disclose it, perhaps in the House or to a Minister, so he cannot claim breach of confidence for such disclosure. But if the Member abuses his position, for example discussing a constituent's personal affairs in casual conversation, an action might lie on the basis that the information was given only for a particular purpose (redress of a grievance) and because of the relationship of confidence between the Member and his constituent.

If the Member has sought information[14] and has promised that it will be treated in confidence or that informers' identities will not be disclosed he could be liable on a contractual basis for excessive disclosure. If the Member has not promised confidentiality, even though he has sought the information, he may assume that he can use publicly any information sent to him.[15] Furthermore, if information is sent to him expressly in confidence, though confidentiality was not offered by the Member of Parliament, it is submitted that the Member would not be liable for an action of breach of confidence if he disclosed it in the course of his "functions as such" even though not within the protection of Parliamentary privilege. The court recognises the need to protect a Member of Parliament's sources of information[16] but it also recognises, as the defence of qualified privilege in libel shows, that a Member of Parliament has a duty or interest in ventilating grievances and exposing wrong-doing. It is suggested that the defence of disclosure of iniquity in the public interest[17] should apply to a Member of Parliament acting as such.

If the proposed extended definition of "proceedings in Parliament" were to be enacted there would be fewer occasions when an action for breach of confidence might lie. But a communication to the Parliamentary Commissioner would still not be protected since the Commissioner is neither an Officer of the House nor a Minister. A speech to constituents, article in a newspaper or casual conversation would also be occasions where liability might lie. In these circumstances the defence of disclosure in the public interest should still apply. A Member's speech outside the House, or newspaper publication, should be recognised by the courts as a proper way of exposing wrongdoing or injustices which affect the public; the defence should not be limited to disclosure to a relevant official but a broad view should be

taken of the Member's role in redressing both private and public wrongs.

Conclusion

Parliament, or a Member, may wish to ascertain or to reveal information which others are intending to keep secret. The Member's ability to circumvent the secrecy of others depends more on political realities than on legal rights. The ninety-five topics on which Ministers will not answer Questions are not legal rules. As an opposition Member Mrs Judith Hart could not raise the question of accountability of the Crown Agents against assertions that questions would harm relations with other nations and 'there was an answer to everything;' only as a Minister could she expose the whole matter.[18] Select Committees may assert their right to information from Ministers and others, but in the end party loyalties will ensure that they receive no more than Ministers are prepared to disclose.[19] But persistent questioning and demand for information achieves at least clarification of the grounds of non-disclosure. Protection of Cabinet secrecy is still seen as a necessary adjunct to collective responsibility, but the individual anonymity and unaccountability of civil servants is less recognised, perhaps largely because the Parliamentary Commissioner, in particular, has entered into realms where they make decision rather than simply giving advice. The problems of Parliamentary investigation while negotiations are in progress and of protecting commercial information from damaging disclosure while preserving accountability to Parliament have not been solved and are of increasing importance. Personal information causes less difficulty. If such information is given in confidence it can be well protected by a hearing in private and no publication.

The individual giving information to Parliament is in theory well protected if he discloses at the request of a House, but in practice disclosure which was needed in the public interest may lead indirectly to reprisals. And the distinction between sought and unsought information for Parliamentary privilege, though logical, is not helpful. Furthermore, if the individual gives information in confidence it is unclear what redress he may have in case of a breach. An extended definition of Parliamentary privilege would protect the Member against the possibility of action for defamation or breach of confidence; at the same time, it would lessen any redress for the individual. The law of defamation gives sufficient protection by qualified privilege for anything outside Parliamentary privilege; it is suggested that the defence of disclosure in the public interest could give a similar sufficient protection against breach of confidence.

C. DISCLOSURE OF CONFIDENTIAL INFORMATION IN STATUTORY INQUIRIES AND INSPECTIONS

1. Public Or Private Investigation

Various bodies have power to order investigations which may be held in public or in private. The advantages of a public investigation are most evident when the matter is one of general public concern for a public hearing enables everyone to see that the matter is fully investigated and no-one is shielded from blame;[1] or knowledge of the issues concerned and of possible continuing dangers may be made widespread[2] so allowing for genuine public debate and decision.[3] A public investigation may have the advantage that witnesses may be compelled to attend[4] and the publicity given to the inquiry may encourage the disclosure of further evidence. A person who may be criticised is able to know all the evidence and answer allegations.

Disadvantages of a public inquiry are that it may be slow since all evidence will be taken first-hand and may be subject to cross-examination; witnesses may be loth to come forward or to speak with frankness;[5] individuals may be injured by publicity given to allegations against them which may turn out to be unfounded.[6] The inquiry may concern matters which it could be contrary to the public interest to disclose;[7] or may require disclosure of information which it was wished to keep secret;[8] or information may be refused which prevents the inquiry from making a fully informed decision.[9]

The advantages of a private investigation are that it may be able to report more quickly; it may be able to use secondary sources of evidence;[10] it need take less care to protect individuals against allegations against them since the allegations will not be widely known;[11] witnesses may feel able to speak more freely and frankly.[12] A private inquiry may obtain evidence which it might be harmful to the public to know. If it transpires that there was no ground for concern less unnecessary damage will have been done.

The disadvantages of a private investigation are that it may not sufficiently allay public misgivings, particularly if public or influential people are thought to have been involved or possible danger to the public is thought to have been concealed. Inability to test the evidence by cross-examination or the production of further evidence may result in wrong information being accepted;[13] or people may find themselves criticised in the report without having had a chance to reply.[14] If the published report does not contain all the evidence some may complain of bias and unfairness.[15]

If the report of a private investigation is not published there may be a continuing feeling of injustice. A father wished to know whose mistakes in an operation caused irreparable brain damage in his daughter;[16] a teacher wished to be able to prove her vindication on certain matters to her colleagues;[17] a newspaper editor considered that the public was entitled to know the full contents of a report criticising a chief constable.[18]

Some damage to personal or commercial reputation may inevitably result from the setting up of an inquiry, whether in public or in private. A decision by Parliament to set up a tribunal under the Tribunals of Inquiry (Evidence) Act 1921 could not be challenged in court.[19] It has been held that the rules of natural justice do not require the Secretary of State for Trade to tell persons affected the grounds for his decision to order an inspection of a company under section 165(b)ii of the Companies Act 1948, nor must he allow them to argue against such an order.[20] The same reasoning would seem to apply to an investigation ordered by the Health and Safety Commission with the consent of the Secretary of State.[21]

The circumstances in which the three types of inquiry may be held in private, rather than in public, are considered in more detail as are the related questions of what the witness must say and the protection of a person criticised.

a) Tribunal of Inquiry

A tribunal may be set up by Parliament under the provisions of the Tribunals of Inquiry (Evidence) Act 1921 to consider a matter of

> "vital public importance concerning which there is something in the nature of a nationwide crisis of confidence."[22]

It may be more important to find out what went wrong than to punish incidental wrongdoers. The "crisis of confidence" will usually only be overcome by an inquiry which is held in public. This was clearly seen by the widespread backbench revolt against a government proposal to hold the Crown Agents inquiry in private. One Member spoke for many when he said

> "The country must know it will be fully informed on everything that has gone on."[23]

There may be valid grounds for hearing part of the evidence in private session but the Act recognises that these must be exceptional. Thus the tribunal

> "shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do for reasons

connected with the subject matter of the inquiry or the nature of the evidence to be given."[24]

Not surprisingly, the Vassall Tribunal in 1963, which concerned spying activities and the extent of knowledge of Admiralty officials, heard much of its evidence in private. National security must be a recognised ground for secrecy,[25] though in an inquiry of this kind the often-recognised convention of civil service anonymity would not be a valid ground of hearing evidence in private.[26] Political or commercial embarrassment were recognised as possible grounds for holding part of the Crown Agents inquiry in private.[27] The Royal Commission on Tribunals of Inquiry suggested this section should be construed as conferring as wide a discretion as has a High Court judge.[28]

b) Company inspection by the Department of Trade

A company inspection[29] is a fact-finding exercise not a judicial proceeding.[30] In Hearts of Oak Assurance Co.Ltd. v Attorney-General[31] the House of Lords held that similar investigations may not be held in public, and this has been applied to an inspection of a company.[32] It has been said that a private hearing is necessary

"because witnesses may say something defamatory of someone else; it would be quite wrong for it to be published without the party affected being able to challenge it."[33]

The only people who may be present are members of the inspector's staff "reasonably necessary to enable him properly to carry out his duty under the statute"[34] and the witness with his representatives.[35]

c) Inquiry under the Health and Safety at Work etc. Act 1974

The public nature of an investigation into the causes of an industrial accident or disaster[36] is emphasised by the fact that it is normally to be held in public. Regulations may be made "requiring any such inquiry to be held otherwise than in public where or to the extent that a Minister of the Crown so directs".[37] The Regulations since made[38] have made more limited and specific inroads into the principle of publicity than the general words of the Tribunals of Inquiry (Evidence) Act 1921.[39] The investigation is to be held in public unless and to the extent that a Minister certifies that it would be contrary to the interests of national security, or the person holding the inquiry decides that a trade secret may be disclosed. Even in these cases a member of the Council on Tribunals, in the first case, and a representative of an employer's association or trade union, in the second case, may attend the private hearing, so an element of public accountability is introduced even here.[40]

2. What The Witnesses Must Say

a) Tribunal of Inquiry

A tribunal of inquiry has the same powers to compel attendance of witnesses and production of evidence as has the High Court,[41] and if a witness refuses to attend, to take the oath or to give evidence he may be reported to the High Court where he may be punished as if guilty of contempt of court.[42] But a witness before a tribunal to which the Act applies is entitled to

> "the same immunities and privileges as if he were a witness in civil proceedings before the High Court."[43]

Thus a witness may refuse to answer a question the answer to which might incriminate him, and legal professional privilege and the other recognised privileges[44] are preserved.

Nevertheless, a witness at such a tribunal may wish to refuse to answer a question or produce evidence, not to protect himself from prosecution but for some other reason. Several journalists at the Vassall Tribunal refused to tell the tribunal the sources of information which they had obtained in confidence about the spy. The information was clearly very important to the inquiry and so, when the tribunal referred the matter to the court under section 1(2), it was held that in spite of their legitimate professional desire to protect journalistic sources they were in contempt of court if they kept silent.[45] Lord Parker C.J. in holding that there was no privilege against disclosure, said[46]

> "any privilege which exists constitutes a shackle on the discovery of the truth and an impediment on the true administration of the law ... *[T]*he undoubted privileges and immunities which now are recognised have arisen from the fact that public policy has demanded that, notwithstanding that some such shackle or impediment may result, the public is, nevertheless, better served by recognising certain limited privileges and immunities ... *[C]*onfidentiality of itself has never been recognised as a ground for a valid claim of immunity."

The Court of Appeal stressed that although the journalists had no privilege neither did the tribunal have an unlimited right to require answers. Lord Denning M.R. said that the court would not punish for refusal to answer unless

> "not only it is relevant but also it is a proper and indeed necessary question in the course of justice to be put and answered."[47]

Donovan L.J. preferred to say that the question

> "ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand."[48]

In the Red Lion Square inquiry[49] into the death of a student demonstrator the question arose in relation to the production of film. Independent Television News cameramen had filmed much of the demonstration and subsequent battle and Lord Justice Scarman, who was conducting the inquiry, ordered them to produce all the film shot, not only that which had subsequently been shown on television news programmes.[50] (He had first viewed the film in private and ascertained that it was relevant.) The fear of the cameramen and journalists was that they would in future be seen not as neutral recorders of the scene but as unwitting collectors of evidence for the police or court.[51] The Radio and Television Safeguards Committee later asked the Home Secretary to ban the use of such evidence in the future.[52] In Senior v Holdsworth[53] similar film was wanted in court proceedings. The Court of Appeal held that it could be ordered but refused an order in the case because it would be oppressive to require the whole film when only one small incident might be relevant. Similar considerations would apply to an order by a tribunal to produce film, but with the added advantage that, unlike the court, a tribunal may have a private look at the information to decide whether it is relevant and should be shown in public.

b) Company Inspection

Company inspectors have a right to obtain information from officers and agents of the company under investigation, whose duty it is to provide the inspectors with the company's books and documents and

> "otherwise to give to the inspectors all assistance in connection with the investigation which they are reasonably able to give."[54]

The examination may be under oath,[55] and the witness has qualified, but not absolute, privilege against libel.[56] If the inspectors wish to examine anyone else they must apply to the court and that person may be examined by the court,[57] but if someone submits to examination by the inspectors it appears that he cannot later complain to the court that he was not an agent of the company and so his evidence should be disregarded.[58]

If a person examined by the inspectors refuses to produce a document or answer a question his refusal may be certified to the court who may punish him as if for contempt of court.[59] Has a witness a right to refuse to answer a question if the answer may incriminate him? Pennington[60] clearly states

"A person under examination by an inspector may not refuse to answer questions because his answers may incriminate him ... "

but the authority cited, Re Pergamon Press Ltd.,[61] though relevant to the second part of the sentence (not quoted here) did not even mention the question of self-incrimination. The section itself does not expressly refer to the question either but some assistance may be gathered from a comparison with other provisions. Two provisions which concern examination by the court[62] contain the words

"The person examined ... shall answer all such questions as the court may put or allow to be put to him."

Identical words are found in the Bankruptcy Act 1914, in relation to the public examination of the debtor, and it has been held that they are wide enough to include a duty to answer even though the answer may incriminate him.[63] However, even here the court apparently has a discretion. In Re Paget, Ex Parte Official Receiver[64] the debtor refused to answer a question as to his true name. The judge, after seeing him alone in his room, held that he was satisfied that the answer to the question would not give any further help to creditors and would cause serious personal detriment to the debtor so he declined to order him to answer the question. The Court of Appeal accepted that the judge had acted properly in interviewing the debtor but remitted the case on the ground that he had failed to take into account the public interest in the public examination of debtors.

"Before the question can be disallowed the court has to be satisfied that the answer could not secure any further assets or rights to the creditors or any protection to the public."[65]

Following these cases it would appear that a third party witness under Section 167(4) of the Companies Act 1948, or a person accused of fraud under section 270(5), when examined by the court will be bound to answer an incriminating question unless the court, taking full account of the public interest, decides to disallow it.

Section 268, however, which is concerned with a private examination by the court in a winding-up, does not contain any such words. It was stated in relation to the predecessor of this section that

"The only matters as to which the witness can refuse to answer are matters in which he may incriminate himself, and matters of professional confidence."[66]

The statement was not strictly necessary to the decision which concerned

whether a person investigated could complain that the court had authorised contributories as well as the receiver to question him. The Court of Appeal emphasised his status as a mere witness. This situation is perhaps more analogous to the investigation by inspectors under section 167(1) than the other cases, since the investigation is in private and the person questioned is a mere witness and not a person accused. However, the public interest aspect of the Department of Trade investigation should not be underestimated.[67]

In McClelland, Pope & Langley Ltd v Howard[68] the plaintiff attended before the inspectors and refused to answer questions on the ground that they might incriminate him. The inspectors insisted that he must answer, and so he did. His legal adviser was present and intervened in the cross-examination. Later the plaintiff sought an order of prohibition to prevent the inspectors from including in their report any of his evidence which might incriminate him. The House of Lords held that the inspectors were wrong in insisting that he must answer since section 167(3) made it plain that he might refuse, leaving the inspectors to refer the matter to the court. Nevertheless the House of Lords was not prepared to say that the lower courts had wrongly exercised their discretion in refusing to grant an order of prohibition. The answers had not been obtained by trickery or duress, and the plaintiff's legal adviser had been present throughout. The case does not in terms state that a privilege against self-incrimination applies to these inspections but leaves the whole matter to the discretion of the court. Ungoed-Thomas J in Selangor United Rubber Estates Ltd. v Cradock (No.2)[69] approved these "observations" of the House of Lords but did not have to decide the point since, although the incriminating answers had been given, the suggestion that they might be used in an action[70] was not pursued.

Thus it would seem that although there is not an absolute privilege against self-incrimination in a company inspection, this is a circumstance when a witness may be entitled to refuse, leaving it to the court to decide whether he must answer. The court would balance the importance of giving the witness what is normally accepted as reasonable protection[71] against the need in the public interest to obtain the necessary information. The witness may be a major actor in the drama being uncovered and to allow him not to answer questions might be to stultify the work of the inspectors. But in many cases sufficient evidence on a particular matter may be obtainable from others and the need for protection of a person criticized by inspectors is increasingly recognised. Section 50 of the Companies Act 1967 now provides that a person's statements before inspectors may be used

as evidence against him so the need for clarification in this area is more than ever important. It is suggested that a witness before inspectors should have a prima facie right not to incriminate himself but that a residual discretion lies in the court to require him to answer where the public interest in obtaining the information outweighs the interest in protecting the witness.

Legal professional privilege, however, is expressly retained by the Companies Act 1948. Section 175 provides that a solicitor need not disclose under section 167 any privileged communication made to him in that capacity, other than the name and address of his client. If inspectors were to obtain by accident original documents within this privilege they would probably not be able to use them,[72] but if they were to obtain a copy, as the Official Receiver did in Butler v Board of Trade,[73] it is suggested that they would probably be able to use it, as in McClelland, Pope & Langley Ltd. v Howard on the basis that it was not obtained by trickery or duress. The public interest outweighing the owner's "limited proprietary right in equity to restrain a breach of confidence"[74] is not perhaps so great as for criminal proceedings in Butler but there is a substantial public interest in having the affairs of a company fully scrutinised.[75]

c) Health and Safety Inquiry

A person holding an inquiry under section 14(2)b of the Health and Safety at Work etc. Act 1974 has the power to require the attendance of "any person appearing to him to be likely to be able to give material evidence."[76] The witness has very little protection although his evidence must normally be given in public and on oath[77] and, like a witness in a company inspection, he probably only has qualified privilege against libel.[78] He is subject to cross-examination by interested parties[79] and it is a criminal offence to refuse to attend or intentionally to obstruct the inquiry.[80] There is no provision for seeking the guidance of the court on whether a question must be answered, as in the Tribunals of Inquiry (Evidence) Act 1921 and the Companies Act 1948, though when served with a notice to attend the witness may apply to the person holding the inquiry to have the notice varied or set aside.[81] The difficulty is that the witness does not then know what questions he will be asked so he cannot at that time ask the tribunal to allow him not to answer particular questions. Has he a right to refuse to answer a question on the ground that the answer might tend to incriminate him? Neither the Act nor the Regulations refer to any such privilege.[82] On the one hand it may be argued that the privilege is so accepted a part of English law that it should not be excluded except

by clear words, but on the other hand there is clearly a public interest in obtaining all necessary information. It is suggested that a witness has a prima facie right not to incrimnate himself but that the tribunal may insist on an answer if the information is necessary to the inquiry and cannot be obtained elsewhere.

Similarly legal professional privilege is not expressly preserved but perhaps a person called as a witness could apply to the tribunal to set the notice aside on the ground that the only evidence he could give would be covered by the privilege. Again it is suggested that the tribunal has a residual power to order disclosure.

The lack of protection given under section 14 is particularly marked when compared with an informal investigation under section 20 of the Act. A witness may be required to give evidence before an inspector[83] but his evidence will be given before a restricted audience[84] and evidence thus given is not admissible against the witness[85] so he need not worry about self-incrimination. Similary legal professional privilege is preserved.[86]

In its concentration on the public interest and the interests of those particularly concerned,[87] the Act and Regulations have perhaps given too little protection to legitimate interests of those who are merely witnesses. This could operate against the public interest because such an inquiry must rely, at least to some extent, on witnesses coming forward voluntarily. If people felt themselves to be unduly at risk in such circumstances a valuable source of information might evaporate.

3. Protection Of A Person Criticized

a) Tribunal of Inquiry

A tribunal of Inquiry is set up to investigate a matter of urgent public importance. To do this it has wide powers to obtain evidence which is heard in the full glare of national publicity. Allegations may be made against individuals which may lead to the ruin of their political, commercial or social reputations.[88] Much criticism has been made of the unfairness of this inquisitorial proceeding on individuals. As The Times said[89]

> "these powers are exercised without the protection afforded by normal rules of procedure, no charges are preferred, there is no justiciable dispute between the parties, ordinary rules of evidence and relevance do not apply throughout. It is like a powerful locomotive running without rails."

When Sir Alfred Butt resigned his seat in Parliament as a result of the Budget Leak Tribunal of 1936 he commented bitterly on the fact that he had

been condemned without any charges being preferred against him and without any opportunity to make any defence or to appeal.[90]

The risk of personal hurt and injustice "is inherent in any procedure which is effective at arriving at the truth;"[91] the Royal Commission on Tribunals of Inquiry made recommendations for minimising that risk. One of the major problems is that "the inquiry may take a fresh turn at any moment."[92] By taking enough time over the preliminary gathering of information by the Treasury Solicitor before the public hearing the Tribunal should be able to discard any obviously groundless or irrelevant allegations[93] and ensure that no-one is involved in the inquiry unless there are circumstances relating to him which must be investigated.[94] It should also then be possible to see at an early stage who will be involved, so that any such person will have enough time to obtain legal representation and prepare his case.[95] He should be able to know, before he gives evidence at the Tribunal, the allegations against him and the substance of the evidence against him.[96]

The Royal Commission recognised the possible danger of intimidation or influencing of witnesses or improper use of the information if notice of the allegations is given before the public hearing, and so it proposed that the form of disclosure of the substance of the adverse evidence must be left to the discretion of the Tribunal.[97] It may be that sometimes the identity of a witness will not be disclosed,[98] although of course his identity will be revealed at the public hearing.[99] Interference with a witness, if revealed, would be punishable as if it were contempt of court,[1] as would any wrongful use of the information since, like documents disclosed on discovery, there would be implied an undertaking not to use it for other purposes.[2]

Persons concerned in the inquiry have, at least since 1936, been allowed to cross-examine witnesses and the Tribunal has a discretion to allow legal representation.[3] However, legal aid is not available nor are costs payable out of public funds, though after the Vassall Tribunal ex gratia payments were made to some witnesses.[4] The Royal Commission recommended also that a person concerned should be allowed to make a short statement early in the proceedings so that he is not unduly affected by the publicity given to early, one-sided, statements by counsel for the Tribunal.[5]

Some of the proposals of the Royal Commission were of a procedural nature and can be implemented in practice. Others, such as the right to legal representation and payment of costs, would require legislation and

have not been implemented.[6] Even if all the proposals were carried out, there would still be occasions when individuals would be perhaps unfairly prejudiced by the holding, if not the findings, of a public Tribunal of Inquiry. As Lord Kilmuir L.C. said[7]

> "There is a conflict between the needs of the state that the truth should be discovered in weighty matters which reflect on the functioning of its important agencies, and the position of the individual who finds himself involved. The vital point ... is that the procedure should only be invoked for weighty and important matters, for it is only then that the sacrifices on the part of the individual can be fairly demanded."

b) Company Inspection

A company inspection may have serious consequences both for the company and for individuals. It is not infrequently the first step towards criminal proceedings and may bring out evidence of civil liability not yet realised by the victim. Although the inquiry is held in private, the report may be, and usually is, published. Proceedings before inspectors are not, and are not expected to be, the best and fairest fact-finding device. As Buckley J said, in another context,

> "Proceedings before inspectors of this kind are no substitute for the investigation of facts by the ordinary machinery of pleading, discovery, examination and cross-examination and so forth, which would take place in litigation."[8]

Nevertheless, it is recognised that although the investigation is not a trial the inspectors may criticise the conduct of particular people and this may have far-reaching consequences.[9] A person who fears criticism may have good reason for wishing to know what other witnesses have said about him so that he can put his own version and for wishing to know what conclusions the inspectors are likely to form about him, so that he can argue for a favourable view.

The courts have held that the inspectors must not act unfairly or oppressively in their investigation.

> "The inspectors can obtain information in any way which they think best, but before they condemn or criticise a man they must give him a fair opportunity for correcting or contradicting what is said against him."[10]

On the other hand, the witness may not be obstructive to the inspectors. In the Pergamon Press inquiry, Mr Maxwell and other former directors of

the company were asked to give evidence to the inspectors. They knew that the report would be given to the company and would be used by the now controlling shareholders who were bringing an action against Mr Maxwell in New York. They refused to answer any questions unless the inspectors allowed them to read the transcripts of evidence of any adverse witnesses, to cross-examine witnesses and to see documents produced against them. The inspectors refused, but assured them that no-one would be criticized in their report without being told charges in general terms and being given an opportunity of explanation. The Court of Appeal held that the attitude of the inspectors was consistent with the duty of fairness, and that of Mr Maxwell and his colleagues was unreasonable. The inquiry was ordered in the public interest and all witnesses must be encouraged to come forward and be frank without fear of a libel action.[11] This is achieved by ensuring that each witness's evidence will be kept confidential so far as possible. The gist of it may have to be put to the person criticized to enable him to refute the criticism, but it should not be disclosed in detail, nor should the witness be subject to cross-examination.[12] On rare occasions it may be so confidential that it should not be put even in outline to the person criticised; in that case it should not be taken into account against him.[13] The court emphasised also the need in the public interest for speed in the work of the inspectors.

The inspectors duly undertook the inspection and produced an interim report. Mr Maxwell thereupon sought a declaration[14] that they had not observed the rules of natural justice in that they had failed to put to him all relevant criticisms made by other witnesses and had not told him of their tentative critical conclusions before embodying them in the report. The Court of Appeal clarified its earlier decision that fairness requires the gist of the criticisms to be put to him but not every detail, and does not require the inspectors to tell him of their conclusions before finalising them. The court emphasised throughout that this type of inquiry is a fact-finding investigation and not a trial, and the requirements of fairness may vary from one type of inquiry to another. There may be cases perhaps where a person may be entitled to know tentative conclusions formed about his conduct so that he can answer them before the decision is made.

The Under-Secretary of State for Trade said in Parliament in 1976 that he was satisfied that the procedures advocated by the court had been followed in later inspections "in the spirit and to the letter."[15] But it has also been suggested that the procedure is becoming increasingly difficult and the production of reports very expensive and slow.[16] The volume of criticism of particular inspectors or of the system

"where investigation and accusation mingle into each other and where prosecutor and judge and jury are identical"[17]

has not abated.[18]

It is unrealistic to consider a person in the position of Mr Maxwell in relation to Pergamon Press Ltd. as a mere witness. By its requirement of "fairness" the court has gone some way to recognise the peculiar situation of a person liable to criticism but has at the same time emphasised the need to protect other witnesses. If a public judicial-type hearing were to be used instead the witness could be given absolute privilege against libel and the person accused could know and refute all criticisms.[19] But the inquiry would be slower and more expensive and, more seriously, would probably involve the disclosure of much commercial information and greater damage to the company. Alternatively, non-disclosure of anything other than facts in the published report might allay hardship but this would be found impracticable. For example in many cases of conflicting evidence the inspectors must state a preference which suggests a criticism.

Company inspections serve a dual purpose of giving information to minority shareholders[20] and keeping a check in the public interest on those who are given the benefits of limited liability. As Hugh Stephenson said[21]

"those who now argue against the use of section 165(b) strengthen the position of those who think that the days of voluntary regulation are numbered."

c) Health and Safety Inquiry

Those who framed the Regulations for health and safety inquiries appear to have had in mind the proposals of the Royal Commission on Tribunals of Inquiry[22] and to have taken steps to protect the interests of those particularly involved. The inquiry is still inquisitorial and there is no justiciable dispute between the parties, but by its nature it is likely to be less liable to

"move into areas of investigation that no-one had anticipated"[23]

than is a Tribunal of Inquiry with wide ranging terms of reference. It is therefore not unrealistic for the Regulations to list those persons and groups for whom special provisions should be made.[24] The persons within this category are any person injured by the occurrence or his personal representative, the owner or occupier of the premises and any person whose activities give rise to the occurrence as well as the Commission, an enforcing authority, an employers' association and a trade union.[25] They are entitled to appear and to be legally represented[26] and must be notified of the hearing.[27] At the hearing they may make an opening statement, call evidence

and cross-examine witnesses[28] and are entitled to receive copies of any written representations received by the person holding the inquiry.[29]

Thus a person who may be criticised is able to state his version at the time of maximum publicity[30] and before damaging allegations are made; he can know all the evidence to be taken into account against him (unless it has to be taken in secret) and has an opportunity to challenge or correct it.

Nevertheless, the publicity in which the proceedings are conducted, together with the fact that evidence may be produced which would be inadmissible in court,[31] make it very unlikely that a prosecution could be brought as a result of a public health and safety inquiry since it would be impossible to find an unprejudiced jury.

4. Subsequent Use Of Information Obtained In Inquiries And Inspections Under Statutory Powers

a) Right to the Information

Information given to an inquiry under statutory powers belongs to the public and so cannot be destroyed just because it is embarrassing to individuals. Any promise given to a witness that no-one will ever see his evidence is not binding. The record will usually be subject to the Public Records Acts.[32] A person concerned may have a statutory right to a copy of the report[33] or there may be a discretion whether he has a full[34] or edited[35] version. Similarly there may be a statutory duty to publish the report[36] or publication may be discretionary.[37] If a person concerned has a copy, it seems that he has a right to publish it at least in defence of his own character.[38]

b) Use of the Record to obtain Information

If the record is published, there is no way in which people can be prevented from "fishing" in it for causes of action. In cases where the record is not made generally available, statute may allow certain groups of people to see the record. Thus notes of a public examination of a company official under section 270 of the Companies Act 1948 may be used in evidence against him and may be inspected by any creditor or contributory of the company.[39] A similar provision applies to the public examination of a debtor in bankruptcy.[40] Both statutes also make provision for private examination of witnesses to assist in the winding-up of the company[41] or settling the affairs of the bankrupt.[42] Nothing is said in either statute about the availability of such evidence to third parties. The major argument for non-disclosure is much like that used for the protection of witnesses in a company inspection.

"Some of the witnesses were very forthcoming; but others put every conceivable obstacle in the way of answering the simplest question. Those who answered frankly could well have done so too but they knew, or thought, that their examinations were private and would remain so, and I have heard nothing to make me think that their transcripts should be released."[43]

The Bankruptcy Rules[44] provide that

"1) All proceedings of the court shall be kept and remain of record in the court for such period as the Lord Chancellor may from time to time direct.

2) The trustee, debtor and any creditor who has proved ... and by special direction of the judge or registrar any other person, may at all reasonable times inspect the file of proceedings."

In Re Beall Ex parte Beall[45] a solicitor was afraid that the Law Society would be allowed to use the information to strike him off the Roll.[46] He therefore sought the removal of depositions from witnesses as contrary to natural justice since he had not been able to cross-examine them. The Court of Appeal held that they were a proceeding of the court and could not be removed. Lopes L.J. said[47]

"I am not aware of any authority which would justify the court in taking the depositions off the file after they had been placed there."

In Re Standard Gold Mining Co.[48] the court disapproved of the fact that a creditor could see the depositions and so "go fishing", and argued that the judge ought to have a discretion whether to allow inspection, but felt constrained by the Rules to allow inspection.

But it appears that although the information is of a kind which ought to be placed 'on the file,' a 'stop order' may be made at least deferring putting the depositions on the file and perhaps keeping some parts permanently off it. Examples might be information about an invention or trade secret of the bankrupt or the whereabouts of some property[49] or information relating to relations with foreign governments.[50] In Re Poulson the court accepted that some information might need to be permanently sealed up, but emphasised that this was not because it was given in confidence but because of its nature. Temporary 'stopping' was justified only if it was needed in the interests of the bankruptcy as a whole. If Parliament through the Rules has said that the information is to be available, it seems at

least surprising that it can be deferred or removed by mere administrative decision. The court in Re Poulson, as in Re Standard Gold Mining Co., would obviously like to see a general discretion in the judge, but that is not what has been given.[51]

However, the Bankruptcy Rules do give a discretion as to who, apart from creditors, will be allowed to inspect the file. On what basis should this be exercised? In Re Standard Gold Mining Co. the judge suggested (obiter) that it should only be allowed for legal proceedings. This may be reasonable since the public interest in ensuring that witnesses speak frankly and all information is obtained should only be counteracted by another public interest[52] rather than a merely private one. Under the ordinary rules of discovery a plaintiff must have his case before obtaining information from the other party. This prevents 'fishing.' In Re Poulson, however, the court went further. The information was required for legal proceedings, the action had been started, but the court decided that this was not enough. Neither was it enough that the information would have a material bearing on an issue in the case. It must be "so obviously relevant"[53] to the action that it would be necessary in the interests of justice to allow inspection. The judges themselves read the depositions and decided that there was no such close connection. They recognised, however, that those concerned with the criminal law would be allowed to have access to the material.[54]

> "Of necessity, public policy demands that those who are entrusted with the administration of the criminal law should have every legitimate source of information open to their inspection ... such persons are public servants who are accountable to the public."[55]

There may be others who should be allowed to see information and there may be other ways of obtaining it. In Re Rolls Razor Ltd.[56] the liquidator was taking action against certain people as a result of information in the inspectors' report. He wished to see the transcripts of their evidence given to the inspectors but the witnesses refused permission. There was no doubt that he would be able to see them at the trial by issuing a subpoena to the inspectors, but the court made an order under section 268 of the Companies Act 1948 allowing the liquidator to examine the inspectors and receive documents in their custody.[57] The section was designed to enable the liquidator to wind up the affairs of the company effectively and with speed and economy and by receiving this evidence before the trial he would be able to frame his action in accordance with the evidence.

The justification for this right to "fish" for information even before the framing of the claim was that the liquidator must be enabled to wind up the affairs of the company and this would assist him in doing so. Since there was already evidence of liability of the individuals to the company,[58] their right to prevent 'fishing' was subordinated to the needs of the company and its creditors.

Thus, there is no unlimited right to use the information to "fish" for causes of action or supporting evidence. Parliament may directly or indirectly allow such a right to people particularly concerned and the courts may assist Parliament in this; in other circumstances, to protect both property and witnesses as much as to protect the person criticized, the courts may tightly restrict further disclosure.

c) Use Of the Information against the Person who gave it.

If the public interest in getting the information was held to require it, witnesses may have been promised immunity from prosecution.[59] Even without such a promise it might be impossible to bring criminal charges after a public inquiry since it would be impossible to ensure a fair trial. This applies to Tribunals of Inquiry[60] and, probably, Health and Safety public inquiries. In other circumstances it may be very important to know whether information given may be subsequently used. For example it is

> "frequent practice in the case of a complex Department of Trade inquiry for the Secretary of State to pass a copy of the inspector's report to the Director of Public Prosecutions to enable him to consider whether any action is called for by him"[61]

Particularly where incriminating evidence must be given, the relevant statute[62] may provide that the evidence is not to be subsequently admissible, or only for certain purposes.[63] In other cases the statute may expressly provide for subsequent admissibility.[64] Where a statute requires incriminating evidence to be given but says nothing about subsequent admissibility,[65] a consideration of the purpose of the statute in question may help in deciding whether subsequent admissibility was intended. In Customs and Excise Commissioners v Harz Lord Reid said[66]

> "Although I need not decide the point, it seems to me reasonably clear that incriminating answers to a proper demand under this section[67] must be admissible if the statutory provision is to achieve its obvious purpose."

Major difficulties arise, however, since many of the statutes may have several purposes, some of which would require subsequent admissibility

(for example action against infringers of other provisions of the statute) and others of which would not (for example discovering loopholes with a view to closing them by statutory amendment, recovery of tax).[68] Faced with these uncertainties many judges are happy to rely on the simple rule in R v Scott[69]

> "If you make a thing lawful to be done, it is lawful in all its consequences; and one of its consequences is, that what may be stated in a lawful examination may be received in evidence against him."

This rule denies that there are two different questions on the admissibility of incriminating evidence, namely did the duty to give evidence include incriminating evidence and, if so, must that evidence be made subsequently available? Hardship unintended by Parliament may thereby be imposed. The dictum in Harz suggests that the courts will now look more carefully to decide whether subsequent admissibility was intended, though they may still rather readily accept punishment of offenders as an aim of the statute without considering whether it is a major aim and so justifies abrogation of the privilege.

However, even if the Scott doctrine is accepted it only applies to information "lawfully" given. Thus, if the statutory provisions were not properly complied with, the evidence given will not be admissible by virtue of the statute in subsequent proceedings. In Harz the House of Lords held that a statutory requirement to produce to the Commissioners

> "within such time and in such form as they may require such information ... as they may specify"[70]

did not require immediate answers to an on-the-spot interrogation without warning, and under an unwarranted threat of prosecution. The evidence thus given was not admissible since it was not within the statutory requirement and was inadmissible at common law as a confession not freely and voluntarily given. In Karak Rubber Co. Ltd. v Burden[71] it was held that unsworn answers given informally to inspectors of a company, rather than formally under oath within section 167 of the Companies Act 1948 were not within the terms of section 50 of the Companies Act 1967 and so were not admissible in subsequent proceedings. No question arose here of involuntarily given statements, as in Harz, but the express statutory provision of section 50 was presumed to be the only way in which such evidence could be admissible.

A report of company inspectors may be used to support an uncontested winding-up petition by the Department of Trade without further evidence, since it is "a report made by persons in a statutory fact-finding capacity".[72]

If the report is contested, the court may require direct evidence to support the petition,[73] but mere opposition without evidence will not prevent the court from making the order on the basis of the report.[74]

If information is to be admissible it is important that it is reliable. His own evidence must have been freely and fairly given; the evidence of others should have been tested. The public interest in ensuring that statutory powers can be used effectively must be balanced against the public interest in ensuring that people are not unfairly condemned either out of their own or out of other people's mouths.

General Conclusion

Various models have been tried for reconciling the interest of the public in knowing what went wrong with the interests of the individuals involved. Courts of law are the most clearly structured and the least criticised, perhaps because familiarity blunts concern at the possible injury done to an acquitted or untried defendant or a successful litigant, perhaps because such people are less likely to be articulate and vociferous than the company directors and well-known figures likely to feature in company inspections or Tribunals of Inquiry. Criticism of court procedure erupts more at attempts to prevent publication of information than at excessive exposure;[75] the boundaries of contempt of court both as regards time and as regards content are in need of clarification and the Phillimore Report proposals would tip the balance more in favour of publication.

The tendency with other inquiries has been to argue that an open inquiry precludes prosecutions against individuals[76] in spite of the safeguards introduced since the report of the Royal Commission on Tribunals of Inquiry[77] and in the Health and Safety legislation. This may have very unfortunate repercussions for the "crisis of confidence" may not be allayed if the price of knowledge is that the malefactors go free. Indeed, since the basis of public misgivings is often the fact that the people concerned had positions of influence immunity from prosecution may serve only to increase cynicism and mistrust. Immunity for individuals may be too high a price for the public to accept.

One possible alternative is a private hearing coupled with an undertaking to publish the full evidence when proceedings, if any, have been taken. At present this is sometimes done, as with the publication of reports of company inspections, or suggested, as with the Bingham report on breaches of oil sanctions, but there is no obligation to produce the full report.[78] Journalists would dislike this solution because the news would be 'stale' and, more seriously, there could be embarrassing conflicts

of evidence or assessment between the report and the court and an unacceptably long delay before receipt of a report.

Alternatively, the analogy of court proceedings could be taken further. The major danger of a prejudiced trial arising from excessive publicity of one side of the evidence in committal proceedings has been largely removed not by holding them in private but by restricting publicity in the press or broadcasting until the danger of prejudice is past. There may anyway have been widespread publicity about the case before any proceedings were taken against anyone. An individual called on to give evidence in a public inquiry is in no worse a position than an individual charged with an offence; neither relishes his position but the public interest in ensuring public ventilation of a serious situation may demand as great a sacrifice on the part of the individual as does the public interest in investigating allegations of crime of which he may be innocent. Immunity from prosecution may occasionally be necessary to uncover information[79] but it should not be used simply because the inquiry is being held in public.

As well as the question of protecting the person involved in the inquiry there is also the problem of protecting some information. This may relate directly to the protection of the person from prejudice - as with the right not to incriminate himself - or it may be a question of drawing a reasonable balance between requiring all relevant information and allowing a person not to give information which he considers confidential. The three types of confidential information all receive some recognition though the extent and method of protection varies.

Personal information has been clearly seen to be protected in Parliament, where battered wives gave evidence in secret and were not named in the report of the Select Committee. To some extent personal information is protected in court - rarely by total exclusion of the evidence,[80] sometimes by hearing it in secret, at other times by restrictions on publicity. It has been seen that protection is given where a public interest is thus served which countervails the public interest in the public availability of all relevant evidence. Personal information will only have to be given before a Tribunal of Inquiry if, after the preliminary sifting process, it is seen to be relevant. The only occasion when evidence was heard in private on the ground that it was personal, the Profumo case, has been much criticized[81] and would be unlikely to be repeated. Thus in circumstances where there is a public interest in information being received personal information is protected against disclosure or dissemination to the extent to which that protection is necessary in the public interest; it is not protection simply because it is personal

information.

The need to protect commercial information is recognised in all the areas considered. Usually the information has to be given[82] but care is taken to restrict those who receive it. This is a major reason for company inspections being held in private and is a clear ground for court and Tribunal hearings to be in private. The interest being protected is the personal property-type interest of the owner of the information and protection is not limited to cases where a particular public interest can be shown. There is, however, some risk in too readily sitting in secret in commercial matters. It is necessary to ensure at least that those directly concerned are not excluded from the hearing and the chance to challenge the information; the law provides sufficient protection in actions for contempt of court or, it is thought, breach of confidence if improper use is then made of the information.

Governmental information receives variable protection. In relation to central government the courts give wide protection by non-disclosure not only on the obvious grounds of national security and detection of crime but also for matters of policy making regardless of the subject-matter, though the protection of advisers is no longer recognised as a ground for total exclusion of evidence either in court or in Parliament. But information concerning the organisation or governing of an industry, factory or company may be very relevant to inquiries or Parliamentary investigations and little recognition is given to a desire for confidentiality except in relation to decisions which have not yet been taken. The public interest in knowing how those with limited liability organised their company or whether health and safety regulations were enforced in a factory is seen to be of greater importance than the private desire to keep such information confidential.

NOTES

General Introduction

1. *The whole question of relevance of information is outside the scope of this work.*

2. *Lord Hewart C.J. in R v Sussex Justices ex parte McCarthy [1924] 1 K.B.256,259.*

3. *For example the decision to set up a Tribunal of Inquiry to investigate losses incurred by the Crown Agents: H.C.Deb Vol.940 col.1026 et.seq.*

4. *Report of the Interdepartmental Committee on the law of Contempt as it affects Tribunals of Inquiry (1969) Cmnd.4078.*

5. *The government wanted a private inquiry into the Crown Agents' losses so that the transcripts of evidence already given to the Fay Committee could be used: H.C.Deb. Vol.940 col.1043.*

A. *Disclosure in Court*
Proceedings in public

6. *Commentaries on the Law of England 16th ed. Vol.3 page 372.*

7. *Royal Commission on Tribunals of Inquiry (1966) Cmnd.3121 para.40.*

8. *Quoted in Scott v Scott [1913] A.C.417,477.*

9. *ibid. at 463 (Lord Atkinson).*

10. *ibid. at 446.*

11. *ibid. at 435 (Viscount Haldane L.C.).*

12. *Article 6 (1). Discussed in detail in Jacobs: The European Convention on Human Rights 1975 pub. Oxford University Press.*

Proceedings in private

13. *(1957) Cmnd.218 paras.76-81.*

14. *The European Convention is in this respect wider than English law since it allows the public to be excluded in the interests of "public order" as well.*

15. *Official Secrets Act 1920 section 8(4). But the judge is not bound to accede to the application.*

16. *Rogers v Home Secretary [1972] 2 All E.R.1057.*

17. *The court will inspect documents privately to decide whether to uphold the claim of privilege: Conway v Rimmer [1968] 1 All E.R.674*

18. *The Times May 28 1974. (Refusal to disclose tapes by President Nixon would have aborted the prosecution of Ehrlichman and Colson.)*

19. *The Times June 12 1974.*

20. *For example Statistics of Trade Act 1947 section 9 and other statutory provisions discussed in Chapter 5.*

21. *The European Convention allows exclusion of the public if "the protection of the private life of the parties" requires it. France, for example, has well-developed laws for the protection of privacy: Younger Report on Privacy (1972) Cmnd 5012 Appendix J.*

22. *R v Wright (1799) 4 R.R.649 quoted in Jones: Justice and Journalism 1974 pub.Barry Rose page 13.*

23. *Morgan v Morgan [1977] 2 All E.R.515, sed quaere.*

24. *The reason which made spouses normally incompetent witnesses against each other: Leach v R [1912] A.C.305; Criminal Law Revision Committee 11th Report 1972 para.147.*

25. *Magistrates Courts Act 1952 section 57(2),(3).*

26. *Section 48(2).*

27. *[1913] A.C.417.*

28. *But the European Convention allows the public to be excluded "in the interests of morals."*

29. *The European Convention Article 6(1) protects juveniles but not the mentally ill.*

30. *recognised in Scott v Scott (above)*

31. *Court of Protection Rules S.I. 1960 No.1146 rule 44 (unless the judge otherwise directs).*

32. *Viscount Haldane L.C. in Scott v Scott at 437.*

33. *Children and Young Persons Act 1933 section 47(2).*

34. *ibid. section 37.*

35. *Matrimonial Causes Act 1973 section 45(9).*

36. *[1971] 3 All E.R.1183.*

37. *The Times February 17 1975.*

38. *By the Law Commission in 1966 in recommending that legitimacy proceedings be heard in camera: Cmnd.3149.*

39. *[1963] 3 All E.R.191.*

40. *[1974] 1 All E.R.1145.*

41. *Reported at 1974 Fam.L.48.*

42. *Megaw L.J. in H v H (above) at 1147.*

43. *Lord Evershed at 197.*

44. *Lord Evershed with whom Lord Reid agreed.*

45. *at 211.*

46. *Disclosure to her legal advisers had been offered but the mother had rejected it. Reports and records kept by a local authority under Boarding-Out Regulations are not made available to the mother: Re D (Infants) [1970] 1 W.L.R.599 C.A. even when she is claiming custody from the local authority: R v Greenwich Juvenile Court ex parte Greenwich London Borough Council The Times May 10 1977.*

47. *Practice Direction [1968] 1 All E.R.762.*

48. *A report from a local authority for the court in custody or supervision proceedings or appeal against assumption of parental rights is read or given in court and parties are invited to make objections. Guardianship Act 1973 section 6; Children Act 1975 section 58. Welfare reports in custody cases should be given to the parties: Re B (Minors) The Times July 23 1977*

49. *H v H [1974] 1 All E.R.1145*

50. *Lord Evershed in Official Solicitor v K at 197*

51. *(note 46 above)*

52. *As in the case of the girl prescribed a contraceptive whose doctor informed her parents: Chapter 4.*

53. *para.80.*

54. *Companies Act 1948 section 268; Bankruptcy Act 1914 section 25(1).*

55. *Companies Act 1948 section 270; Bankruptcy Act 1914 section 15.*

56. *Statutory inquiries and inspections.*

57. *Salmon L.J. in R v Savundranayagan and Walker 1968 3 All E.R.439, 441 "Trial by Television."*

58. *See for example Mr Roy Jenkins in the Second Reading Debate on the Criminal Justice Bill: H.C.Deb 5th series Vol.738 col.54. It was pointed out by Mr Quintin Hogg that the accusatorial basis of preliminary hearings is rendered necessary by the fact that they are held in public: ibid.col.85.*

59. *As in the trial of Dr John Bodkin Adams in 1957.;*

60. *As in the "Great Mail Train Robbery" case in 1963.*

61. *As in the "Moors Murders" case in 1965.*

62. *(1958) Cmnd.479 para.11. The committee was appointed as a result of the Bodkin Adams case.*

63. *op.cit. page 18.*

64. *For example Lord Ellenborough in R v Fisher (1811) 11 R.R.799 and Lord Abbott C.J. in Duncan v Thwaites (1824) 107 E.R.850.*

65. *Section 4(2).*

66. *Criminal Justice Act 1967 section 6(1).*

67. *H.C.Deb. 5th series vol.738 col.55.*

68. *Scott v Scott [1913] A.C.417,438.*

69. *Especially Lord Halsbury and Lord Shaw. But the ground has been used to hear in camera an application for the examination of a witness under the Bankruptcy Act 1914 section 25(1) where the press had publicised allegations of fradulent dealings: Re Green [1958] 2 All E.R.57.*

70. *Comment in Halsbury's Statutes 3rd ed. Vol.21 page 371.*

71. *Brian Harris in The Courts, the press and the public, 1976 pub. Barry Rose page 24.*

72. *Section 1.*

73. *Section 3 discussed below.*

74. *Jones op.cit. Chapter 7.*

75. *Perhaps it was thought to be irrelevant. But English China Clay Ltd. persuaded an inspector to hold part of a local public inquiry in private on this ground with the result that objectors could not challenge some of the evidence: Sunday Times December 6 1970. It has since been recommended that the High Court alone should sanction such procedure: The Times August 2 1976.*

76. *[1913] A.C.417,483. Also Lord Atkinson at 451.*

77. *(1883) 24 Ch.D.156.*

78. At 169. Perhaps on that basis this ground for a hearing in private comes within the European Convention - "in special circumstances where publicity would prejudice the interests of justice."

79. It was said to be the first time such circumstances had arisen. In earlier cases Lord Eldon had refused injunctions against disclosure of secret formulae on the ground that if they were secret the court could not judge whether they had been infringed! Newbury v James (1817) 2 Mer.446; Williams v Williams (1817) 3 Mer. 157.

80. An action for breach of confidence would probably lie.

81. cases concerning breach of patent or misuse of confidential commercial information are often heard in camera at the request of the parties, e.g. Yates Circuit Foil Co. v Electrofoils Ltd [1976] F.S.R. 345 (where most of the alleged secrets were held not to be secret at all.)

What a witness must say

82. A major example of such protection is the rule prohibiting disclosure of other offences before conviction in a criminal case. The rule is one of public policy: R v Border Television Ltd ex parte Attorney-General. The Times January 17 1978.

83. Brown v Walker (1896) 161 U.S.591 quoted in Heydon: Evidence Cases and Materials 1975 pub. Butterworth's page 129.

84. In Blunt v Park Lane Hotels Ltd [1942] 2 K.B.253,257.

85. In civil cases exposure to forfeiture is no longer within the scope of the privilege: Civil Evidence Act 1968 section 16 (1) (a).

86. ibid. section 14 (1)(b).

87. Criminal Evidence Act 1898 section 1(e).

88. Contrast the English and American attitudes to illegally obtained evidence. Cross: Evidence 4th ed.1974 pub. Butterworths page 242. And Jeffrey v Black [1978] 1 All E.R.555 criticised by McKean [1978] C.L.J. 200.

89. R v Kinglake (1870) 22 L.T.335.

90. R v Coote (1873) L.R.4 P.C.599.

91. Statutory inquiries and inspections. The arguments for and against the privilege are discussed in Heydon op.cit. pages 129-134. On balance he favours the privilege.

92. [1912] A.C.305.

93. Metropolitan Police Commissioner v Hoskyn [1978] 2 All E.R.136. It has been argued that this decision is contrary to the public interest: Lord Edmund-Davies dissenting and The Times April 19 1978. It removes protection from a wife who wishes to give evidence.

94. 11th Report 1972 para.153. The Committee acted on the basis, as the law then stood, that she was compellable for a charge of violence against herself.

95. The reasons for the more limited proposals of the Criminal Law Revision Committee are set out in paras.150,151.

96. It may be argued that everything spouses tell each other is confidential, but incompetence as a witness means that the spouse cannot even answer what clothes the defendant was wearing, a matter which cannot be called confidential.

97. Discussed in Chapter 3B.

98. D. v N.S.P.C.C. [1977] 1 All E.R.589. H.L.Discussed in Chapter 3A.

99. Cotton L.J. in Raymond v Tapson (1883) 22 Ch.D.432,435.

1. R.S.C.Order 38/14 - 19/11.

2. [1909] 1 K.B.258.

3. Indeed to try to dissuade a person from being a witness, even by threatening the exercise of a lawful right, is an attempt to pervert the course of justice: R v Kellett [1975] 3 All E.R.468.

4. As in R v Noble [1974] 2 All E.R.811, a claim that the witness was perjuring himself by way of revenge.

5. But not just because the document was given in confidence: R v Daye [1908] 2 K.B.333.

6. The relevant note to Order 38 (above note 1) states the discretion only in relation to documents. Both types of subpoena were set aside on this ground in Morgan v Morgan (below).

7. Mellor v Thompson (1885) 31 Ch.D. 55.

8. Re Paget [1927] 2 Ch.86.

9. Law Reform Committee 16th report: Privilege in civil proceedings (1967) Cmnd.3472 para.1 quoted with approval by Lord Hailsham in D v N.S.P.C.C. (above) at 622.

10. Discussed in Chapter 4.

11. For example the journalist in the "Tartan Army" case: The Times June 20 1975. The informant later released him from his undertaking. Nevertheless he was fined £500.

12. [1977] 1 All E.R.589,594.

13. [1927] 2 Ch.86.

14. [1977] 2 All E.R.515.

15. Matrimonial Causes Act 1973 section 25(1).

16. [1975] 2 All E.R.1009. A statement of Lord Denning M.R. who was in a minority. The statement appears to conflict with Attorney-General v Mulholland [1963] 1 All E.R.767.

17. The Times June 29 1976.

18. For example the children in Re Somerset [1894] 1 Ch.231.

19. Trustee Act 1925 section 31.

20. ibid. section 32.

21. Or by the court on their behalf: Variation of Trusts Act 1958 section 1(1)(b) and (d).

22. Synge v Synge [1894] 1 Q.B.466.

23. The judge considered that the chance of revocation went to weight and not to relevance.

What may be done with information

24. The policy of a local newspaper that "you never hit a man when he's down, so you never report court cases" is so rare as to be newsworthy: The Observer July 9 1978.

25. Lord Campbell C.J. obiter in Davison v Duncan (1857) 26 L.J. (N.S.)104.

26. Home Office Circular 78/1967.

27. Quoted by Jones op.cit. page 113.

28. Home Office Circular 78/1967.

29. By Jones op.cit.

30. ibid. page 24.

Open court proceedings

31. Criminal Justice Act 1967 section 3(1),(4).

32. Cited in Harris op.cit. page 24.

33. (1958) Cmnd.479.

34. R v Russell ex parte Beaverbrook Newspapers Ltd. [1968] 3 All E.R. 695 applied in the Jeremy Thorpe conspiracy case.

35. Criminal Justice Act 1967 section 3(2).

36. Home Office Circular 109/1968. But they need not come.

37. Section 3(3).

38. The Times January 17 1978.

39. In Attorney-General v Times Newspapers Ltd [1974] A.C.273,294.

40. Section 1(1)(a).

41. Section 1(1)(b).

42. Argyll v Argyll [1965] 1 All E.R.611. Perhaps even a person who was not a party: Windeatt v Windeatt [1962] 1 All E.R.776

43. Committee on Privacy (1972) Cmnd.5012.

44. Children and Young Persons Act 1933 sections 39 and 49 as amended by Children and Young Persons Act 1969 section 10 (subject to directions by the court).

45. (1972) Cmnd.5012 para.174.

46. Jones op.cit. page 160.

47. R v Socialist Worker [1975] 1 All E.R.142,145; Phillimore Report para.141 discussed below.

48. Section 6(1)(b). He may apply to have the restriction lifted.

49. The Times June 30 1977.

50. (1977) Cmnd.6810 para.19.22.

Matters not made public in court.

51. An example is an order that the amount of money paid into court in offer of a settlement should not be disclosedafter the hearing in case of an appeal: The Times March 8 1975.

52. Or occasionally some other public interest. In an Official Secrets Acts prosecution the judge allowed a witness to be referred to as "Colonel B." His identity was disclosed in Parliament: The Times April 21 1978 and elsewhere. Journalists who disclosed it were found guilty of contempt of court: Attorney-General v Leveller Magazine Ltd. [1978] 3 All E.R.731.

53. R v Socialist Worker Printers & Publishers Ltd and another [1975] 1 All E.R.142.

54. *As suggested by the Lord Chancellor in Scott v Scott [1913] A.C.417,439.*

55. *[1975] 1 All E.R.142,150.*

56. *H.C.Deb. Vol.893 col.242.*

57. *At 151. It has since been given by the Sexual Offences (Amendment) Act 1976 section 4.*

58. *ibid.*

59. *Marks v Beyfus (1890) 25 Q.B.D.494 But cf. Tapper (1978) 41 M.L.R. 192 suggesting that the basis of these cases is irrelevance.*

60. *D v N.S.P.C.C. [1977] 1 All E.R.589.*

61. *Crompton (Alfred) v Commissioners of Customs and Excise [1973] 2 All E.R.1169.*

62. *Report of the Committee on contempt of court (1974) Cmnd.5794 para.141 note 72.*

63. *It has been argued that the House of Lords has no right to prohibit publication since that would be to create a new Parliamentary privilege: The Times October 25 1974.*

64. *Miller: Contempt of Court 1976 pub. Elek page 231.*

65. *For example Criminal Justice Act 1967 section 3(1) (committal proceedings).*

66. *Lord Denning M.R. in Attorney-General v Butterworth [1962] 3 All E.R. 326 and Lord Widgery C.J. in the Socialist Worker case speak of the potential witness hearing or reading about the contempt.*

67. *Criminal Justice Act 1967 section 3(3).*

68. *Cmnd.5794 para.132. It has been argued that newspaper comment should be allowed after trial but before sentence: Sunday Times February 26 1978.*

69. *Ibid. para.113. A recommended test not very different from that propounded by the House of Lords in Attorney-General v Times Newspapers Ltd. [1973] 3 All E.R.54.*

70. *In warning journalists not to publish background material on a drugs trial after verdict but before sentence, the judge said that his mind would not be affected but people might think he had been influenced: The Times March 3 1978.*

71. *Moore v Clerk of Assize, Bristol [1972] 1 All E.R.58.*

72. *Attorney-General v Butterworth [1962] 3 All E.R.326. The Phillimore Committee recommends that this should no longer be punishable as contempt of court but should be made an indictable offence: para.157.*

73. *[1975] 1 All E.R.142,145.*

74. *Phillimore Committee Report para.141; Law of Libel (Amendment) Act 1888 section 3 (privilege).*

75. *Both the House of Lords in the Sunday Times case and the Phillimore Committee disapproved of the device and the committee (Para.127) recommended that contempt should not apply until the date of setting down for trial in civil cases, but the House of Lords decision in the Sunday Times case is still the law and does not prevent a gagging writ (ibid.para.98). But cf. Wallersteiner v Moir [1974] 3 All E.R.217,230 fair comment on a matter of public interest is not contempt.*

76. *Distillers Co. (Biochemicals) Ltd. v Times Newspapers Ltd. [1975] 1 All E.R.41 but subject to the right under the European Convention on Human Rights to discuss matters of public importance.*

77. *As is suggested, where the ground of non-disclosure is national security or the safety of the individual, by the action against those who named "Colonel B": Attorney-General v Leveller Magazine Ltd. [1978] 3 All E.R.731, discussed by Williams [1978] C.L.J.196.*

78. *Criminal Justice Act 1967 section 8.*

Hearings in private

79. *For example Lord Hewart C.J. in 1932 quoted in Miller op.cit. page 213; Wynn-Parry J. obiter in Re De Beaujeu [1949] 1 All E.R.439,441.*

80. *[1913] A.C.417.*

81. *At 484 (Lord Shaw).*

82. *At 448.*

83. *At 484. Scarman L.J. has called his speech "a classic declaration of common law principle."*

84. *For example, Practice Direction [1972] 1 All E.R.1056 (wardship proceedings and other proceedings relating to children).*

85. *At 448. It is suggested that this right is not abrogated by Administration of Justice Act 1960 section 12 but is within section 12(4)*

86. *Re F. (a minor) [1977] 1 All E.R.114.*

87. *Section 12(1)(a)-(e).*

88. *Where proceedings are held in private on this ground even speculation as to what might be happening in court is "potential contempt": statement of the Lord Chief Justice in the Prager trial noted (1971) 121 New Law Journal 548.*

89. *Miller op.cit. page 216 suggests that this is the more convenient and the most natural reading of the section.*

90. *Re F (a minor) [1977] 1 All E.R.114 approving Re R. (M.J.) (an infant) [1975] 2 All E.R.749.*

91. *who had received the transcripts under Practice Direction [1972] 1 All E.R.1056. The Practice Direction would have been ultra vires if the Act had removed the discretion.*

92. *[1975] 2 All E.R.749,755.*

93. *ibid. at 756.*

94. *[1977] 1 All E.R.114. C.A. Reported as Re A. The Times October 14 1976.*

95. *[1976] 3 All E.R.274.*

96. *Daily Telegraph July 14 1976. This newspaper, not surprisingly gave a much fuller account of the case than The Times.*

97. *Administration of Justice Act 1960 section 12(1).*

98. *[1977] 1 All E.R.114,130 (Scarman L.J.).*

99. *At 135. This might prove to be an unworkable test if, for example, a social worker prepared a report thinking it would be produced only in a private hearing but the judge either ordered that the court sit in public or allowed disclosure of the information for some other purpose. The social worker could not object.*

1. *At 126 (emphasis supplied).*

2. *Conway v Rimmer [1968] A.C.910*

3. *Lord Salmon in Rogers v Home Secretary [1972] 2 All E.R.1057,1071.*

4. *[1913] A.C.417,483.*

5. *Ibid. at 452 (Lord Atkinson); Re F (a minor) [1977] 1 All E.R.114,121 (Lord Denning M.R.).*

6. *Law of Libel Amendment Act 1888 section 3 (extended by Defamation Act 1952 section 9(2)).*

7. *Section 1(1).*

8. *[1965] 1 All E.R.611,628.*

9. *At least if he was not a bone fide purchaser: Morison v Moat (1851) 9 Hare 241.*

10. *Fraser v Evans [1969] 1 All E.R.8.*

Use against the witness

11. *R v Coote (1873) L.R.4 P.C.599 (depositions taken on oath under statutory provisions admissible in court).*

12. *Section 11. It is conclusive evidence for the purposes of a defamation action: ibid. section 13.*

13. *Wauchope v Mordecai [1970] 1 All E.R.417. C.A.*

14. *ibid. section 12.*

15. *Court of Protection Rules S.I. 1960 No.1146 Rule 37. The Rules are made under the authority of Mental Health Act 1959 section 114.*

16. *ibid. Rule 30.*

17. *Seaman v Netherclift (1876) 2 C.P.D.53,60 (Bramwell J.A.). The privilege applies not only to witnesses but also to judges, parties and advocates.*

18. *ibid. at 62 (Amphlett J.A.).*

19. *[1964] A.C.40.*

20. *At 85 (Lord Evershed).*

21. *Quoted by Holroyd Pearce L.J. [1962] 1 All E.R.834,837.*

22. *[1962] 1 All E.R.834,850.*

23. *Police (Discipline) (Deputy etc.) Regulations 1952. The Court of Appeal had held that the Regulations were not applicable since the Watch Committee was not acting on a "report or allegation." cf. Lord Reid [1964] A.C.40,80.*

24. *[1964] A.C.40,85.*

25. *On analogy with cases concerning deprivation of property e.g. Cooper v Wandworth Board of Works (1863) 14 C.B.N.S.180 and matters involving civil consequences to individuals: Wood v Woad (1874) L.R.9. Exch.190.*

26. *[1964] A.C.40,128.*

27. *Magistrates Courts Rules 1968 Rule 54(10). Similar Rules apply for other courts.*

28. *For example The Times September 11 1976 referred to in Hewitt: Privacy: The information gatherers 1977 pub. N.C.C.L. page 63.*

29. *The exceptions are wide, especially in relation to employment: Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 S.1. No.1023.*

30. *Defined in section 1.*

31. *Section 4.*

32. *Section 8.*

33. *Section 9.*

34. *Cranston: The Right to Privacy. (1) The Legal Right B.B.C. Radio 3 June 10 1974.*

B. *Disclosure of Confidential Information in Parliament*

1. *Howard v Gossett (1845) 10 Q.B.359; 116 E.R.139. A Committee's Order of Reference is given by the House and it only has power to call witnesses if given that power by the House.*

2. *Erskine May: Parliamentary Practice 19th ed. 1976 pub. Butterworths page 221.*

3. *Standing Order No.83A.*

4. *Erskine May Chapter XXIV.*

5. *A committee may also sit in private to protect the reputation of individual civil servants: 2nd report of the Select Committee on the Parliamentary Commissioner for Administration (1967-68) para.30.*

6. *As early as 1621 the House of Commons appointed a committee with "Power to send for what or whom they thought fit to be questioned": Berger: Executive Privilege - a Constitutional myth 1974 pub. Harvard University Press page 16. By 1763 power to send for persons, papers and records was a routine formality: Thomas: The House of Commons in the Eighteenth Century 1971 pub. Clarendon Press page 268. But in January 1976 the Select Committee on Cyprus was reconvened to prepare its report without the power of sending for witnesses although some members wanted to question the Minister: The Times January 17 1976 Appendix C of First Report of Select Committee on Procedure (1977-78) gives the history and present position.*

7. *Erskine May page 692. And the House has no rule excluding evidence of one spouse against the other as indicated by the Select Committee on Violence in Marriage 1974-5. But the House protects witnesses against reprisals for giving evidence (see below).*

8. *A major factor is the lack of expertise in committee members which may prevent them asking the right questions. It has been suggested that all members should have a research assistant: Sunday Times January 22 1978; or select committees should be able to appoint more specialist advisers: First Report of Select Committee on Procedure (1977-78) para.6.40.*

9. *The civil service is the chief source of witnesses before the various sub-committees of the Expenditure Committee: Study of Parliament Group: The Commons in the Seventies 1977 pub. Fontana page 146. Between 1970 and 1974 fourteen Ministers appeared before Select Committees as did over 300 civil servants: ibid. page 179. But civil servants do not give evidence on government organisation: First Report of Select Committee on Procedure [1977-78) para.7.14.*

10. *Erskine May page 645. The Joint Committee on Statutory Instruments was given only power to require a government department to submit a memorandum or send a representative: ibid C.J. (1948-9) 9. But the*

Select Committee on the Parliamentary Commissioner for Administration expressly reserved its right to send for individual civil servants (2nd report (1967-8) paras.29,30) in the face of strenuous argument by the Attorney-General that this might not only be unfair to the individual singled out but would enable a Minister to excuse himself from responsibility for his Department (ibid. Minutes of Evidence question 556.).

11. *The Commons in the seventies page 22; Ganz: Government and Industry Chapter 6; the Select Committee on Parliamentary Questions (1971-2) listed 95 topics on which government departments persistently refuse to answer questions, from commercial and personal information to the composition of Cabinet committees and House of Lords attendance allowances: The Times April 24 1978.*

12. *Sir Antony Part, a former senior civil servant, arguing against extending the range of inquiry by Select Committees, has said "A number of leading Ministers, past and present, would not be prepared to rely on confidences being kept on all occasions even if they were given in private session": Sunday Times January 29 1978. A similar point was made by Geoffrey Robinson M.P. The Times April 11 1978.*

13. *Their differences in Cabinet had been 'leaked.'*

14. *In answer to a Parliamentary Question, quoted in The Times January 16 1976. This principle applies to the answering of a Question put by a Member in the House but the sub-committee had by delegation from the House an unlimited power to call witnesses. It has been suggested, by a former Permanent Secretary, that Select Committees should receive only information which would be given in reply to a Parliamentary Question: Sunday Times January 29 1978.*

15. *Similarly, the Minister for Overseas Development refused to tell the relevant Select Committee which departments were involved in drawing up a new policy: The Times January 26,27 1978.*

16. *The Times November 17 1977. But the Trade and Industry sub-committee has examined industrialists and a Minister during negotiations though it did not produce its report until they were concluded: Ganz: Government and Industry 1977 pub. Professional Books Ltd. page 13.*

17. *The Times January 19 1978. The Times had commented "too often the claim that commercial or national security requires the maintenance of secrecy is used as an excuse for avoiding embarrassment.": January 12 1978.*

18. *Daily Telegraph November 22 1977. After pressure in Parliament the Secretary of State disclosed the size of the subsidy, £28 million, but not details of the agreement: The Times December 13 1977.*

19. *The First Report of the Select Committee on Procedure (1977-78) seeks to strengthen control over government (para.1.6.) Its proposals include increased staffing facilities (paras.6.37,40,46.) and power to order a Minister or Secretary of State to appear and produce papers. Refusal would be reported to the House (para.7.21,22,24).*

20. *Erskine May page 692.*

21. *ibid. page 647. Because "the House cannot order the Crown.*

22. *The Times September 23 1976. When the Expenditure Committee complained in 1976 at uninformative White Papers, Mr Joel Barnett, a Treasury Minister, said "Ministers felt we were in danger of over-loading the public mind with volumes of papers:" quoted in The Sunday Times January22 1978.*

23. *Parliamentary Commissioner Act 1967. A complaint must reach him through a Member, and he reports annually to a Select Committee. An American commentator has said "British M.P.'s appear to consider [him] not as a rival but as a powerful Parliamentary arm that enables them to handle their constituents' complaints more effectively": Schwartz in Schwartz & Wade: Legal Control of Government 1972 pub. Clarendon Press page 75. It has been suggested that individuals should have direct access to the Commissioner by Justice: Our fettered Ombudsman 1977 and by the Commissioner himself: Annual Report 1977.*

24. *Section 4(2).*

25. *Section 5(1). There are exceptions, including personnel matters which has been much criticized. Stacey: The British Ombudsman 1971 pub. Oxford University Press pages 295-302; Report of the Select Committee H.C. (1976-77) 524 paras.1-3.*

26. *Section 7(2).*

27. *Section 7(1).*

28. *Section 7(2).*

29. *Section 10(2).*

30. *Select Committee on the Parliamentary Commissioner 2nd report (1967-8) para.26.*

31. *Section 8(5). A Member communicating with the commissioner has absolute privilege against libel, but a witness does not. Section 10.*

32. *[1977] 1 All E.R.589.*

33. *Section 8(3).*

34. *By comparison in France the Ministry may refuse information to the Mediateur on the grounds that it would disclose secrets relating to national defence, the safety of the state or foreign policy: Brown & Lavirotte: The Mediator: A French Ombundsman? (1974) 90 L.Q.R.211,230.*

35. *Section 8(4).*

36. *The Times August 4 1975.*

37. *Section 5 (1)(a).*

38. *Schwartz & Wade: Legal Control of Government 1972 pub. Clarendon Press page 65.*

39. *The Select Committee on the Parliamentary Commissioner for Administration has recommended that he be given access to Cabinet papers except where the Attorney-General certifies that access would be prejudicial to the safety of the state or otherwise contrary to the public interest: Fourth Report H.C.(1977-78) 615 para.34.*

Protection of the witness

40. *Quoted in Erskine May page 156.*

41. *ibid; Select Committee on Witnesses (1934-5).*

42. *Erskine May page 158.*

43. *Third Report of the Committee of Privileges H.C. (1975-76) 274.*

44. *Quoted in The Times April 30 1976.*

45. *Erskine Page 158 gives examples.*

46. *Goffin v Donnelly (1881) 6 Q.B.D.307.*

47. *Mr Grimshaw was advised that criminal action would have cost him £25,000: The Times April 30 1976.*

48. *Or authorisation by implication. Franks Report on Official Secrets Act 1911 section 2 (1972) Cmnd.5104 para.18.*

49. *Official Secrets Act 1911 section 2(1)(a) cf. the position of the informal informant (below),*

Subsequent use of the information.

50. *Thomas op.cit. pages 138-146 shows that the frequent banning of the public from debates in the House of Commons from 1770 to 1777 stemmed from the rise of newspapers reporting Parliamentary debates. But the reporting of a proceeding in Parliament or a committee, unless held in private, is no longer contempt of Parliament: Resolution July 16 1971.*

51. *Parliamentary Papers Act 1840. But even Hansard may not be used in court unless Parliament has first been petitioned for permission: Church of Scientology v Johnson Smith [1972] 1 All E.R.378,382.*

52. *(1868) L.R.4 Q.B.73.*

53. *The defence of fair comment would be available for the leading article; Parliamentary proceedings are conclusively presumed to be of public interest: Cook v Alexander [1973] 3 All E.R.1037,1041. But contempt of court might be committed in reporting words said in Parliament though no action could be taken against the Member: The Times April 21 1978. The Faulkes Committee on Defamation (1975) Cmnd.5909 para. 220 proposed absolute privilege for words in a live broadcast and qualified privilege for television pictures; a libel writ was issued against a Member when his statement in the House was broadcast: The Times May 29 1978.*

54. *(1868) L.R.4 Q.B.73,89. The Lord Chancellor emphasised both the responsibility of government to its electors and the electors' right to influence decision making.*

55. *[1973] 3 All E.R.1037,1042.*

56. *Erskine May page 650.*

57. *The House may still, if it wishes, insist on the full Minutes of Evidence being laid before it.*

58. *Though the information may be obtainable elsewhere.*

59. *Parliamentary Commissioner Act 1967 section 11. cf. the position of the Commissioners for Local Administration discussed in Chapter 6.*

60. *Erskine May page 652. The Select Committee on Procedure (1977-78) proposes that such reporting be no longer even theoretically contempt: para.6.25.*

61. *Standing Order 85A.*

62. *The Times May 28 1974, the Committee on European Secondary Legislation.*

63. *Standing Order 85. Members of Parliament do not as such receive advance copies.*

64. *First Report of the Committee of Privileges (1975-76).*

65. *ibid. A similar view is taken by judges of journalists' claims to protect their sources in court and before tribunals: Attorney-General v Mulholland [1963] 1 All E.R.767.*

66. *The Times December 4*

67. For example Regulations of the Armed Services allow communication with Members on any subject, so long as secret information is not disclosed; prisoners have an unrestricted right to communicate with Members (though one of the complaints in the case of Golder (1975) before the European Commission was that his letter to his Member of Parliament had been stopped.)

68. (1859) 1.F.& F.419; 115 Rev.Rep.926.

69. ibid. at 932.

70. Or a professional person: Beach v Freeson [1971] 2 All E.R.854,859.

71. "Every elector or inhabitant of the locality would have an interest in the conduct of its public functionaries": Lord Hewart C.J. in R v Rule [1937] 2 K.B.375.

72. Hebditch v MacIlwaine [1894] 2 Q.B.54 approved in Beach v Freeson (above), disapproving a dictum to the contrary in Watt v Longsdon [1930] 1 K.B.130; Street on Torts 6th ed. 1976 page 322.

73. (1855) 5 E. & B.344; 103 Rev.Rep.507, still cited as the leading case e.g.Street loc.cit.

74. [1937] 2 K.B.375. The fact that the Member had asked for the information was held not necessary.

75. [1971] 2 All E.R.854 - interest of the Lord Chancellor in the proper behaviour of solicitors.

76. Parliamentary Commissioner Act 1967 section 10(5).

77. Rivlin v Bilainkin [1953] 1 Q.B.485 (posting letters to Members in the House).

78. H.C.Deb Vol.926 cols.38-40.

79. Erskine May page 160. And when a Member alleged that two employees of a nationalised industry had been made redundant as a result of giving information to him about mismanagement in the industry, the Speaker ruled that there was no prima facie breach of privilege because no Member had been prevented from carrying out his Parliamentary duties: H.C.Deb.Vol.487 (1950-51) Col.576.

80. Official Secrets Act 1911 section 2(1)(a).

81. H.C.Deb. Vol.353 Col.1080.

82. For example protests by Members at the Speaker's ruling of no prima facie breach of privilege: H.C.Deb. Vol.487 (1950-51) col.577; Vol.524 (1953-54) col.1934.

83. H.C.Deb. Vol.524 (1953-54) col.1932. The Minister had suggested in debate that the information be sent to the Department, who then allowed the person defamed to see the letter.

84. Quoted in Erskine May page 160. Members were concerned at their own possible liability in libel as well as the protection of constituents.

85. The Times February 26 1977 (Mr Iaian Sproat).

86. The identities of the letter writers were not disclosed to the newspaper.

87. Discussed in Chapter 2.

88. H.C. (1938-39) 101.

89. In 1970 40% of a sample of Members received 25-50 letters each week from their constituency, while 34% received a similar number from outside their constituency; some 10% received more than 100 of each: Barker & Rush: The Member of Parliament and his Information 1970 pub. Allen & Unwin pages 60,74.

The Member of Parliament

90. The question whether merely bringing an action for libel would constitute a breach of Parliamentary privilege is uncertain. In the Strauss case in 1958 the matter did not have to be decided since the House of Commons narrowly rejected the recommendation of the Committee of Privileges that a letter sent by a Member to a Minister was a 'proceeding in Parliament': H.C.Deb.Vol.591 5th series col.345. Both Heuston: Essays in Constitutional Law 2nd ed.1964 pub. Stevens page 97 and De Smith: Parliamentary Privilege and the Bill of Rights (1958) 21 M.L.R.465,474 consider that it should not be a breach. There might be stronger argument if an action were brought for breach of confidence, where there is no clearly recognised defence equivalent to absolute privilege in libel.

91. Report of the Select Committee on the Official Secrets Acts H.C.101 of 1938-39. But a Member was unable to discuss possible social security frauds with civil servants because they were bound by the Acts: The Times February 26 1977.

92. Especially important is freedom from a defamation action where little proof is available, for example threats made to Judith Hart M.P. when as an Opposition Member she wished to question the activities of the Crown Agents: H.C.Deb.Vol.940 col.1056.

93. For example two directors of Lonrho reacted strongly to statements made about them in the House of Commons, and challenged one Member to repeat his remarks outside the House: The Times August 7 1976.

94. Statement by Mr Speaker June 7 1961 H.C.Deb.Vol.641 col.1090 quoted in Wilson: Cases & Materials on Constitutional Law 2nd ed. 1976 pub. Cambridge University Press page 455. And if the person defamed seeks to vindicate himself the court may construe liberally the relevance of his statements and the extent of publication permissible without loss of qualified privilege: Adam v Ward [1917] A.C.309.

95. The Maltese government disclosed in Parliament, for political purposes, information kept secret in court proceedings: The Times October 10 1975. But the Committee of Privileges recommended that a warning to newspapers that they risked proceedings for contempt of court if they reported statements made in Parliament was not a contempt of the House: The Times August 25 1978.

96. House of Commons Resolution July 23 1963.

97. For example, comment is allowed when a matter of public concern is awaiting appeal since the likelihood of prejudicing the course of justice is recognised to be remote. The Phillimore committee would require "serious" prejudice: Report of the Committee on Contempt of Court (1975) Cmnd.5794.

98. The Times July 30 1976.

99. The dispute over Hansard was resolved by Act of Parliament because the House of Lords had a common interest with the House of Commons; had conflict arisen in the Strauss case there might have been no solution: De Smith loc.cit. above note90.

1. Barker & Rush op.cit. page 197.

2. ibid. Chapter IV.

3. Parliamentary Commissioner Act 1967 section 10(5).

4. The complainant could not sue since he sought disclosure to the Commissioner, but information from another source may also be disclosed.

5. R v Rule [1937] 2 K.B.375; Beach v Freeson [1972] 1 Q.B.14.

6. Beach v Freeson [1972] 1 Q.B.14,25.

7. Quoted in De Smith loc.cit. In Beach v Freeson (above) the judge dismissed lack of inquiry as a ground for asserting malice by saying that the Member was "singularly ill-equipped either in terms of experience or time."

8. (1958)21.M.L.R.465,482.

9. Third Report (1976-77) H.C.417 para.7; Williams [1978] C.L.J.1.

10. R v Creevey (1813) 1.M.&S.273. held that subsequent publication of a Member's Parliamentary speech in newspapers (not an amended version as suggested in Davison v Duncan (1857) 26.L.J.(N.S.)104) was not a proceeding in Parliament; this would not be affected by the proposals.

11. Lord Campbell C.J. (obiter) in Davison v Duncan (above) approved in Wason v Walter 1868 L.R.4 Q.B.73,95.

12. But the Faulkes Committee on Defamation would remove any risk of infected malice in these circumstances: (1975) Cmnd.5909 para.276 (6).

13. When asked by a Member whether he owed a duty of confidentiality to a constituent, the Speaker declined to advise saying only that there was no rule of the House on the subject: H.C.Deb. Vol.926 col.40.

14. Occasionally a Member will deliberately ask people to send him their problems; more frequently he will ask for correspondence on a national issue with which he is involved to indicate the strength of support for his case and also to give him new facts and examples which he can use as ammunition: Barker & Rush op.cit. pages 179,53.

15. Winston Churchill suggested that Members might ascertain from a correspondent seeking redress of a grievance that he did not object to disclosure beyond the relevant Government department: H.C.Deb Vol.525 col.211 but this may not be practicable where hundreds of letters are received on a national issue.

16. Adam v Fisher (1914) 110.L.T.537 no interrogatories in a libel action.

17. As in Initial Services Ltd. v Putterill [1967] 3 All E.R.145.

18. The story of her campaign was disclosed in debate by Sir Harold Wilson: H.C.Deb. Vol.940 cols.1026-1057.

19. This will be so if the changes proposed by the Select Committee on Procedure (1977-78) are adopted, as is recognised by the Committee, though the proposals would at least assert a theoretical right to information and would ensure that the matter was aired in the House.

C. Statutory Inquiries and Inspections

Public or private investigation

1. Reasons given for wanting a public inquiry into the Crown Agents' losses: H.C.Deb. Vol.940 col.1026 et.seq.; arguments in favour of an inquiry into associates of Poulson: The Times June 3 1975.

2. *Arguments for a public inquiry into the thalidomide tragedy: The Times July 9 1976.*

3. *Arguments for a public debate on fast breeder reactors and other sources of energy: The Times December 14 1976.*

4. *Crown Agents debate col.1030; Tribunals of Inquiry (Evidence) Act 1921 section 1(1)(a); but this may also apply in a private inquiry e.g. Companies Act 1948 section 167.*

5. *For example The Times July 22 1976 (inquiry into the conviction for murder of three youths). There are many other examples of this argument.*

6. *Keeton: Trial by Tribunal 1960 pub. Museum Press.*

7. *For example the Profumo scandal concerned Foreign Office Secrets as well as people's private lives. The inquiry was held in private.*

8. *For example a confidential medical report on a doctor's fitness for work: Daily Telegraph July 2 1977; the journalists'sources in the Vassall inquiry: Attorney-General v Mulholland [1963] 2 Q.B. 477.*

9. *For example the Department of Energy refused to inform the Royal Commission on Environmental Pollution what steps would be taken to prevent thefts of plutonium. Daily Telegraph December 3 1976.*

10. *Government wanted the Crown Agents inquiry in private so that transcripts of evidence given to the Fay Committee could be used: loc.cit.col.1043.*

11. *The extent of publication of the report is relevant here.*

12. *For example In re Poulson ex parte Granada Television Ltd. v Maudling. The Times May 6 1976 (statement by the Registrar of Wakefield County Court.)*

13. *This was suggested in relation to a planning application by English China Clays where the central evidence was heard in private: Sunday Times December 6 1970. The Stevens Committee on Planning Control over Mineral Working 1976 pub.H.M.S.O. recommended that in future an application to hear such evidence in private should be made to a high Court judge who would have to be satisfied that public disclosure would result in disadvantage to the applicant which, by comparison with the advantage to the public of that disclosure, would be unwarranted: para.16.20.*

14. *A criticism much levelled at reports of company inspections for example The Times December 13 1977 (accountants criticised in the report on the Stonehouse companies) and by the Parliamentary Commissioner for Administration. The Times January 21 1977 in spite of safeguards laid down by the Court of Appeal in Re Pergamon Press Ltd [1970] 3 All E.R.535.*

15. *For example the Lonrho report: The Times July 13 1976. (Lord Duncan-Sandys).*

16. *The Times June 9 1977. Department of Health guidance suggests that only the Area Health Authority should see the full report.*

17. *Conversely members of U.K.I.A.S., wishing the director to resign, leaked to the Press a secret report which was highly critical of him: Sunday Times February 6 1977.*

18. *The Times March 1 1977, report by the Lancashire Evening Post.*

19. *Bill of Rights Article 9.*

20. *Norwest Holst Ltd. v Department of Trade [1978] 3 All E.R. 280. Before 1962 the Board of Trade had such a practice but it was discontinued.*

21. *Health and Safety at Work etc. Act 1974 section 14(2)(b). Conversely it has been argued that the inability of a person or group aggrieved to obtain a public inquiry if the commission is opposed to one is a weakness: Industrial Law Journal 1975 pages 195,202.*

22. *Royal Commission on Tribunals of Inquiry (1966) Cmnd.3121. para.27.*

23. *H.C.Deb.Vol.940 col.1029 (Mr Medelson). The Royal Commission recommended that no government should again set up a Profumo-type secret tribunal for any matter causing nation-wide concern: para.42.*

24. *Tribunals of Inquiry (Evidence) Act 1921 section 2(a).*

25. *Similarly at the Roskill Inquiry into a third London airport evidence about the interest of the Ministry of Defence in certain firing ranges was heard in private. Senior counsel appearing for one party was accepted by all the objectors as representing their interests in the private hearing.*

26. *See below on protection for an individual criticised in the inquiry.*

27. *H.C. Vol.940 col.1030.*

28. *(1966) Cmnd.3121 para.122.*

29. *Companies Act 1948 sections 164,165.*

30. *Re Grosvenor and West End Railway Terminus Hotel Co.Ltd. (1897) 76 L.T.337. (C.A.); Maxwell v Department of Trade [1974]2 All E.R. 122. (C.A.). Because of the possibly damaging effect of such an inquiry on a company or individuals its "unjudicial character" is increasingly criticised, for example The Times July 13 1976; The Times September 20 1976.*

31. *[1932] A.C.392. (examination under the Friendly Societies Act 1896 and Industrial Assurance Act 1923).*

32. *Re Gaumont-British Picture Corporation Ltd. [1940] 2 All E.R.415. on the Companies Act 1929 but applicable also to the 1948 Act.*

33. *Maxwell v Department of Trade [1974] 2 All E.R.122,127*

34. *Hearts of Oak Assurance Co.Ltd. v Attorney-General (above); in Re Gaumont-British Picture Corp. Ltd. (above) the managing director who refused to disclose company secrets before the shorthand writer was found guilty as if of contempt.*

35. *Pennington: Company Law 3rd ed. 1973 pub. Butterworths page 587.*

36. *Health and Safety at Work etc. Act 1974 section 14(2)(b).*

37. *ibid. section 14(4)(c).*

38. *Health and Safety Inquiries (Procedure) Regulations 1975 S.I. No.335 (later amendments have not affected the matters under discussion).*

39. *Section 2(a) discussed above.*

40. *Regulation 8(3). By contrast, it has been recommended that only a High Court judge should have power to order evidence in a planning inquiry to be heard in private and, if he does so, the parties will be entitled to be represented by counsel at the private hearing: Stevens Committee on Planning Control over Mineral Workings 1976 para.16.20.*

41. *Tribunals of Inquiry (Evidence) Act 1921 section 1(1).*

42. *ibid. section 1(2).*

43. *ibid. section 1(3) as amended by Civil Evidence Act 1968 section 17(1).*

44. *Discussed in Chapter 3. In the Second Reading Debate on the 1921 Bill the Attorney-General said of this provision "In other words, a witness is entitled to absolute privilege": H.C.Deb.5th series vol.138 col.398, presumably a reference to privilege against libel. But the sub-section is clearly wider though the Special Commissions Act 1888 on which the 1921 Act was modelled gave witnesses complete immunity (except for perjury) but no right to refuse evidence: sections 9, 10(2).*

45. *Attorney-General v Clough [1963] 1 All E.R.420; Attorney-General v Mulholland [1963] 1 All E.R.767(C.A.).*

46. *Attorney-General v Clough at 424.*

47. *Attorney-General v Mulholland at 771.*

48. *ibid at 772, approved in Senior v Holdsworth [1975] 2 All E.R.1009.*

49. *The report is (1975) Cmnd.5919.*

50. *B.B.C. Television News destroy untransmitted film but I.T.N. do not.*

51. *Independent Television News 10 p.m. September 11 1974.*

52. *The Times October 8 1974.*

53. *[1975] 2 All E.R.1009.*

54. *Companies Act 1948 section 167(1).*

55. *ibid. section 167(2).*

56. *Re Pergamon Press Ltd [1970] 3 All E.R.535,539.*

57. *ibid. section 167(4).*

58. *McClelland, Pope & Langley Ltd. v Howard (1966) H.L.noted [1968] 1 All E.R.569.*

59. *Companies Act 1948 section 167(3). This machinery is the same as that provided by the Tribunals of Inquiry (Evidence) Act 1921.*

60. *Company Law 3rd Ed. 1973 pub. Butterworths page 586.*

61. *[1970] 3 All E.R.535.*

62. *Section 167(4) and section 270(5).*

63. *Re Atherton [1912] 2 K.B.251 under the Bankruptcy Act 1883 section 118 which was in the same words. Incrimination under foreigh law may not have been a ground of privilege; now it is not: Civil Evidence Act 1968 section 14(1)(a).*

64. *[1927] 2.Ch.86.*

65. *At 92.*

66. *Re Silkstone and Dodworth Coal and Iron Co. (1881) 19.Ch.D.118, 121 Baggallay L.J. quoting with approval Buckley's Company Law.*

67. *Maxwell v Department of Trade and Industry [1974] 2 All E.R.122.*

68. *Noted [1968] 1 All E.R.569.*

69. *(Note). [1968] 1 All E.R.567.*

70. He had decided that transcripts of evidence before the inspectors were admissible under Companies Act 1967 section 50.

71. Redfern v Redfern [1891] P.139: "one of the inveterate principles of English Law."

72. But in Truman (Frank)(Export) Ltd. v Metropolitan Police Commissioner [1977] 3 All E.R.431 the police could use the documents when legal professional privilege was not claimed.

73. [1971] Ch.680.

74. At 691.

75. Re Pergamon Press Ltd [1970] 3 All E.R.535,543 Sachs L.J.

76. Health and Safety Inquiries (procedure) Regulations 1975 S.I. No.335 Regulation 7(1). The witness is entitled to his expenses: Regulation 7(4).

77. Regulation 8(6).

78. O'Connor v Waldron [1935] A.C.76 (P.C.).

79. Regulation 8(5).

80. Health and Safety at Work etc Act 1974 section 33(1)(d).

81. Regulation 7(2).

82. Heydon: (1971) 87 L.Q.R.214 says that the statutes are usually clear on the question whether incriminating evidence must be given: this one is not.

83. Section 20(2)(j).

84. ibid.

85. Section 20(7).

86. Section 20(8).

87. See below.

Protection of a person criticised

88. Report of Interdepartmental Committee on the Law of Contempt as it affects Tribunals of Inquiry (1969) Cmnd.4078.

89. April 26 1963 quoted in Wraith & Lamb: Public inquiries as an instrument of Government 1971 pub. Allen & Unwin page 214.

90. Keeton: Trial by Tribunal 1960 pub. Museum Press Page 151.

91. Royal Commission on Tribunals of Inquiry (1966) Cmnd.3121. para.29.

92. ibid. para.30.

93. ibid. para.52.

94. ibid. para.32.

95. Mr J.H. Thomas was not mentioned until a late stage of the Budget Leak Tribunal, so he was then called as a witness and his advisers had very little time to prepare his case: ibid. para.15.

96. ibid. para.50. This was done "so far as possible" in the Vassall Tribunal 1962: ibid. para.19.

97. ibid. para.51.

98. cf. Rogers v Home Secretary [1972] 2 All E.R.1057

99. *The Royal Commission suggested that the tribunal might allow a witness to write a name rather than say it publicly: ibid para.122. The power of the court to enforce secrecy in such circumstances is doubtful: R v Socialist Worker [1975] 1 All E.R.142 discussed above in Part A.*

1. *Tribunals of Inquiry (Evidence) Act 1921 section 1(2)(c).*

2. *Alterskye v Scott [1948] 1 All E.R.469; Riddick v Thames Board Mills Ltd. [1977] 3 All E.R.677 (C.A.).*

3. *Tribunals of Inquiry (Evidence) Act 1921 section 2(b). The Royal Commission recommended that this should be a right: loc.cit. para.54. Senior civil servants involved in the Crown Agents inquiry have insisted on legal representation: The Times May 19 1978.*

4. *The Royal Commission recommended that the Tribunal should have power to award costs out of public funds: para.60.*

5. *ibid. para.65.*

6. *But they have apparently been applied to Health and Safety Tribunals (see below).*

7. *In a House of Lords Debate on May 14 1959, quoted in Keeton op.cit. page 235.*

8. *Re A.B.C. Coupler and Engineering Co.Ltd. (No.2) [1962] 3 All E.R.68.*

9. *The Parliamentary Commissioner for Administration has criticized the practice of publishing comments on individuals: H.C. (1976-77) 223.*

10. *Re Pergamon Press Ltd. [1970] 3 All E.R.535,539 (Lord Denning M.R.)*

11. *ibid. at 539 (Lord Denning M.R.); 543 (Sachs L.J.).*

12. *ibid. at 539 (Lord Denning M.R.); 544 (Sachs L.J.); 545 (Buckley L.J.)*

13. *ibid. at 540 (Lord Denning M.R.).*

14. *Maxwell v Department of Trade and Industry [1974] 2 All E.R.122.*

15. *H.C.Deb. Vol.916-2 col.2070.*

16. *The Times September 20 1976. The Lonrho report cost £200,000.*

17. *ibid.*

18. *For example The Times March 11 1977.*

19. *Though because of the roving nature of a Tribunal of Inquiry individuals may suffer from undue publicity: Keeton op.cit. page 231.*

20. *In Re Grosvenor and West-End Railway Terminus Hotel Co.Ltd. (1897) 76 L.T.337 (C.A.) this was said to be their only purpose under the Companies Act 1862.*

21. *The Times September 20 1976.*

22. *(1966) Cmnd.3121, especially the six cardinal principles para.32.*

23. *Wraith & Lamb op.cit. page 215.*

24. *cf. the Parliamentary Commissioner for Administration may not know at first who is likely to need protection and sometimes has to stop the investigation to allow someone to obtain representation.*

25. *Regulation 5(1).*

26. *Regulation 6.*

27. *Regulation 4(1).*

28. *Regulation 8(5).*

29. *Regulation 8(8).*

30. *Keeton op.cit. page 231.*

31. *Regulation 8(7).*

Subsequent Use of Information

32. *Statement by Lord Elwyn-Jones L.C. in relation to the records of the Profumo investigation: H.L.Deb. vol.382. col.319.*

33. *For example Companies Act 1948 section 168(2)(a) (the company) though the Jenkins Committee recommended a discretion: (1962) Cmnd. 1749 para.218 (g); Parliamentary Commissioner Act 1967 section 10(2) (person and department criticised).*

34. *Companies Act 1948 section 168 (2)(b) (persons affected).*

35. *Health and Safety Inquiries (Procedure) Regulations 1975 S.1. No.335 Regulation 10(2).*

36. *For example Local Government Act 1974 section 30(4) (local authority must allow public inspection of a report of a Local Commissioner for three weeks).*

37. *Companies Act 1948 section 168(2): Health and Safety at Work, etc. Act 1974 section 14(5).*

38. *Scott v Scott [1913]A.C.417.*

39. *Companies Act 1948 section 270(7).*

40. *Bankruptcy Act 1914 section 15(8).*

41. *Companies Act 1948 section 268.*

42. *Bankruptcy Act 1914 section 25(1).*

43. *Registrar of Wakefield County Court quoted in In re Poulson ex parte Granada Television Ltd. v Maulding [1976] 2 All E.R.1020,1026.*

44. *Bankruptcy Rules 1952. S.1. 1952/2113 Rule 15 as amended by S.1. 1962/295.*

45. *[1894] 2 Q.B.135.*

46. *Now they would have a right of inspection: Solicitors Act 1974 section 83.*

47. *At 140.*

48. *[1895] 2 Ch.545.*

49. *[1976] 2 All E.R.1020,1029-30.*

50. *This may be the reason why some of Mr Maulding's evidence in the Poulson bankruptcy was treated as "most confidential": ibid. at 1024.*

51. *The court in Re Poulson considered that the Rule should be amended: ibid. at 1032.*

52. *Farrar: Private examinations and the public interest (note) [1977] J.B.L. 178 suggests that "any new Rule should give clear priority to the public interest in freedom of speech on matters of public importance" - in that case the private business activities of public figures.*

53. At 1032.

54. Permission had already been given.

55. At 1026.

56. [1968] 3 All E.R.698.

57. It was accepted that the inspectors might seek non-disclosure of some parts of the evidence.

58. The situation would be different if examination were sought of a person against whom an action had been started: Re Bletchley Boat Co.Ltd. [1974] 1 All E.R.1225.

59. For example the announcement by Scarman L.J. at the opening of the Red Lion Square inquiry: The Times August 1 1974; Croom-Johnson J. announced before the Crown Agents inquiry that "neither the evidence of a witness ... nor any document he is required to produce ... shall be used against him in any criminal proceedings.": The Times April 11 1978. The Royal Commission had recommended subsequent inadmissibility of a witness's evidence: (1966) Cmnd.3121 para.63.

60. "If you once have an inquiry, you cannot have a criminal trial": Lord Hailsham L.C. The Times February 20 1974.

61. Mr Clinton Davis, Under-secretary for Trade in the House of Commons debate on the Lonrho report: H.C.Deb. Vol.916-2 col.2066.

62. The various statutes are discussed in detail by Heydon: (1971) 87 L.Q.R.214, to which I am much indebted.

63. For example Representation of the People Act 1949 section 123(7)(b) information not admissible "in any proceedings, civil or criminal" except perjury.

64. For example Companies Act 1967 section 50 "may be used in evidence against him."

65. Comparison of such a section with another expressly providing for admissibility may indicate that it was intentionally omitted: R v Savundra and Walker (1968) 52 Cr.App.R.637.

66. [1967] 1 A.C.760,816.

67. Purchase Tax Act 1963 section 24(6).

68. Heydon op.cit. suggests that if prosecution is only a minor and subsidiary purpose of the statute the evidence should not be subsequently admissible. It may be difficult to decide which are the major purposes in a particular statute.

69. (1856) Dears & B. 47. (Alderson B.).

70. Purchase Tax Act 1963 section 24(6).

71. [1971] 3 All E.R.1118. And in R v Savundra and Walker (above) statements of hiw own views made by the Official Receiver's Examiner and signed by the person examined were not "answers" within section 50.

72. Re Travel and Holiday Clubs Ltd. [1967] 2 All E.R.606,608.

73. Buckley J in Re A.B.C. Coupler & Engineering Co.Ltd. (No.2) [1962]] 3 All E.R.68 explained in Re Allied Produce Co. Ltd. [1967] 3 All E.R.399; Megarry J. obiter in Re Koskok Interpanetary (U.K.) Ltd. [1972] 3 All E.R.829.

74. Re Armvent Ltd. [1975] 3 All E.R.441.

General Conclusion

75. *Exceptional critics of over-exposure leading to an unfair trial (apart from cases since rectified by statute) include the company director Savundra who in 1968 complained of pre-trial television coverage and the Member of Parliament Jeremy Thorpe whose committal proceedings in 1978 were reported because of the wishes of a co-defendant.*

76. *Or apparently vice versa as with the Poulson cases.*

77. *(1966) Cmnd.3121.*

78. *An obligation to publish would lessen the likelihood of premature disclosure as happened with the report on the Birmingham smallpox outbreak in December 1978.*

79. *As in the Tribunal of Inquiry investigating the death of a demonstrator after clashes with the police in Red Lion Square in 1974.*

80. *As in Morgan v Morgan [1977] 2 All E.R.515 though it may be excluded as irrelevant.*

81. *The hearing of some evidence in secret on national security grounds, the other aspect of the Profumo case, has been done in other Tribunals, such as the Vassall Tribunal, and is not criticized.*

82. *Though government refuse to give information to Parliament on this ground. It may be given to a Select Committee in confidence.*

CONCLUSION

It is not possible to say that certain kinds of information are by their nature confidential. There is probably no information which everyone would agree to be confidential. One person would consider his vasectomy to be a very private affair while another will happily discuss the matter with his colleagues at work. One company will tell its shareholders and employees only what it is legally bound to tell them while another company will operate a policy of much fuller disclosure. Even in relation to national[1] and internal[2] security there are those who would advocate publicity though these areas are usually exempted by advocates of a policy of freedom of information. Thus there is no information which by its content is necessarily recognised by people, or by the law, as confidential.

It can, however, be said that some information cannot be confidential. Thus information which is "in the public domain" cannot be called confidential. It is not necessary that it can be readily obtained by any member of the public[3] at any time; once it has been made public it cannot become confidential again because it is not, or is no longer, generally available. The protection of privacy might require, for example, protection against the raking-up of old stories. Statute might give such protection, as in the Rehabilitation of Offenders Act 1974, but the English law of confidential information has not made such value judgments. Thus, statute apart, a person's criminal record is not confidential because convictions are stated in open court, even though access to the record is not readily available. Similarly the earlier decisions of the Local Government Commissioners not to make their reports generally available were not supportable on principle because the reports must be made available to the public for a period of time. Further, if information has been given to a person in his official capacity or as an agent for another he cannot then make the information confidential so that it cannot be seen by a person with a right to see such official information or by his principal.

What makes information confidential is its content and judicial recognition of the validity of the desire of the owner or holder in relation to information of that kind. Whether facts about my health are known by my doctor, my employer, my school or the Department of Health and Social Security, my desire for non-dissemination of the information is the same. Whether my commercial secrets are sought by a court or government department or trade union my reason for seeking to deny them, or at least to ensure that the disclosure goes no further, is the same. But the fact of confidentialit

does not of itself indicate the extent of protection or disclosure which the law will enforce. The law does not give blanket protection in all circumstances to confidential information, but neither is the confidentiality irrelevant in law. Legal response depends on the type of information and the purpose for which, or person against whom, disclosure is sought or sought to be restrained.

The public interest has been invoked to require non-disclosure of confidential information in various cases. Although the circumstances vary, a general desire to protect informants can be seen to be justified where there is a public interest in the receipt of information and a real danger of loss of information if disclosure is made. Conversely, the judicial refutation of the arguments for protecting advisers has application not just in the field of crown privilege but generally. The public interest has also been raised in many contexts as a ground for authorising disclosure of information which the owner seeks to keep confidential. Various aspects of this have been discussed and it is clear that the time is ripe for the general, rather uncertain, defence to be classified into more detailed and specific defences.

The rest of this Chapter is divided into three parts. Each type of confidential information is examined in turn. The present law, as ascertained in the earlier chapters, is summarised and proposals for reform are made. A draft Bill in Appendix A includes both present law and proposed reforms and would codify the law relating to confidential information.

NOTES

1. *Russell: Justice in wartime 1916 pub. Bertrand Russell Peace Foundation 1978 page 95.*

2. *Stevens: Operation Splinter Factor 1974 pub. Hodder & Stoughton page 11 suggesting 75 years for Special Branch and S.I.S. files.*

3. *The British Computer Society suggested a test that the information could be obtained from sources available at a public library: Privacy and the Computer 1972 page 13.*

PART I

Confidential Personal Information

The nature of confidential personal information

101. Information may be confidential in the hands of the person from whom it emanates or in the hands of a disclosee.

102. Personal information is confidential if it relates to the personal life of an individual, including his circumstances and personal activities, and is not ascertainable from sources available to the public. It is on this ground that the court may allow a witness not to give evidence of his financial affairs[1] or, if he does disclose the information, may imply that it is not to be used for any purpose other than that for which it was given[2] and society may reinforce this confidentiality based on the nature of the information by providing criminal sanctions.[3]

103. Confidential personal information which has been disclosed or discovered is protected in equity from further disclosure or use by the holder if it was ascertained within, and because of, a relationship of confidence which it is in the public interest to maintain.[4] It is not necessary to show financial loss.[5]

104. Personal information may have been disclosed expressly or impliedly for a particular purpose or purposes. Use or disclosure for other purposes may be prevented by action for breach of contract[6] or, if the information is confidential in nature, by action for breach of confidence.[7]

105. If personal information has been taken surreptitiously its subsequent use or disclosure without the consent of the subject may probably be prevented by equity even if it is not of a confidential nature.[8]

Giving personal information about oneself

The present law

106. There is no legal duty to give personal information about oneself apart from statute or court order or an order of either House of Parliament in respect of a proceeding in Parliament.[9] The right not to give information receives some support from the Universal Declaration of Human Rights[10] and the European Convention on Human Rights.[11]

107. Statute may impose a duty to give personal information about oneself. The statute may state the duty widely[12] or expressly limit the information to be given.[13] It may state the purposes for which the information is to be used and the limits of disclosure[14] or it may not.[15]

108. The individual may give information even though he is under no legal duty to do so. He may be required to do so in order to receive benefits or services; he may be persuaded to give the information; he may volunteer it. If he gives it expressly in confidence the acceptance of the information may create a contractual obligation limiting disclosure or use but exceptions to a contractual duty of confidence are implied.[16]

109. If the individual gives information about himself the law may prevent or restrict subsequent use or disclosure by the holder. Statute may provide penalties for unauthorised disclosure or use.[17] There may be contractual restrictions on disclosure, expressly or by implication.[18] There may be liability in breach of confidence if the information is confidential in nature and given within a relationship of confidence[19] or given in circumstances justifying the imposition of a duty of confidence. Personal information of a confidential nature given for the purpose of obtaining legal advice[20] or conciliation[21] or in preparation for litigation[22] is privileged from disclosure on discovery.

Problems and proposals for reform

Right not to give information

110. Although there may be no legal duty to give information there are many circumstances in which information is required from an applicant for benefits or services. The individual may wish to receive the benefits or services but not to give some information. He may feel that it is irrelevant and an excessive invasion of his privacy or he may fear that further use or dissemination of the information may be made, perhaps to his detriment. Refusal to give information may result in loss or failure to obtain the benefits he sought. His application may simply be rejected.

Where statute imposes a duty to give information there is Parliamentary control over what is to be given and its subsequent uses. Where personal information is sought in legal proceedings the court is concerned that only relevant information be required. But outside these areas there is little control. Public pressure may

force a local authority to change its requirements if enough people complain ; for example there has been much discussion over plans to include questions on ethnic origins on applications for corporation housing.[23] But other bodies may not be amenable to such pressure and in situations of scarce resources people may be unwilling to resist the demand for information. The same problem can arise where a person is required to authorise another to give information about him; increasingly applicants for jobs and insurance are required to authorise the collection of wide-ranging information from their doctors.[24] Clearly the provision of information may be absolutely necessary before a decision can be made on eligibility for benefits or what services are needed. Questions on ethnic origin may be relevant for a local authority adopting a housing policy of dispersal, or a college operating under government-imposed quotas, but not presumably for a political or social club.[25] Where much information may be found relevant (for example in medical diagnosis and treatment), emphasis must be placed on preventing excessive dissemination by the recipient, thus encouraging full disclosure. But where there is little control over subsequent use or dissemination it is necessary to restrict the information which must be given.

It is proposed that the common law basic right not to disclose confidential personal information should be given statutory force with a corresponding provision that no penalty or disqualification shall be imposed by reason only of failure to give such information unless there is a duty to disclose it or the seeker can prove that it was reasonably required for the purpose. Thus if the applicant simply refuses to answer the question his application cannot be rejected on that ground alone unless there is good reason for the question. This would provide the element of control over demands for confidential personal information which is at present almost non-existent.

Incriminating information

111. If a statute imposes a duty to give information it is important that the statutory function is facilitated by the provision of full information. But equally important is the basic common law right not to incriminate oneself.[26] If Parliament has decided that that right must be overridden for the purposes of the statute the duty to give incriminating evidence can be stated.[27] Or Parliament may decide to hold the balance between the public purpose and individual

freedom by providing that information given under the statute may not be used against the giver.[28] But if nothing is said about incriminating evidence and no exemption from liability is stated, it is proposed that a prima facie right not to give incriminating evidence should be construed as part of the statute, though with a residual discretion in the court to require information to be given if satisfied that it is necessary for the statutory purpose and cannot be obtained elsewhere.

Subsequent use of incriminating information

112. If incriminating information must be given under a statutory duty it is sometimes unclear whether the information may be used against the giver. It may be clearly the purpose of the provision[29] but in other cases it is less clear. Of course those who have the information will wish to use it and there is a public interest in the apprehension and punishment of wrongdoers. But there is also a public interest in the right of people not to be compelled to injure themselves and the provision of information may be seriously impaired if this right is insufficiently recognised. The simple rule in R v Scott[30] may produce hardship unintended by Parliament. It is proposed that if nothing is said in the relevant statute about subsequent admissibility, incriminating evidence shall only be available in subsequent proceedings if a major aim of the statutory provisions would otherwise be frustrated and the court is satisfied that the information was freely and fairly given.[31]

Subsequent use of confidential personal information

113. A major area of uncertainty, of frequent practical importance, is how far confidential personal information may be used for purposes other than that for which it was given or may be passed from the recipient to others where no agreement has been made as to the extent of use or disclosure.[32] Sometimes the limits are set in a statute[33] but in many circumstances there is no relevant statutory provision. The individual requires some control over what happens to his own information and people might be less ready to give information if they have no knowledge of its subsequent uses. The use of computerised records exacerbates this reluctance since more information can be stored, it can be kept for longer periods without inconvenience and it can easily be retrieved and transmitted. Co-operation in the provision of information is of great importance to government departments, local authorities and others and where the information is of a

nature that a person would not be expected to volunteer it readily[34] and there is a public interest in the purpose for which the information is given co-operation is encouraged by limiting the use of the information to that purpose.

114. If the individual gave the information under compulsion, whether by statute or contract, or was persuaded to give it by promise that it would not be used for other purposes or would be held in confidence then similarly the use of the information should be restricted to that purpose. (In both cases other uses may be authorised by statute, court order or consent).

115. Use for "that purpose" may include ancillary purposes,[35] perhaps unstated or even unforeseen. Problems arise concerning the extent of these ancillary purposes; should disclosure only be allowed if it was within the express consent of the donor, or actually within his contemplation or should an objective test be employed? Must a doctor specify all the people who might handle the medical record; does it matter whether a hospital patient knows the number of copies of his record and their destinations; should he just be told of unexpected uses? Must a social worker seek his client's consent before participating in a case conference or writing a court report; is the housing department entitled to information in the social work department's files? Some social workers who work directly with clients would prefer express consent, but those further removed from the client prefer wider dissemination of information once it has been obtained. In view of the difficulties of ascertaining whether express consent had been given and the sometimes disastrous effect of failure to pass on information[36] it is suggested that an objective test should be applied. This should, however, be subject to express refusals of consent which, if duly recorded, should be effective. But as several people may in turn deal with the matter an express refusal, if not recorded, should not bind anyone other than the person to whom it was given. The same should apply to an express promise by the recipient not to disclose it.

116. The above are all cases where some element of pressure has caused the individual to give the information. If, however, he volunteered it should there be any restriction on subsequent use? It may be argued that the donor gave it without restraint and so should not be able to complain later. He did not attempt to protect his information and so the law should not step in when he changes his mind. On the other hand the law recognises that certain relationships

lend themselves to the disclosure of personal information whether mutually (such as husband and wife) or unilaterally (such as patient and doctor) and that to allow one party to abuse the relationship by unrestrained dissemination would be contrary to the public interest. The categories of such relationships are not settled but it is suggested that those relationships which give rise to a presumption of undue influence for the avoidance of gifts[37] would also give rise to a presumption against permissible disclosure. As with undue influence, other relationships may, on the facts, indicate that the information was given only because of the relationship. But for the law to intervene and override the normal freedom of speech and prevent the dissemination of information lawfully obtained it is necessary also that the relationship be one which it is in the public interest to uphold.[38]

117. Thus it is proposed that personal information given in the following circumstances shall be considered to have been given for a particular purpose:-

i) where the nature of the information is such that a person would not be expected to volunteer it readily and there is a public interest in the purpose for which the information was given;

ii) where the individual was compelled, by statute or contract, to give the information or was persuaded to give it by promise that it would not be disclosed for other purposes or would be held in confidence

but that the donor of the information shall be presumed to consent to the use or disclosure of the information for purposes reasonably incidental to or related to that purpose in the absence of express refusal of consent. Volunteered information shall be considered to be confidential information if given within and because of a presumed or proved relationship of confidence which it is in the public interest to protect.

Knowing personal information about oneself

The present law

118. There is no general legal right to know information about oneself in the hands of another.

119. There may be a statutory right to see certain information.[39]

120. Information may be claimed for a particular purpose:-

i) information required for legal proceedings may have to be

disclosed on discovery pre-trial[40] or, for personal injuries litigation, pre-action.[41] A doctor must disclose information in his possession if his patient requires it, at least for litigation.[42]

ii) under the rules of natural justice a person may be entitled to see information which is to be used in determining a claim, at least if his property is affected,[43] or which is to be used against his interests.[44]

iii) information must be given to a patient in order to obtain his consent to medical treatment.

121. Disclosure of information may be forbidden by statute[45] or refused on the ground that it is not authorised by statute.[46]

122. Disclosure of information may be refused on the ground that knowledge of the information might harm the subject[47] or that informers should be protected[48] or that disclosure would encourage 'fishing' for causes of action.[49]

Problems and proposals for reform

Seeing information about oneself

123. If the subject of information cannot see the information he may be prejudiced by inaccurate statements of facts or biased and unfair comment. Many cases have been documented[50] of prejudice caused by a mistaken identity or misleading statements as well as long-outdated information. The developing rules of natural justice[51] are not sufficiently wide to allow a right of inspection of all files kept or references given. It is proposed that there should be a general statutory right to see information about oneself.

Parental right to information

124. It is unclear how far parents (and guardians) have a right to see information relating to their minor children. Statutes give some rights,[52] parental consent is required for medical treatment at least for children under 16,[53] schools in fact give some information. Since parents have a duty to care for their children until majority it is suggested that the common law rule that information may not be withheld if it is reasonably necessary to carry out a common law duty[54] is applicable here. Since there may still be uncertainty as to the extent of the duty, especially towards the older child, it is proposed that the statutory right to see information about oneself should include a parent's right to see information about his minor child.

Harmful information

125. The possibility of harm to the subject has been given as a reason for limiting disclosure of medical information on discovery to legal or medical advisers of the subject[55] and for refusing information to the parent of a child.[56] It is given as a ground for refusing reasons for failure of an application for parole[57] and for not informing a patient of the risks of an operation before obtaining his consent.[58] While it is recognised that children have a special need of protection and there may be others who are especially vulnerable, such as mental patients and old people in care perhaps, an adult in normal circumstances who seeks information about himself should be accepted as entitled to have it. It is therefore proposed that information should not be refused or limited to advisers on the ground of harm to the subject unless the subject is a child or person in a position of special vulnerability and harm is likely to ensue.

Informed consent

126. The extent of information which must be given for valid consent to medical (or other) treatment is unclear, partly because the courts have wrongly considered only the question of negligence in some of the cases. Implied consent by coming for treatment covers only normal treatment and that which is reasonably necessary for treatment. It does not cover use for experiments, even if they are considered likely to be therapeutic. It is no answer to a failure to inform the patient that the information might frighten him. It is proposed that the fact that the individual is undergoing or about to undergo medical treatment is no ground for refusing information needed for his consent.

Protecting informers

127. The donor of information about a third party may wish the subject not to see what he said or that he said it. This applies particularly to comment and assessment but may also apply to statements of fact.[59] He may have given the information 'in confidence' (this is normal practice for medical reports and references) and perhaps would not have given any information or would not have been so frank had he known that the subject might learn what he had said. But to refuse disclosure of any information simply on this ground could encourage carelessness or unfairness in the giving of information and prejudice to the subject. The rules of absolute and qualified

privilege, it is suggested, sufficiently protect the informant against a defamation action unless he was malicious, and there is no good reason to protect a malicious informer.[60] There may, however, be occasions when the public interest in receiving volunteered information about third parties and the chance of those informants or others refusing to give information or being injured as a result of disclosure may require non-disclosure of the identity of the informant.[61] Normally, even in these cases, the information itself should be disclosed unless that would necessarily reveal the identity of the informant. It is proposed, therefore, that if personal information is required for legal proceedings, or under the requirements of natural justice, or because the subject, or his parent, requires to see it disclosure should not be refused on the ground of protecting the informer unless disclosure would reveal the identity of the informant and the supply of such information is necessary for a public purpose and the supply would be likely to diminish as a result of the disclosure or the informant would be likely to suffer reprisals.

Disclosing a cause of action

128. A right to see information could uncover causes of action unknown to the subject. Is the public interest in not unduly encouraging litigation sufficient to make this a ground for non-disclosure? The courts are concerned not to let people hunt through the records of others on "fishing expeditions"[62] and information obtained on discovery may not be used as the basis of an unrelated action.[63] One of the arguments against a Freedom of Information Act is that in United States of America people use the Act to hunt for causes of action.[64] But the courts have long accepted rights of inspection as an adjunct to property, even if litigation might ensue.[65] If the individual is adversely affected by the activities of others directed against him there is at least as great a public interest in enabling him to know as in enabling him to protect his property. If information is obtainable only for a particular purpose it is reasonable to confine its use to that purpose, but if there is a general right to know it the fact that it was obtained for a purpose is irrelevant. Thus the litigant who obtained information only because of the litigation would still be in contempt of court if he used it for some other purpose,[66] but, if the proposed general right to see information relating to oneself were enacted, the litigant who obtained such information on discovery, though he could have obtained it on demand,

should not be in contempt of court for using it for another purpose. It is proposed that the fact that information might reveal a cause of action hitherto unknown to the subject should not be a sufficient reason for refusing disclosure.

Machinery for exceptions to disclosure

129. If a right to see information relating to onesself is to be enacted, there will have to be some exceptions, as seen above, and there will have to be machinery to ensure that disclosure is promptly granted or properly refused. Certain groups, such as police informers, would clearly come within the category requiring protection but others may be revealed only on consultation or arise later. There should, however, be Parliamentary control to ensure that the exceptions are not too widely stated, so a power for the Home Secretary to make orders excepting certain groups, subject to affirmative resolution of Parliament[67] should be provided.

130. Particular occasions may arise where an informant is thought to need protection and the court should have power to grant protection outside the categories of exemption. A judge should be able to hear the evidence in private, but such occasions should be rare and the expense of litigation could deter an applicant. To encourage disclosure as the normal rule and non-disclosure as the exception, the holder should normally have to pay the costs of an application to court.

131. It is possible, under the present law, that if the information is defamatory the holder who discloses it could also be liable in defamation by transferred malice.[68] If he is disclosing under the statutory duty rather than, for example, volunteering the information out of a desire to cause trouble, he should not be liable. It is proposed therefore that liability in defamation for disclosure under the statutory duty should be excluded unless the disclosure be made with malice. If the recommendation of the Faulks committee in respect of transferred malice[69] were enacted this provision would not be necessary.

132. To ensure that applications for disclosure are not obstructed and disclosure is not refused without good reason it is proposed that a holder of information who refuses or fails to disclose it without cause shall commit an offence, similar to that provided in the Local Government Act 1972[70] for obstruction of information which the public are entitled to see.

Giving personal information about another

The present law

133. Some statutes impose a duty to give personal information about another. The statute may require the information to be given without identifying the subject;[71] or limit the information to be given by a person in a confidential relationship with the subject;[72] or exclude such a person from the duty to give information;[73] or exclude some information;[74] or the statute may make no exceptions. There is no presumption in the construction of such a statute that confidential information is to be excluded.[75]

134. Personal information about another may have to be given for legal proceedings, usually not until the hearing but by statute medical information may have to be given pre-trial[76] or even pre-action.[77] If the subject requires the information for litigation the holder may have to give it to him or at his order.[78] The holder may be entitled in other cases to require a court order before disclosing, and the court has a discretion not to insist on disclosure.[79] But the fact that the information was obtained in confidence is not a sufficient ground for the court to refuse to order disclosure for legal proceedings[80] and failure to disclose is contempt of court.[81] The courts have produced categories of information which are privileged from disclosure on discovery.[82] There is also an overriding requirement not to disclose information if disclosure would be contrary to the public interest.[83]

135. There may be a duty by contract to disclose information about another.[84]

136. The holder of information relating to another may voluntarily disclose it. If it was lawfully obtained and not for a particular purpose only or in confidence or within a confidential relationship the only liability of the discloser (apart from statute[85]) is in defamation if the information is untrue. Absolute or qualified privilege protect the discloser if the information was given on a privileged occasion. Nevertheless, the court may refuse to order subsequent disclosure of volunteered information.[86]

137. If the information was obtained surreptitiously there may be criminal liability for the obtaining of it[87] and liability in breach of confidence for subsequent disclosure or use.[88]

138. If the information was obtained for a particular purpose only, whether expressly or by implication, or within a confidential

relationship subsequent use or disclosure may be limited to the purposes for which it was obtained and there may be liability in contract,[89] breach of confidence[90] or contempt of court[91] for subsequent disclosure or use.

139. It may be a defence to an action for breach of contract or breach of confidence that the information was disclosed to vindicate the defendant's character or actions[92] or to protect the defendant's interests.[93] It is a defence to breach of contract that the contract not to disclose was void as contrary to public policy.[94] It is a defence to breach of confidence that the disclosure reveals the plaintiff's iniquity.[95]

Problems and proposals for reform

Disclosure for legal proceedings

140. There is some uncertainty how far the fact that the information is confidential entitles the holder to refuse to disclose it for legal proceedings without a court order. If he unreasonably refuses he may be penalised in costs. If he discloses without an order he may risk professional rebuke.[96] It is clear that disclosure must be made if it is sought by the subject himself without waiting for an order.[97] If disclosure is sought by a third party, a doctor working within a venereal disease scheme where confidentiality was statutory was entitled to await a court order[98] as were the Commissioner for Customs and Excise whose statutory powers authorised limited disclosure.[99] The Court of Appeal have suggested that a journalist is entitled to await a court order.[1] But the House of Lords have strongly said that confidentiality alone is not enough to prevent disclosure.[2] May the holder withhold the information until the litigant obtains, at his own expense, a court order even though there is no real doubt that in the end the information must be disclosed? It is proposed that the holder of confidential personal information may require a court order before disclosing the information to a third party for legal proceedings if the information was obtained within a confidential relationship[3] or he has grounds for belief that his sources of information may be affected by the disclosure. It should not be necessary to show a strong public interest in the maintenance of his sources to justify him seeking an order, though such a public interest is probably necessary in obtaining an exemption from disclosure.[4]

Duty to disclose to prevent injury

141. The extent of the contractual duty to disclose implied in the employment contract of an employed doctor or social worker is unclear.[5] Is he to be treated in the same way as the doctor or social worker who simply treats or assists a patient or client, or is his duty to his employer greater than his duty to the member of the organisation for whom he cares? Does his relationship with the other members of the organisation affect his duty to the one who comes to him for help? It is suggested that the company doctor, for example, is in a rather different position from the general practitioner in that he has a duty of care to all the employees and perhaps to third parties directly affected such as consumers of the product. It is proposed that the employed person who in the course of his employment discovers that an employee or member of the organisation may be endangering the health or safety of fellow employees or third parties by his activities within the organisation is under a duty to disclose that information to those who are able to deal with the danger. He is not, however, under a duty to disclose that the employee is endangering his own health alone or to disclose any other information which the employer may wish to know.

Disclosure to prevent injury

142. The holder of personal information may foresee that others may be injured directly or indirectly by the subject. Unlike the employment situation discussed above, there is no duty to disclose information to prevent injury to others unless such a duty is imposed by statute or at common law.[6] Disclosure may be defensible, for example if the subject was guilty of 'iniquity' (discussed below) and a contract not to disclose would probably be void[7] but it is suggested that the benefit to society of such disclosure, if made to a person directly affected or to someone in a position to mitigate the danger, outweighs the importance of the protection of confidences. It is proposed therefore that there should be a general defence to an action for breach of confidence or of contract that the information was disclosed to prevent foreseeable injury to third parties and the extent and method of disclosure was appropriate for that purpose.

Disclosure in the interests of the subject.

143. The holder of confidential personal information may foresee that the subject may himself be injured if he does not disclose the information, or may benefit from disclosure.[8] An employee's weak

heart may be affected by his work; an old person may be entitled to welfare benefits if his financial position is revealed; a student may receive compassionate treatment in an Examinations Board if his unhappy home life is disclosed. In many circumstances the holder can point this out to the subject and advise disclosure or seek his consent to disclosure. If the subject refuses, there is no reason why the holder should be allowed to break the confidentiality under which he received it. Neither should he be protected if he discloses without seeking consent when he had reason to believe consent would not be forthcoming. On the other hand, there are circumstances when it is impracticable to seek consent, for example in an emergency or where the subject cannot consent for himself and the interest of his guardian might in this matter be adverse to him. The inquiries into the deaths of several children have shown the importance of shared information[9] and, although this is probably protected in law by the implied consent, it would be beneficial to have a statutory defence to breach of confidence. (No such defence should apply to breach of contract since the parties should be taken to have considered the circumstances for permissible disclosure.) It is therefore proposed that it should be a defence to action for breach of confidence that the information was disclosed in a reasonable belief that it was in the interests of the subject in circumstances where it was not practicable to obtain his consent but there was no reason to believe that such consent would be refused and the extent and method of the disclosure was appropriate for the purpose.

Iniquity

144. It is recognised that it is a defence to action for breach of confidence that the information disclosed iniquity on the part of the plaintiff but the extent of iniquity is uncertain.[10] Several cases have indicated that it now extends beyond the categories of "misdeeds of a serious nature and importance to the country"[11] and flexibility is important to enable new vices to be included. But a consistent framework is necessary if the defence is to be more than "the idiosyncratic inferences of a few judicial minds."[12] It is suggested (following North[13]) that the grounds of iniquity should be seen to be analogous to those on which a contract is rendered void for illegality. Jurisdiction to avoid contracts proceeds along recognised lines while allowing flexibility in the interpretation of the categories so that it remains in line with changing

views of public policy.[14] Jurisdiction in allowing breaches of confidence must also invoke the public interest to override private rights and the circumstances are sufficiently similar to produce useful analogies. It is proposed that in an action for breach of confidence it shall be a defence to disclosure that if the subject-matter disclosed had been the subject-matter of a contract between the plaintiff and the defendant that contract would have been void for illegality.

Disclosure for public purposes

145. It is not always clear whether confidential personal information may be disclosed for purposes which may be for the public good, such as research or statistical analysis, without the consent of the subject. It is clear that such information is in fact used, for example researchers in a hospital may be given easy access to information about patients without their knowledge or consent, but it is not clear whether such uses are within those purposes for which consent may be implied. The individual may well object to his information being widely disseminated, whether he provided it or it was learned about him, but the possible value of such dissemination or use is undoubted. It is suggested that the basis for complaint is the identifying of the information with the individual and since many of the beneficial uses do not require this it is proposed that consent should be presumed to the use or disclosure of the information for research or other public purposes provided that it is not possible to identify the subject from the information given. Possible pooling of sources of information, made more feasible with computers, would have to be carefully watched in this context. Uses which would require or result in disclosure of identity do not come within this provision and so express consent would still have to be obtained. By making the provision one of presumed consent, the subject would be able expressly to forbid such uses.

Remedies

The present law

146. For disclosure or use in breach of contract or confidence the subject may obtain damages. The basis for damages in breach of confidence appears to be Lord Cairns' Act[15] or possibly "modern developments in the compensatory jurisdiction of Equity."[16]

147. The discloser may incur criminal liability for breach of a statutory duty not to disclose;[17] the subject may be able to claim

damages in tort for breach of statutory duty.[18]

148. The most important remedy for disclosure of confidential personal information is an injunction, since usually it is the wish of the subject to prevent the disclosure rather than to be compensated for it. The court will not normally grant an interlocutory injunction if the real complaint of the plaintiff is defamation and the defendant intends to justify,[19] but incidental inaccuracies would not prevent the grant of an injunction if the essence of the complaint is the abuse of confidence.

149. Remedies for non-disclosure will depend on the effect of the non-disclosure. For example, one might obtain a declaration that a decision was wrongly made in breach of the rules of natural justice[20] or claim damages in trespass for medical treatment for which consent was not properly obtained.[21]

Problems and proposals for reform

Remedies against a third party

150. It is unclear whether, and if so what, remedies should lie against a third party who obtains confidential personal information from the wrongful discloser.[22] If he knew of the breach of contract or confidence when he obtained the information, or knew that it had been obtained surreptitiously there is no reason to exclude him from liability. He may have induced the breach of contract or may be considered a party to the breach of confidence. Even if he has paid for the information there is no reason to protect him; payment is irrelevant at common law and equity helped only a bona fide purchaser. But he may not have known and may have had good reason not to suspect any confidentiality or surreptitiousness. Much personal information may be known without reserve and disclosed without breach of any duty. Friends, relatives, neighbours and working colleagues may learn much with no obligation of confidentiality. People vary greatly in their sense of personal privacy and some will freely discuss matters which others would tell only in confidence and under pressure. Most biographies contain personal information from a variety of sources. The publisher may have no idea of the breach of confidence until he has spent money producing a book or even published many copies. Should both damages and injunction be awarded against him? It is suggested that damages should not be awarded against a defendant who acquired the information in good faith (whether for payment or not) and in a reasonable belief

that it had been obtained without breach of contract or confidence or surreptitiously.

Should an injunction lie once he comes to know that the information was given in confidence? On the one hand stand the benefits of freedom of speech, allowing a person who obtained information in good faith to disclose it and on the other hand there may be a public interest in continuing the confidentiality. The basis for much protection of confidential personal information is the preservation of those relationships whose stability is in the public interest. Here, it is suggested, the public interest in preserving the relationship is paramount; the confidence runs with the relationship and even an innocent purchaser may be enjoined from damaging the relationship. Similarly the public interest in discouraging surreptitious invasions of privacy requires that even an innocent purchaser may be enjoined from making use of the wrongly obtained information. But in other cases the confidentiality is contractual or based on the information being given for a purpose and the duty is personal to the original donee rather than imposed in the public interest. Here, it is suggested, the innocent acquirer of the information should not be enjoined from using or disclosing information which he acquired in good faith.[23]

Limits to injunctions

151. If an injunction is to be granted against either an original disclosee or a subsequent holder, the question arises how long the injunction should last. It has been suggested[24] that the lifetime of the subject may be suitable. But disclosure even later may be hurtful to relatives, as is recognised in the Public Records Act 1958 which allows extended retention or limited public access for personal information.[25] The argument from distress is bolstered by the consideration that if a person received the information in confidence or, if the defendant is a third party, there is a public interest in not breaching the confidence, there is no justification in allowing him to profit by the breach even after the death of the subject. If Lord Moran breached his duty to his patient in disclosing information learned in the relationship it was no less a breach and no less harmful to relationships between doctors and their patients because he wrote his book only after Churchill had died.[26] The arguments for limiting the injunction so far as possible to allow freedom of speech, which is important in relation to

governmental information,[27] is here countervailed by the public interest in ensuring that confidential relationships are not abused. Similary surreptitiously obtained information should not be revealed. It is proposed that an injunction against disclosure of confidential personal information may be a perpetual injunction if it was acquired in a confidential relationship or surreptitiously.

SUMMARY OF RECOMMENDATIONS

The following gives a summary of the recommendations in relation to confidential personal information. Reference is made to the chapters and the paragraphs of this chapter where the matters are discussed and, where the recommendations involve the need for legislation, to the draft clauses in Appendix A.

1. There should be a basic statutory right not to disclose confidential personal information and a prohibition of penalties or disqualifications for refusal unless there is a duty to give the information or it is reasonably required for the purpose.
   (Chapter 4 section 3; Chapter 6 section 3(c); para.110; clause 5(1),(2)).
2. There should be a basic right not to give self-incriminating information, unless excluded by statute, but a residual discretion in the judge to order disclosure.
   (Chapter 7 Part C section 4; para.111; clause 5(3)).
3. Incriminating evidence should not be admissible unless a major aim of the statute would be frustrated and the information was freely and fairly given.
   (Chapter 7 Part C section 4; para.112; clause 5(4)).
4. Where the nature of information is such that one would not volunteer it readily and there is a public interest in the purpose for which it was sought the information should be presumed to have been given only for a purpose.
   (Chapter 1 section 2; para.113; clause 1(3)).
5. Information given under compulsion or persuasion should be presumed to have been given only for a purpose.
   (Chapter 1 section 2; para 114; clause 1(3)).
6. The donor of information given for a purpose should be presumed to consent to disclosure for purposes reasonably incidental or related.
   (Chapter 4 section 2(c); para.115; clause 8(1)).
7. The presumption of consent should be rebuttable.
   (ibid; clause 8(2)).
8. Volunteered personal information given within and because of a relationship of confidence which it is in the public interest to protect should be considered confidential.
   (Chapter 1 section 2; para.116; clause 1(2)).

9. There should be a general statutory right to see confidential personal information relating to oneself.
(Chapter 4 section 3; para.123; clause 10(1)).

10. Parents should have a right to see information relating to their minor children.
(Chapter 4 section 2; para.124; clause 10(1)).

11. Information should not be refused or limited to advisers on the ground of harm to the subject unless he is a child or person in a position of special vulnerability and harm is likely.
(Chapter 4 section 3; Chapter 6 section 3(d); para.125; clause 10(1)(a)).

12. The fact that the subject is undergoing or is about to undergo medical treatment is not a ground for refusing information needed for his consent.
(Chapter 4 section 3; para.126; clause 10(1)(a)).

13. Information should not be refused on the ground of protecting informers unless it would reveal the identity of the informer and the supply of information is necessary for a public purpose and would be likely to diminish or the informer would be likely to suffer reprisals.
(Chapter 6 section 3(d); para.127; clause 10(1)(c)).

14. The fact that information might reveal a cause of action should not be a sufficient reason for refusing disclosure.
(Chapter 3 Part A section 2(c); para.128; clause 10(1) proviso).

15. The Home Secretary should have power by order to except groups of information from the duty of disclosure, the orders to be subject to affirmative resolution of both Houses.
(para 129; clause 10(2).)

16. A judge should have power to hear evidence in private on an application for non-disclosure.
(para.130; clause 10(3))

17. The holder of the information should normally pay the costs of an application for non-disclosure.
(para.130; clause 10(4))

18. A holder disclosing under the statutory duty should not be liable in defamation unless the disclosure was made with malice.
(para.131; clause 10(5))

19. It should be an offence to refuse or fail to disclose information under the statutory duty without cause.
(para 132; clause 10(6))

20. The holder of confidential personal information should be able to require a court order before disclosing to a third party for legal proceedings.
(Chapter 4 section 2(b); para.140; clause 9(1) proviso)

21. There should be a duty to disclose information learned in employment to prevent foreseeable injury to third parties.
(Chapter 4 section 2(d); para 141; clause 9(2))

22. Disclosure to prevent foreseeable injury to third parties should be a defence to breach of confidence or contract.
(Chapter 1 section 3; para.142; clauses 11(1)(b), 11(2)(b))

23. Disclosure in the interests of the subject should be a defence to breach of confidence.
(Chapter 1 section 3; chapter 4 section 2(e); para.143; clause 11(2)(c))

24. There should be a defence to breach of confidence like that of illegality in contract.
(Chapter 1 section 3; para.144; clause 11(2)(e))

25. Consent of the subject should be presumed for anonymous disclosure for public purposes.
(Chapter 4 section 2(F); para 145; clause 8(1)(c))

26. Damages should not be awarded against a subsequent holder who acquired the information in good faith and in a reasonable belief that it was acquired without breach.
(Chapter 1 section 3; para.150; clause 11(3)(a))

27. A final injunction should only be granted in such circumstances if the information was acquired through a confidential relationship which it is in the public interest to protect or it was acquired surreptitiously.
(Chapter 1 section 3; para 150; clause 11(3)(b))

28. A perpetual injunction may be granted if the information was acquired through a confidential relationship which it is in the public interest to protect or it was acquired surreptitiously.
(Chapter 4 section 1; para.151; clause 11(3)(c))

NOTES

Definition

1. *Morgan v Morgan [1977] 2 All E.R.15.*
2. *Viscount Dilhorne in Norwich Pharmacal Co v Commissioners of customs [1973] 2 All E.R.943 at 961.*
3. *Franks Report on Official Secrets Act 1911 section 2 (1972) Cmnd. 5104 para.196.*
4. *Argyll v Argyll [1965] 1 All E.R.611*
5. *Albert (Prince) v Strange (1849) 1 Mac & G. 25.*
6. *Pollard v Photographic Co. (1889) 40 Ch.D.345.*
7. *For example, information given to a doctor or social worker.*
8. *By analogy with the commercial case of Robb v Green [1895] 2 Q.B.315,318 Kay L.J.*

Giving personal information about oneself

9. *Rice v Connolly [1966] 2 Q.B.414*
10. *Article 12 "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence."*
11. *Article 8 "Everyone has the right to respect for his private and family life, his home and his correspondence."*
12. *For example duty to make a return of income Taxes Management Act 1970 Section 7.*
13. *For example an Order in Council under the Census Act 1920.*
14. *For example taxation information.*
15. *For example information given under the Social Security Act 1973 in application for benefits; information given in a census.*
16. *Tournier v National Provincial & Union Bank of England [1924] 1 K.B. 461.*
17. *These may be specific provisions e.g. Sex Discrimination Act 1975 section 61(2). Or the general provisions of Official Secrets Act 1911.S.2*
18. *Parry-Jones v Law Society [1968] 1 All E.R.177.*
19. *Argyll v Argyll [1965] 1 All E.R.611.*
20. *Re Arnott (1889) 60 L.T.109 (a secret address).*
21. *Unless both parties waive the privilege: Theodoropoulas v Theodoropoulas [1964] P.311.*
22. *For example medical reports Worrall v Reich [1955] 1 All E.R.363.*
23. *The Times April 30 1977. Discussed in Chapter 6 section 3(c).*
24. *British Medical Journal 1977 page 1544. Discussed in Chapter 4 section 3.*
25. *The Race Relations Act 1976 may make such a question illegal but positive discrimination is permissible in some cases: section 26. Questions on marital status may be equally irrelevant and may constitute discrimination under the Sex Discrimination Act 1975.*

26. *Blunt v Park Lane Hotel Ltd. [1942] 2 K.B.253. The privilege is discussed in Chapter 7 section A3 and statutory provisions in section C4.*

27. *as in Bankruptcy Act 1914 section 15(8).*

28. *as in Representation of the People Act 1949 section 123(7)(b).*

29. *Commissioners of Customs v Harz [1967] 1 A.C.760,816 Lord Reid. This matter is discussed in Chapter 7 section C4(c).*

30. *(1856) Dears & B.47.*

31. *not perhaps under erroneous orders as in McClelland, Pope & Langley Ltd. v Howard noted [1968] 1 All E.R.569.*

32. *Discussed in Chapter 1 section 2.2.*

33. *for example taxation statutes.*

34. *Viscount Dilhorne in Norwich Pharmacal Co. v Commissioners of Customs [1973] 2 All E.R.943 at 961.*

35. *Discussed in Chapter 4 section 2 and Chapter 1 section 3.*

36. *As in the battered baby cases.*

37. *The relationships are those of parent and child, guardian and ward, engaged couples, religious, medical and financial advisers and those whom they advise and solicitor and client. Snell: Equity 27th ed. 1973 page 548. To these would have to be added husband and wife.*

38. *Thus perhaps excluding at least casual sexual relationships cf. Gareth Jones (1970) 86 L.Q.R.463,473.*

Knowing personal information about oneself.

39. *for example a Social Inquiry Report: Criminal Justice Act 1948 section 43.*

40. *Discussed in Chapter 3 section A1.*

41. *Administration of Justice Act 1970 section 31.*

42. *C v C [1946] 1 All E.R.562.*

43. *R v Kent Police Authority ex parte Godden [1971] 2 Q.B.662.*

44. *Re Pergamon Press [1970] 3 All E.R.535.*

45. *Official Secrets Act 1911 section2 applies to unauthorised disclosure even to the subject of the information (though the discloser and recipient of a social security file were not prosecuted: H.C.Deb. Vol.858 col.1963)*

46. *Re D (Infants) [1970] 1 W.L.R.599 Lord Denning M.R. and argument by the Customs in Norwich Pharmacal*

47. *Deistung v South West Metropolitan Regional Hospital Board [1975] 1 All E.R.573.*

48. *D v NSPCC [1977] 1 All E.R.589*

49. *Dunning v Board of Governors of United Liverpool Hospitals [1973] 2 All E.R. 454. 458 Stamp L.J. dissenting.*

50. *for example Horizon BBC Television December 2 1976.*

51. *discussed in Chapter 6 section 3(d)*

52. *for example Employment and Training Act 1973 section 9 (vocational advice).*

53. by implication from Family Law Reform Act 1969 section 8 discussed in Chapter 4 section 2(d).

54. R v Barnes Borough Council ex parte Conlan [1938] 3 All E.R.226 and Conway v Petronius Clothing Co.Ltd. [1978] 1 All E.R.185. At common law the duty towards a legitimate child lay on the father; since the Guardianship Act 1973 it lies on both parents.

55. Deistung v South West Metropolitan Regional Hospital Board [1975] but disapproved by McIvor v Southern Health and Social Services Board [1978] 2 All E.R.625 H.L.

56. R v Greenwich Juvenile Court ex parte Greenwich London Borough Council. The Times May 10 1977.

57. The Times January 23 1976.

58. Cases discussed in Chapter 4 section 3(a).

59. as in D v NSPCC (above).

60. This argument will be equally applicable if the proposals of the Faulks Committee on Defamation (1975) Cmnd.5909 to replace 'malice' by abuse of the privileged occasion are enacted.

61. For example D v NSPCC (above); R v Home Secretary ex parte Hosenball [1977] 3 All E.R.452.

62. discussed in Chapter 3 section A2.

63. Riddick v Thames Board Mills Ltd [1977] 3 All E.R.677.

64. For example Jane Fonda: Radio Times August 23 1978.

65. Mutter v Eastern & Midlands Railway Co. (1888) 38 Ch.D.92, a statutory right.

66. Alterskye v Scott [1948] 1 All E.R.469.

67. a similar provision is made in the Rehabilitation of Offenders Act 1974.

68. De Smith: (1958) 21 M.L.R.465,482.

69. (1975) Cmnd. 5909 para.276(b).

70. Section 228(7).

Giving personal information about another

71. For example Finance Act 1969 section 58(as amended) - numbers of employees.

72. For example Income & Corporation Taxes Act 1970 section 490(3).

73. For example Taxes Management Act 1970 section 20B(8) (added by Finance Act 1976 Schedule 6) - no duty on a lawyer to deliver documents subject to legal professional privilege.

74. for example Employment Protection Act 1975 section 18(1)(d).

75. Hunter v Mann [1974] 2 All E.R. 414.

76. Administration of Justice Act 1970 section 32(1).

77. Administration of Justice Act 1970 section 31.

78. C v C [1946] 1 All E.R.562.

79. Attorney-General v Mulholland [1963] 1 All E.R.767

80. Crompton (Alfred) v Commissioners of Customs [1973] 2 All E.R.1169

81. *Attorney-General v Clough [1963] 1 All E.R.420.*

82. *Discussed in Chapter 3 Part B.*

83. *D v NSPCC [1977] 1 All E.R.589*

84. *Swan v West (Butchers) Ltd. [1936] 3 All E.R.261.*

85. *For example Rehabilitation of Offenders Act 1974.*

86. *Rogers v Home Secretary [1972] 2 All E.R.1057.*

87. *for example Post Office Act 1953 section 56, opening a person's mail with intent to injure him.*

88. *Robb v Green [1895] 2 Q.B.315.*

89. *Pollard v Photographic Co. (1888) 40 Ch.D.345.*

90. *Argyll v Argyll [1965] 1 All E.R.611*

91. *for example Association of Licensed Aircraft Engineers v BEA [1973] 1 C.R.601.*

92. *Scott v Scott [1913] A.C.417; In Gee v Pritchard (1818) 2 Swans.402 the defendant could give the gist of the information though not publish it.*

93. *Tournier v National Provincial & Union Bank of England [1924] 1 K.B. 461*

94. *Howard v Odhams Press Ltd. [1938] 1 K.B.1.*

95. *Hubbard v Vosper [1972] 1 All E.R.1023.*

96. *for example a doctor: Chapter 4 section 1.*

97. *C v C [1946] 1 All E.R.562.*

98. *Garner v Garner (1920) 36 T.L.R.196*

99. *Norwich Pharmacal Co. v Commissioners of Customs [1973] 2 All E.R.943*

1. *Attorney-General v Mulholland [1963] 1 All E.R.767. He was attempting not to answer certain questions before a Tribunal of Inquiry where refusal and certification are the only way to get judicial consideration of the propriety of the questions.*

2. *Crompton (Alfred) v Commissioners of Customs [1973] 2 All E.R.1169, 1180 (Lord Cross)*

3. *this would include priest and penitent and social worker and client.*

4. *thus a journalist or researcher could indicate his attempt to protect his sources although his interest is a private rather than a public interest.*

5. *Discussed in chapter 4 section 2(d).*

6. *There is a duty to disclose the murderer still manic, and probably other serious crime, to the police: Hunter v Mann [1974] 2 All E.R.414.*

7. *Howard v Odhams Press Ltd. [1938] 1 K.B.1.*

8. *This question is discussed in Chapter 1 section 3 and Chapter 4 section 2(e).*

9. *for example Maria Colwell and Susan Auckland. Discussed in Chapter 4 section 2(e).*

10. *The matter is discussed in Chapter 1 section 3(a).*

11. *Beloff v Pressdram Ltd [1973] 1 All E.R.241,260.*

12. *Lord Atkin in Fender v St.John-Mildmay [1938] A.C.1, 12 (concerning illegality in contract)*

13. *(1972) J.S.P.T.L. 149.*

14. *for example, it has been suggested that the content of immoral contracts has changed: Dwyer: (1977) 93 L.Q.R.386.*

Remedies

15. *Chancery Amendment Act 1858. This basis was suggested in Saltman Engineering Co. v Campbell Engineering Co. (1948) 65 R.P.C.203,219 Jolowicz (1975) 34 Camb.L.J.224 indicates that the Act allows the award of damages in a purely equitable cause of action and this power has survived the repeal of the Act.*

16. *suggested in Finn: Fiduciary Obligations 1976 pub. Law Book Co.Ltd page 167.*

17. *For example under Official Secrets Act 1911 section 2.*

18. *The Law Commission Report No.21 The interpretation of statutes proposed a prima facie right of action for damages for anyone injured by a breach of statutory duty but this has not been enacted.*

19. *Fraser v Evans [1969] 1 All E.R.8. This question is discussed in Chapter 1 section 3(a)(iii).*

20. *for example Ridge v Baldwin [1964] A.C.40.*

21. *Though a claim in negligence when something goes wrong is more common. Discussed in Chapter 4 section 3(a).*

22. *This question is discussed in Chapter 1 section 3(b).*

23. *There is support for this approach in the proposal that mere receipt of information should no longer be an offence under the Official Secrets Acts: Franks Report (1972) Cmnd.5104 para233 accepted by the Government (1978) Cmnd.7285 para.10.*

24. *in Wyatt v Wilson (1820) unreported.*

25. *Public Records Act 1958 section 5(2).*

26. *He was in fact censured by his profession.*

27. *Discussed below in Part III.*

PART II

Confidential Commercial Information

The nature of confidential commercial information

The present law

201. Commercial information may be defined as information which is of commercial value. This may be because it is directly exploitable, for example an invention, or contributes directly to the making of goods, for example a process, or contributes indirectly to the making of goods, for example knowledge of properties of a material. Or the information may relate to the organisation or process of selling rather than manufacture, such as information about the company's financial position, results of market research or identities of sales outlets. Such information may not be of direct financial benefit but its disclosure to competitors or potential customers may cause financial loss.

202. Some of this commercial information may be readily available and cannot be said to be owned by any person. It would be possible by contract to agree that a disclosee must not disclose or use it, though for public policy reasons such a contract might not be binding on an ex-employee.[1] Partners, directors and employees may be enjoined from using such information if they take it surreptitiously rather than obtaining it openly and lawfully because surreptitious taking is a breach of their duty of fidelity.[2]

203. The information may not be known generally but may be obtainable, for example it may have been published in a little-known journal or a foreign patent may have been sought, or it may be known independently to some people.[3] Can it be said to be confidential information? The question is whether the information can be said to be (or have been) the plaintiff's property in that he discovered or created it and, if so, whether he has abandoned the secrecy attaching to it. So if he has publicised it by, for example, making a patent application abroad[4] or putting the product on the market without seeking a patent or has not taken reasonable steps to keep it secret[5] the court will not protect it as his information. But if others know without any fault on his part and a substantial number of those who would wish to know do not, his secret is of value and the courts will protect it.

204. Commercial information which may be described as confidential clearly includes an invention kept secret and only imparted (if at all) in confidence. The invention, of potential if not immediate financial value, may obviously be described as the property of the inventor.[6] The invention may be something totally new or, more usually, the product of the inventor's brain on available materials. Although the materials may be readily available the inventor has made something new and valuable with them and this is protectable as his property.

205. Other information may be equally valuable in directly or indirectly contributing to the wealth of a person or institution. Or, while not contributing to wealth, the loss of the information, or its acquisition by a competitor or the public, would cause substantial injury to the person or undertaking.[7] Can such information be described as confidential and its disclosure be restricted? If the acquirer knows it to be of particular commercial significance then it may be confidential in his hands, though a third party without such knowledge would not be under any obligation;[8] similarly, if it is significant in the undertaking a reasonable employee should recognise that it is the property of his employer.[9] But general information and skill relating to the job is a matter which an employee is entitled to take with him and pass on to others, at least when the employment has ended.[10]

206. In addition to commercial significance there must be a sense in which the information belongs to the plaintiff. Thus, commercial significance and secrecy by a manufacturer are not enough if the information is in fact readily available elsewhere;[11] neither will the court protect against disclosures which would damage the plaintiff's reputation in his name or goods if that reputation is undeserved. The holder of information that the plaintiff's advertising is misleading,[12] that a cult is indoctrinating people with "dangerous quackeries",[13] that a pop-star's personal life was not as he represented it[14] will not be enjoined from disclosing the information although in each case it was acquired by an employee or participant in the organisation. Similarly, it is suggested, disclosure would not be prevented of information that the goods do not have the ingredients or properties claimed for them or the provider of services is not the expert he claims to be. This refusal to prevent disclosure does not depend on the presence of 'iniquity'

in the sense of crime or fraud, nor on the need for disclosure in the public interest to prevent injury to others (though either or both may additionally be present) but it is based on a recognition that the plaintiff is seeking protection of "property", that is his reputation in his name or goods, which he is not entitled to have, just as the law of defamation refuses to protect a plaintiff's reputation against truthful statements.[15]

207. Thus confidential commercial information is information of commercial value to a person or body describable as the owner. It is his property because he invented it, either as a complete novelty or as a product of his brain on existing materials, or because it relates to his undertaking or legitimate commercial interests. The information cannot be called confidential if it is generally available or available to some because the plaintiff has failed to take reasonable steps to keep it secret.[16]

208. The confidential nature of commercial information is not lost by disclosure for a particular purpose (where it is presumed that it may not be used for any other purpose), disclosure to an employee, director or partner (where it is protected by the discloseе's duty of fidelity), disclosure expressly or impliedly in confidence (and there may be a presumption that such information is only disclosed in confidence[17]) or by surreptitious taking.

Problems and proposals for reform

Surreptitious taking

209. Surreptitious taking of commercial information by an employee, partner or director has long been restrained. The question arises whether surreptitious taking by others will also be restrained or whether the courts' intervention depends on breach of a duty of fidelity. The Younger Committee gave many examples of industrial espionage[18] and though several involved employees and other members of the organisation some were perpetrated by outsiders. A visitor to the factory left alone for a few minutes opens and photographs the contents of a file. He may commit no criminal offence[19] and he owes no duty of fidelity to the owner of the information but it is thought that he should not be protected by law, even if the information is of a readily available nature, because such activities should be discouraged. If, however, he could sell the information (which is often his intention) and the purchaser could use it without restraint speculative surreptitious taking would still be profitable. The Younger Committee recommended a tort of disclosure or other use

of unlawfully acquired information which the defendant knew or ought reasonably to have known was unlawfully acquired.[20] It is suggested that discouragement should go further. Just as an innocent purchaser takes no title to stolen goods[21] so an innocent purchaser of surreptitiously taken commercial information should not be protected in law. He should be left to his remedy in contract against his vendor. It is proposed that surreptitious taking should be defined as secret and unauthorised taking[22] and a surreptitious taker of commercial information or a subsequent holder from him should have no right to use or disclose the information without the consent of the owner. (For remedies see paras.254,255.)

Assignability

210. The right to maintain secrecy is an important part of the value of an invention or other secret. The question arises whether that right may be assigned with the information. The original owner may have employees who have known of the secret in the course of their work. If he sells the secret can the purchaser ensure that the employees do not use or disclose it? The vendor may contract that he will use his best endeavours to prevent disclosure[23] but this may be of little use to the purchaser if he cannot bring action against the employees.

The question of assignability may also be very important where there is no contractual obligation of secrecy. For example, an inventor who made unsolicited disclosure of his invention to a manufacturer in the unfulfulled hope of co-operation in exploitation now wishes to sell the invention to a third party. If the third party cannot take action against the first disclosee in the event of abuse of his knowledge the invention may be worth little or nothing to him. Again, is the right to require secrecy a personal right which dies with the owner or does it pass to the person entitled to the information on his death?

Although obligations of employees cannot normally be assigned, the duty of non-disclosure is a negative obligation not a contract of personal services and so the benefit of it may be assigned.[24] In several cases personal representatives have brought actions against breach of confidence[25] and in Morison v Moat[26] the inheritors of the secret were able to enforce the duty of confidentiality. It seems, therefore, that at least where the obligation is contractual the benefit may pass with the information. But if the right

of action is non-contractual there is doubt whether it is an equitable interest, and so assignable, or a mere equity, and so probably not asignable,[27] or tortious and so probably[28] assignable with the property to which it relates. Since the value of confidential commercial information is so dependent on the ability to keep it confidential, and the basis of protection is the property-nature of the information, it is suggested that assignability should not depend on whether the right of action is contractual, equitable or tortious. It is proposed that the right of confidentiality attaching to confidential commercial information should by statute be made assignable with the information. The method of assignment should be the same as for a legal thing in action, as provided by the Law of Property Act 1925 section 136.

Giving of confidential commercial information

The present law

211. The owner of confidential commercial information may have to disclose the information to another who requires it for his purposes. The duty is usually[29] imposed by statute which may protect the secrecy of the information (or some of it) either by limiting the uses to be made of it or its subsequent disclosure or by limiting the information to be given.[30] The statute may restrict subsequent use or disclosure, without consent of the donor, of all the information[31] or some, such as trade secrets.[32] The restriction may be absolute or to be balanced against the public interest in disclosure. For example, the Equal Opportunities Commission should exclude from a report information prejudicial to a person's business interests "so far as is consistent with their duties";[33] it is a defence to disclosure of a trade secret in the publication of air pollution information by a local authority that the Secretary of State consented.[34]

The statute may restrict the persons or bodies to whom the information may be given either expressly, as in the Finance Acts, or by reference to the consent of the relevant Minister,[35] and may or may not restrict the purposes for which they may use it. There is a noticeable trend towards increased sharing of information without restriction of use.[36]

In some circumstances the purpose for which the information was collected can be served by public disclosure in an anonymous form which protects the secrecy of the information. This was an important incentive to co-operation with the Statistics of Trade Act 1947 and is a general provision in the Health and Safety at

Work etc. Act 1974, although in some circumstances under that Act even trade secrets may be disclosed publicly and identifiably.[37]

If subsequent use or disclosure is not to be limited, the statute may restrict the information to be given. This may be necessary to secure co-operation in the provision of information but those who seek disclosure must also be satisfied that exclusion is justified. The Industry Act 1975 and the Employment Protection Act 1975 provide machinery for arbitration of a claim to exclude information from disclosure to trade unions on the ground that it would cause "substantial injury" to the undertaking or was given in confidence.[38]

212. The owner or holder of confidential commercial information may have to disclose the information for legal proceedings or a statutory inquiry. The fact that the information relates to his business or that disclosure will harm his business is no ground for a litigant or sometimes a third party[39] to refuse discovery or inspection or to give information to an inquiry.[40] But the courts are careful not to order disclosure of unnecessary information about the business affairs of others and on discovery special undertakings may be required.[41] It would anyway be a contempt of court to use information obtained on discovery for any other purpose.[42] If, however, the information was obtained in confidence and disclosure would be likely to cause resentment and loss of information needed for a public purpose the court may refuse discovery on the ground of public interest privilege.[43] But the public interest in availability of information for litigation overrides a mere private interest in protecting sources.[44] Exceptionally the importance of secrecy to the property value of confidential commercial information may be such that the court will refuse discovery or strictly limit recipients.[45] A court may also sit in private to hear evidence of a trade secret[46] even if it is not one protectable by patent.[47] Tribunals and inquiries may be given similar power.[48]

213. The owner may disclose confidential commercial information for his own purposes to his employees or his partner with whom he is working. Or he may disclose it to a third party to enable him to do a job for the owner[49] or in the hope of sale or co-operation in exploitation.[50] He may ensure that the recipient does not disclose or use the information for his own purposes by express contractual provision. If nothing is expressly stated the court may imply

terms in a contract[51] or restrain subsequent use or disclosure in breach of confidence.[52]

Problems and proposals for reform

Information given for a purpose

214. To ensure to those who require it the supply of information which is of commercial value it is necessary that the value of the information to the supplier be sufficiently protected. The two principles of relevance to the purpose and protection against unnecessary disclosure must be carefully adhered to. The trend to wider dissemination of information is already producing opposition to the provision of commercial information because of the fear of financial loss. The threats posed by increased computerisation apply as much to commercial information as to personal information.[53] It is proposed that there should be a statutory provision that if confidential commercial information has to be given for one purpose it is given in confidence and it is not to be used for other purposes or disclosed more than is necessary for that purpose unless the contrary is stated or agreed. Since most such obligations are statutory this would allow Parliament to consider the question of subsequent disclosure in each case where it was wanted, and in the case of contractual obligations it would ensure that the giver of information knew what was to be done with it.

Protection against third parties

215. The provision of statutory rights to confidential commercial information in trade unions, in particular, has led to some fear of the information reaching competitors with the result of financial detriment to the giver.[54] The proposed rule of use for no other purpose, though relevant here, may not be sufficient. For example, Company A may inform union representatives, concerned about the safety of their colleagues, as to the harmless chemicals being used in a process; union representatives (of the same union) in Company B, which makes a similar product, may be told that the process in their company is necessarily hazardous and employees must accept some risk if the process is to be carried out. If the union representatives from the two companies discuss the matter and inform Company B of the safe process used in Company A it cannot realistically be said that they have used the information for a different purpose from that for which they received it. The

true complaint of Company A is the loss (if any) caused by Company B receiving and using the information. Rather than limiting the information to be given to the unions, the remedy of Company A should be against Company B and this will be sufficiently provided by a right to receive damages from a third party who knew or ought to have known that the information which he received had been given to his donor in confidence. (See below paras.256,257.)

Information obtained in confidence

216. Some recent statutes show a trend towards excluding from a duty to disclose not only information the disclosure of which would harm the owner but also information given in confidence or received because of a confidence reposed in him by another.[55] It would apparently be possible for much information to be brought within this exception merely by labelling it 'confidential,' and thus the purposes of the Acts could be thwarted. It is proposed that such an exception should be construed to include only information which is confidential in nature and which would not have been received at all but for the relation of confidence.

Testing evidence heard in private

217. It is right that a court or tribunal should be able to hear evidence in private to protect a commercial secret, but it is also important that the parties and their legal and specialist advisers hear the evidence so that they can if necessary challenge it. The court has power to order destruction of copies of evidence and to punish as contempt of court any subsequent use or disclosure of the information. Other forms of inquiry may not have clearly opposing parties but the principle of allowing opportunity to test the evidence is equally important. If, as has been suggested,[56] the power to hold part of a public inquiry in private for the protection of a commercial secret be exercisable, in the absence of other statutory authorisation,[57] only with the consent of a High Court judge, his order should include both authority for the representation of adverse interested parties and instructions for sealing up or destruction of evidence. Obstruction of the judge's order should be punishable as contempt of court. If no such representation can adequately be provided the judge or tribunal should have power to appoint an amicus curiae.[58] The provisions in the Health and Safety Inquiries Regulations for nominal representation[59] give some recognition of the public interest but do nothing to ensure that in

a proper case the evidence is tested.

The recipient of the information

The present law

218. A person who receives confidential commercial information for a particular purpose may be bound by contract to use the information for that purpose only expressly or by implication where a reasonable person would have realised that the information was being given to him in confidence.[60] An attempt to exclude such a term might be avoided for inequality of bargaining power. The obligation continues if he retains the information after the contract has ended.[61]

219. He may receive the information without any contractual obligation to the owner, for example if it is given without agreement or he receives it through another. He may then be liable for use or disclosure causing detriment to the plaintiff if he obtained it expressly or impliedly in confidence[62] or if he received it from a third party who had received it in confidence.[63]

220. A person who receives the information within a fiduciary relationship may be liable to hold as constructive trustee any profit which he makes from use or disclosure of the information outside his fiduciary duty.[64]

221. An employee who receives or discovers information in the course of his employment may be bound by contract not to use or disclose it but such a contract will be void as an excessive restraint of trade unless its terms are reasonable to protect the employer's legitimate interests and reasonable in the public interest.[65] Nevertheless terms protecting the employer's property may be implied,[66] and the contract will be construed if possible to relate only to legitimate restraint.[67]

222. The employee is bound by his duty of fidelity not to use or disclose information which a reasonable employee would recognise as the property of the employer[68] and not to take information from his employer surreptitiously.[69]

223. A partner who receives or discovers confidential commercial information in the course of the partnership may not use or disclose it to the detriment of the partnership. The duty may be contractual[70] or arise out of his fiduciary relationship.[71] But he is not precluded from using or disclosing information which is not valuable to the partnership, for example because its exploitation

is outside the scope of the partnership business.[72]

Problems and proposals for reform

General duty on recipients

224. The recipient may obtain the information for a purpose but then discover that others have also received it without any such obligation or the owner has made it generally available or it has been independently discovered by others. The question arises whether he is bound by the obligation of confidence not to make use of information that others may use. The protection of confidential commercial information must balance the interests of the owner against the fact that such information is often not exclusive (as is personal information) and the public interest in the dissemination and use of commercial information. It has been said that the duty of the recipient is not to take unfair advantage of the information[73] and it is proposed that this should be given statutory recognition as a general duty in relation to confidential commercial information. What constitutes unfair advantage will vary from one situation to another.

Information in the public domain

225. If the donor of the information has not been treating it as confidential or it was generally known when he imparted it to the defendant no restraint should be placed on the donee just because he received it for a purpose. The information was not confidential but was in the public domain. (See para.207) Similarly if it was disclosed in circumstances negativing a duty of confidentiality he will not be restrained.[74]

Subsequently known information

226. If the donor later makes the information publicly available or it becomes generally known, should the recipient in confidence be immediately absolved from any duty or should he still be bound? There is judicial authority for both views.[75] Since the basis of the duty (as suggested above) is not to take unfair advantage of the information, detriment to the plaintiff is necessary. If the information is generally available before the defendant uses it the plaintiff cannot say he has suffered from that use. But if the defendant used his advance knowledge to get ahead of competitors this may be a detriment to the plaintiff and the defendant may be liable accordingly. But since disclosure of confidential commercial information usually does cause detriment to the owner the burden of proof should be on the defendant to show that in this case,

because of the extent of knowledge elsewhere, his disclosure or use has not caused detriment to the plaintiff.

Unsolicited information

227. The information may have been unsolicited and not greatly wanted by the recipient, for example brought by an inventor hoping to sell it. The normal presumption that it was given in confidence and is not to be used for other purposes may unreasonably restrict the recipient in his own activities. Perhaps he had been working in that area and would soon have found this solution or it is an obviously useful, but minor, addition to his own invention. Just as the defendant must not make unfair use of the information so neither must he be unfairly restrained. Such circumstances should be a defence to a claim for an injunction and on payment of damages the defendant should be able to use the information. But in fairness to the plaintiff the payment should give him a licence rather than an exclusive right to the information. (For remedies see para 254).

Position of a fiduciary

228. The existence of a different basis of liability for disclosure or use of confidential commercial information by fiduciaries and by others causes anomalous situations. It is clear that detriment is a necessary ingredient for breach of confidence but not if the defendant is a fiduciary who can be made a constructive trustee of his profit. If Mr Boardman[76] had obtained information in confidence as a friend of the trustees rather than by acting as trustee, he would probably not have been liable to account for his profit;[77] if Mr Cooley[78] has been an ordinary employee, or a partner,[79] rather than a director he would probably have been allowed to profit from the job which he was offered. It is proposed that a fiduciary should not be made a constructive trustee of profit made from the disclosure or use of confidential commercial information discovered in his fiduciary position if he can show that no detriment was thereby caused to his beneficiaries.

Implied terms in a contract of employment

229. If an employee's contract of employment does not expressly make provision for the use or disclosure of confidential commercial information discovered in the course of the employment the court will imply an obligation not to take information surreptitiously and not to use or disclose information which a reasonable employee

would recognise as the property of the employer.[80] Problems may arise if the contract of employment does make provision but those provisions are void, for example as an invalid restraint of trade by including too much information or by applying restrictions for an unreasonable length of time, or the provisions are not sufficient to cover the circumstances. The court must be prepared to imply terms "upon which the sane and fair conduct of business is likely to depend"[81] but these terms must lie within clear limits or uncertainty and unfairness will be produced.[82] It is proposed that if the provisions are void or if there are no relevant provisions terms should be implied to prevent surreptitious taking and to protect the employer's property but (subject to para.230) not beyond this. If there are express terms the court should not impose further obligations if these are insufficient to protect the employer.

Implied duty not to injure the client.

230. In addition to the implied terms which protect the employer's property there should be some duty to protect the client.[83] Injury to him may be clearly foreseeable, to fail to protect him may harm the employer's goodwill, such a provision would, it is thought, be expected by reasonable employees.[84] It is proposed that an employee's contract of employment should include an implied duty not intentionally or negligently to disclose confidential information learned in the course of his employment which he can reasonably foresee is likely to cause damage either to the employer or to the employer's client. This obligation should extend after the end of the employment so long as injury is reasonably foreseeable.

Duty of partners

231. A partner, as such, has a right in common with the other partners to information belonging to the partnership. Problems sometimes arise if a partner insists on taking information or using it for himself or insists on his right to know information. The general rule of not making unfair use of the information applies to all information which belongs to the partnership, either because it was brought in as a partnership asset or because it was discovered or made in the course of the partnership business. It is not unfair, for example, to take a copy of accounts or, in the absence of contrary agreement, to set up in business in opposition when the partnership has ended, or to use information which the

partnership could not use. But it is unfair to take, use or disclose without agreement information which is of value to the partnership. It is proposed that a partner should be under a duty not to make use of partnership information of commercial value to the partnership without the agreement of the other partners.

Defences

The present law

232. Disclosure of confidential commercial information is not culpable if made under compulsion of law, either by statute or common law[85] duty or under a court order. A holder of such information is entitled to require a court order before disclosing the information on discovery.[86]

233. It may be a defence to an action for breach of contract arising out of the disclosure of confidential commercial information that the disclosure was made to protect the interests of the defendant. This limit to the contractual duty will be implied[87] in the absence of agreement to the contrary.

234. It is not, however, permissible to disclose for one's own protection or vindication confidential commercial information which was disclosed in court proceedings held in private since such disclosure would destroy the value of the property which the private court proceedings were designed to protect.[88] Disclosure of a secret process, discovery or invention is contempt of court[89] unless the judge authorises disclosure.[90]

235. It is a defence to an action for breach of contract that the contractual provision is void as being contrary to public policy.[91]

236. It is a defence to an action for breach of confidence that the defendant had "just cause or excuse"[92] for the disclosure. This includes disclosure of 'iniquity' in the sense of crime, fraud or serious misdeeds provided that the disclosure was in the public interest.

Problems and proposals for reform

Disclosure in the public interest

237. The question arises whether there should be a general defence to breach of contract and breach of confidence that disclosure of confidential commercial information was made in the public interest. The example given by the Younger Committee of information that a company is about to discharge 10,000 employees[93] has been overtaken by events. The unions would now be entitled to the information[94] and the Minister has indicated that once they knew it he would not

treat it as confidential.[95] Prior disclosure by a newspaper would be merely scoop-seeking. But there are many other examples. A journalist may learn in confidence that a company's assets are in imminent danger of being lost.[96] Disclosure has been made of railway reorganisation plans given to local councillors in confidence[97] and disclosure has been sought of Coal Board future plans for an area.[98] The defence has been claimed for information about possible future Prime Ministers[99] and the public relations efforts of a foreign government.[1] Some of these circumstances indicate a prospect of injury to individuals which may be able to be avoided or mitigated by knowledge; others are matters of general interest only. It is suggested that the public interest in avoiding foreseeable injury to individuals outweighs the public interest in the protection of confidences or of the plaintiff's property,[2] but general public interest does not.

On the other hand, there are some matters which are potentially so injurious to the public that confidentiality should not be allowed to prevent disclosure. An example is evidence of corrupt business practices such as was exposed in relation to Poulson; others (not involving criminal liability) would be inadequacies of defence or other public service equipment, overpricing in a nationalised industry or incompetent management practices in the civil service. It would be rare for an action in breach of confidence or contract to be brought against the discloser in such circumstances because of the adverse publicity, but some people have been penalised in their jobs and others may be deterred from disclosure. It is proposed that it should be a defence to an action for breach of contract or confidence that the disclosure of confidential commercial information was justified in the public interest because it was made for the purpose of preventing foreseeable injury to third parties or preventing frauds on the public.

Protecting the interests of the defendant

238. It is a defence to an action for breach of contract that the disclosure was made to protect the defendant's interests (para. 33). It is not clear whether such a defence applies to breach of confidence. Disclosure of confidential commercial information may destroy the value of the owner's property and so should only be justified if there is a higher public interest to be served by disclosure or such disclosure is agreed by the parties, either expressly or by implication. The contract defence of protecting

the defendant's interests is based on implied agreement. In some circumstances disclosure may be actually foreseen. For example, under the Health and Safety at Work etc Act 1974 an employer must, if they ask, tell employees' representatives the composition of substances used by them. So disclosure in confidence of the composition by the manufacturer must allow for disclosure by the employer.[3] Suppose that an action is brought by a third party against the defendant for infringement of a patent. He wishes, in his defence, to show that he is using a different, non-infringing, process which he has obtained in confidence and uses on licence from the plaintiff.[4] Such disclosure may be said to be implied in his licencing contract. But if the defendant is one stage removed, for example, a contractor of the licencee, it would be illogical that he should not have a defence to breach of confidence which he would have had to contract. It is proposed that it should be a defence to an action for breach of confidence that the disclosure was made to protect the interests of the defendant.

Devaluation of the plaintiff's reputation

239. It is not clear on what basis the court refuses injunctions against disclosure of the private lives of pop-stars[5] but it is suggested a relevant factor is that these actions have been brought to preserve the commercial value of the plaintiff's reputations and it is this which distinguishes these cases from personal information ones such as Argyll v Argyll.[6] The principle that the court will not protect a plaintiff's personal reputation which is undeserved because based on untruth is clear in the law of defamation. It is suggested that a similar principle obtains in relation to an action for breach of confidence where the plaintiff is seeking to uphold an undeserved reputation in his name or goods. This would apply to disclosure of matters such as misleading advertisements as to the nature or efficacy of goods or the lack of qualifications or expertise of a provider of services. It is proposed that it should be a defence to an action for breach of confidence or contract arising out of the disclosure of confidential commercial information that the disclosure was of substantially true information and the only detriment suffered by the plaintiff arose from the justifiable devaluation of his reputation in his name or goods as a result of the disclosure.

The extent and method of disclosure

240. The extent and method of disclosure may be relevant in deciding whether disclosure was justified. The defence of foreseeable injury to third parties may require disclosure to those third parties or to someone who can take steps to prevent injury. The relevant third parties, or their representatives, may be accessible, for example employees of a particular company, or only contactable by public statement, for example shareholders of a public company, residents of an area. Disclosure of public frauds may require wide publicity both to protect those affected and to discourage repetition or emulation. Protection of the defendant's interests gives the defendant a personal right superceding that of the plaintiff who gave the information in confidence. It is important that disclosure be no wider than is necessary for his purpose. A plaintiff's reputation may extend over a wide or a narrow field and the extent of publication to counteract it may therefore vary. But in this case the plaintiff is seeking to protect something to which he is not entitled so there is no public interest in the protection of his property to be upheld. The extent of permissible disclosure here is not important.

Although the precise circumstances will vary it is important to have some indication as to what disclosure the court will consider acceptable or the defences will become unworkable. The limits to qualified privilege in libel requiring a duty or interest to receive the information could be used, but it is suggested that the grounds for allowing disclosure of true information in the public interest may allow wider disclosure than the law of defamation allows for untrue information. Publication of a libel in a newspaper is rarely justified, but disclosure of evidence of public frauds or an undeserved reputation, for example, may best be made in a newspaper. The extent of suitable disclosure depends on the purpose for which the defence is given. It is proposed that where restriction is required the defence should include a provision that the extent and method of disclosure was appropriate for that purpose. This provision should apply to the defences proposed in paras.237 and 238.

Defence of iniquity

241. It is proposed that it should be a defence to an action for breach of confidence in relation to disclosure of confidential

commercial information that, if the subject-matter disclosed had been the subject-matter of a contract between the plaintiff and the defendant, that contract would have been void for illegality. The reasons for this proposed categorisation of the defence of disclosure of "iniquity" are the same in relation to confidential commercial information as in relation to confidential personal information discussed in para.144.

Remedies

The present law

242. Remedies for wrongful disclosure or use of confidential commercial information may take the form of injunction, damages, account of profits or declaration of a constructive trust. The court may order destruction of notes, machinery or infringing goods. Remedies may be granted against the original disclosee or a person who subsequently acquired the information.

243. An injunction may be granted against use of the information or the manufacture of articles if use of the confidential information is necessarily involved.[7]

An injunction may be perpetual or for a sufficient time to prevent the defendant having an unfair advantage.[8]

244. No interlocutory injunction will be granted if the basis of the complaint is the inaccuracy of the information.[9] Probably no interlocutory injunction will be granted if the defendant pleads iniquity and disclosure in the public interest.[10] If the extent and validity of a contractual restraint are uncertain or the secrecy of the information is uncertain the court may refuse an interlocutory injunction.[11]

245. Damages may be awarded where an injunction is refused, even in an action for breach of confidence.[12]

246. Damages may take the form of a sale of the information[13] or remuneration for use by the defendant[14] or compensation for the plaintiff's loss.[15]

247. An account of profits may include the whole of the profit made by the defendant through the sale of infringing goods[16] or that part of the profits attributable to the use of the confidential information.[17]

Problems and proposals for reform

Patentable information

248. The relationship between breach of confidence and contract

and patent law where the confidential commercial information is patentable raises questions of policy. Patent law holds the balance between individual property and public dissemination by giving a monopoly right for a fixed period of time in return for full disclosure. Thus others can immediately know and start working on improvements to the invention and after the patent period has expired anyone can use it. If the patent holder suppresses his invention and does not make use of it a compulsory licence may be granted to another.[18] A patent is valid against anyone and thus is wider than breach of confidence protection which avails only against a person who receive the information in confidence and subsequent holders through him. Breach of confidence protection, however, may last indefinitely and may prevent the holder from using information and expertise of his own. Although the risk of suppression of inventions is less serious than with patented information, because there is no restriction on third parties making the same discovery for themselves and exploiting it, it is possible in narrow fields of expertise to stifle inventions by disclosure in confidence.[19]

Relationship between patent and confidence

249. It is arguable that since the law provides the system of patents no other restriction on the use of patentable information should be allowed. Certainly equity early refused to enforce by injunction a contractual duty of confidence after the patent had expired[20] and Lord Eldon was doubtful whether the court should assist the secrecy of an unpatented medicine.[21] It was recently argued in United States of America that breach of confidence was in conflict with federal patent legislation and so was unconstitutional, but it was held that they do not conflict because they protect different interests.[22] It is suggested that this approach is correct. A general provision removing all other protection from patentable information would cause injustice. Employees and contractors who may inevitably receive such information if its owner is to use it at all should not be allowed to abuse their position by selling it to competitors or setting up in competition. If trade unions and others who may receive it for their own purposes were allowed immediately to exploit it, the supply of information would dry up. But some restriction should be made on the owner's right to gag everyone else and keep his invention away

from the public. Confidence and contract should not be able to undo the whole fabric of patent legislation.

Patent obtained after disclosure

250. The Patents Act 1977 itself provides that a disclosure in breach of confidence will not prevent the owner obtaining a patent if he files his application within six months of the wrongful disclosure.[23] The harm done by the disclosure will not then be very great and the owner will be able to prevent or punish recurrence under the patent law. Two matters arise, however, in relation to the discloser. He will, normally, be liable for damages for his wrongful disclosure but it is suggested that if the plaintiff misled him into believing that he was not going to seek a patent and then did so, the defendant should not have to pay damages. He will be prevented from any further use, and he may have incurred expense, so he should have some protection against a misleading plaintiff.

Patent lost by delay

251. The other matter concerns a plaintiff who delays after the defendant's disclosure and so loses his right to a patent. The defendant will have to pay damages for breach of confidence or contract but it is suggested that those damages should not be enhanced by the value of the loss of a patent unless the delay was caused by the defendant. Although his disclosure was culpable, he is not in a position to ensure that the plaintiff acts speedily to get a patent and a plaintiff who perhaps did not anyway want to go through the process of obtaining a patent[24] could use this as a "gold-digging" action to obtain enhanced damages. Of course the position would be different if the defendant himself caused the delay.

Grant of rights to the holder of patentable information

252. On the general question of stifling inventions and excessive restraint of disclosees it is proposed that the solution should be two-fold. First, provision should be made for allowing use of the invention by the confidential holder if it is not used by the owner. This may conveniently be based on the provisions for compulsory licences in patents[25] though the grant would be made by the court. On application by the holder, the court should have power to grant a right of use or disclosure on terms in the court's discretion. The matters to be taken into account should be those matters which are set out in the Patents Act 1977[26] as grounds for an application for a compulsory licence of a patent since the public

interest in exploitation of the invention is the same in both cases. It should also be provided that the court is not to take into account the fact that the information was received in confidence since the court might otherwise refuse applications, for example from original disclosees rather than subsequent holders, on that ground alone. Application should be able to be made after three years[27] after the original disclosure in confidence by the owner but the court should have power to adjourn the application if there has not been sufficient time for the owner to work the invention[28] or to have applied for a patent. Provision should also be made to allow the holder of the information, after the three year period, to use or disclose the information without first seeking an order and then, if action is brought, to stay it while he seeks an order. This provides for the situation where the owner may have abandoned all concern about the information so that application to the court would be a waste of time and money.[29]

Restriction of remedies for patentable information

253. The second part of the solution is that there should be a general provision that an owner who obtains judgment for breach of confidence or contract arising out of the wrongful use or disclosure of patentable confidential commercial information should be given no more protection against the discloser than he would have had if he had obtained a patent at the date of the wrongful disclosure or use. Thus an injunction against further exploitation should not last longer than the patent period.[30]

Non-patentable information - the original recipient

254. In the case of unpatentable confidential commercial information there is no great difficulty of principle in deciding on remedies against the person to whom the information was communicated in confidence. But the cases indicate no settled view as to whether damages should be awarded as of right or at the court's discretion in breach of confidence or whether injunctions should be awarded and if so for how long. It is suggested that breach of confidence in relation to commercial information should be seen to be a tort and so the plaintiff should have a right to damages for infringement. He should be entitled, as an alternative, to an account of profits against the original disclosee. An injunction against further use or disclosure would normally be granted but should be refused if it would be unfair to the defendant. This

would arise, for example, if the evidence showed that the defendant would soon have reached this solution himself or the information would soon be freely available on the market. A surreptitious taker has no claims to fairness; damages and a perpetual injunction should normally be awarded against him.

Third party recipient from a surreptitious taker

255. More difficult problems arise when the defendant is not the original disclosee but a third party who received the information directly or indirectly from him. It is suggested that his knowledge or innocence should be seen to be relevant as should the question whether he gave value for the information or was a donee. On the other hand, the need to discourage surreptitious takers is such that any recipient from such a person should be given no help. He may be able to sue his vendor for total failure of consideration, which would put the loss where it ought to fall, and the risk of this may act as a deterrent to some. It is proposed that the court should have a power to award a perpetual injunction and damages, or an account of profits, against a holder who obtained the information directly or indirectly from a surreptitious taker.[31]

Third party recipient with knowledge

256. It is proposed that a third party who recieved the information with knowledge that it had been obtained in confidence and the disclosure to him, or use through which he received the knowledge, was a breach of the obligation of confidence should also be liable for an injunction and damages or an account of profits. This should be so whether the discloser to him knew or did not know that the disclosure was a breach of confidence. Lack of knowledge would arise, for example, where an employee discloses the secret formula to a partner who, under the terms of the partnership agreement, unknown to the employee, is not entitled to share the secret.[32] Another example would be where a contractor, mistakenly thinking a sub-contractor needs the information to perform his part of the job, unnecessarily discloses confidential information given by the client solely for the purposes of the contract. In both cases the knowing recipient should not be allowed to profit from the ignorance of the original disclosee.

Information which must have been obtained by breach

257. A third party acquirer of the information who did not actually know that the information was obtained or disclosed to him in breach of confidence or contract should not be allowed to cause

injury to the owner by his ignorance if the circumstances are such that the information must have been obtained in such a way.[33] However, it may only be with hindsight that the circumstances become clear. For example, the defendant may not have had any way of knowing that the owner took precautions to prevent accidental disclosure or that he treated the information as confidential. It is proposed, therefore, that although a perpetual injunction and damages may be awarded the plaintiff should not in this case have the alternative of an account of profits.

Third party recipient in good faith and without knowledge

258. A third party who acquires confidential commercial information in good faith and with no actual or constructive notice of the breach of confidence or contract, in circumstances where the information could have been obtained without any breach, is in a different position. It is proposed that since the basis of protection of confidential commercial information is protection of the plaintiff's property damages should normally be awarded but a discretionary power of set-off should be provided.[34] This would enable the court to balance the loss to the plaintiff against loss to the defendant who may have gone to expense in preparing to exploit the information before he had notice of the plaintiff's claim. No alternative of an account of profits should be allowed against the innocent third party since that would give unwarranted benefit to the plaintiff. Further, if the defendant had acquired the information for value it is proposed that no injunction should normally be granted against him. This would enable a bona fide purchaser of the information to use it on payment to the plaintiff. But it is proposed that payment should give him merely a right to use the information in common with the plaintiff rather than take the form of an enforced sale of the plaintiff's property.[35]

Finder of the information

259. The finder of confidential commercial information may be aware that the information is confidential and the owner would not be likely to consent to his use or disclosure of it. If so, he is in no better position than a knowing recipient (para.256) and he should be liable to pay damages or account for his profit and an injunction should be awarded against further use. For example, a businessman is working on a train. One of his papers, marked 'Confidential' drops to the floor and he leaves the train without

seeing it. The defendant watches him, says nothing and appropriates the document when he has gone.[36]

But a finder may honestly not have any such awareness. A book labelled "secret recipes" and found in a rubbish bin, or in the street, may have been dropped accidentally or may have been thrown away as no longer important.[37] Once the finder comes to know that it is still confidential an injunction may be granted against him, but he should not in this case be liable to pay damages or account for his profits arising from use or disclosure before that time.

SUMMARY OF RECOMMENDATIONS

The following gives a summary of the recommendations in relation to confidential commercial information. Reference is made to the chapters and the paragraphs of this chapter where the matters are discussed and, where the recommendations involve the need for legislation, to the draft clauses in Appendix A.

1. Confidential commercial information should be defined as should the circumstances in which disclosure or discovery of the information is "in confidence." Generally known information should be excluded but the circumstances in which information known to some may still be confidential should be defined.
   (Chapter 1 section 2; Chapter 5 passim; paras.201-8; clauses 2 (1-3),4(1).)
2. "Surreptitious taking" should be defined as secret and unauthorised taking and provision should be made to ensure that a surreptitious taker or a holder from him does not benefit.
   (Chapter 1 section 3; paras.209,254,255; clauses 4(3),12,17(1).)
3. The right of confidentiality attaching to confidential commercial information should be assignable with the information.
   (Chapter 5 section 2; para.210; clause 2(4).)
4. There should be a general provision that confidential commercial information given for a purpose is given in confidence and should not be used for any other purpose unless the contrary is stated or agreed.
   (Chapterl section 2; Chapter 5 section 4; para.214; clauses 2(3), 13(2), 13(4).)
5. A statutory provision excluding from disclosure commercial information given to an undertaking "in confidence" should be construed as including only information of a confidential nature and which would not have been received at all but for the relationship or promise of confidentiality.
   (Chapter 5 section 2; para.216.)
6. If statutory provision be made for a public inquiry to be held in private for the protection of commercial information, this should require the consent of a High Court judge who should have power to appoint an amicus curiae to test the evidence if necessary and disclosure of information thus given should be punishable as contempt of court.
   (Chapter 7 Part C section 1; para.217.)

7. There should be a general statutory duty on the holder of confidential commercial information not to take unfair advantage of the information.
(Chapter 1 passim; Chapter 5 passim; para.224; clause 13(1).)

8. Detriment to the plaintiff should be a necessary ingredient of liability for disclosure or use of confidential commercial information, except by a holder for his own purposes, but the burden of proof should lie on the defendant. The same rule should apply to a fiduciary.
(Chapter 1 section 2(c); paras.226,228; clauses 13(3), (4), 15(4).)

9. There should be implied in a contract of employment with no relevant valid terms provisions forbidding surreptitious taking and unauthorised disclosure or use of the employer's property. No terms should be implied if there are valid express terms.
(Chapter 5 section 2; para.229; clauses 13(5),(6).)

10. An employee or ex-employee should be under a duty not to disclose information to the reasonably foreseeable detriment of the employer or his client.
(Chapter 5 section 2; para.230; clause 13(7).)

11. The duty of a partner should be clarified as a duty not to make use of partnership information of commercial value to the partnership without agreement.
(Chapter 5 section 3; para 231; clause 13(8).)

12. It should be a defence to breach of confidence or contract that disclosure was made to prevent foreseeable injury to third parties or frauds on the public.
(Chapter 1 section 3; Chapter 5 section 2; para 237; clause 15 (1)(a).)

13. It should be a defence to breach of confidence or contract (unless expressly excluded) that disclosure was made to protect the interests of the defendant.
(Chapter 1 section 2; para.238; clause 15(1)(b).)

14. The extent and method of disclosure allowed within the above two defences should be that which is appropriate for that purpose.
(Chapter 1 section 3; para 240; clauses 15(1)(a),(b).)

15. It should be a defence to breach of confidence or contract that the disclosure was of substantially true information and the only detriment to the plaintiff was justifiable devaluation of his reputation in his name or goods.
(Chapter 1 sections 2,3; para 239; clause 15(1)(c).)

16. There should be a similar defence in breach of confidence to that of illegality in contract.
(Chapter 1 section 3; para 241; clause 15(3).)

17. The conflict between patent protection and breach of confidence should be resolved by

a) A provision that a defendant should not have to pay damages for breach of confidence or contract if the plaintiff misled him into believing he would not apply for a patent.
(para 250; clause 16(1)(a).)

b) a provision that no extra damages should be payable for loss of a patent unless the delay was the fault of the defendant.
(para 251; clause 16(1)(b).)

c) a provision allowing the court to grant licence rights to the holder after three years, with power to extend the time and power to adjourn an action for breach.
(para 252; clauses 16(2),(3),(4).)

d) a general limitation on remedies for unpatented patentable confidential commercial information.
(para 253; clause 16(5).)

(The whole question is discussed in Chapter 5 section 5.)

18. Notwithstanding other restrictions on remedies, the remedies available against a surreptitious taker or a subsequent holder from him should be damages or account of profits and a perpetual injunction.
(paras 254,255; clause 17(1).)

19. Remedies available against the original holder should be damages or account of profits and an injunction unless that would be unfair to the defendant.
(paras.227,254; clause 17(2)(a).)

20. Remedies available against a third party holder with knowledge of the breach should be damages or an account of profits and injunction.
(para 256; clause 17(2)(b).)

21. Remedies available against a third party holder without knowledge of the breach when the information could only have been obtained by a breach should be damages and an injunction but not an account of profits.
(para 257; clause 17(2)(c).)

22. A third party holder in good faith and without notice of a breach should be able, in the discretion of the court, to set off his expenses against an award of damages. If he was a purchaser for value no injunction should be granted against him.
(para.258; clause 17(3),(4).)

23. Remedies available against a finder of the information with knowledge should be the same as those against a holder with knowledge.
(para 259; clause 17(5).)

24. No damages or account of profits should be awarded against a finder of the information with no knowledge, though an injunction against further disclosure or use may be granted.
(para 259; clause 17(6).)

(The position of third party defendants is discussed in Chapter 1 section 3.)

NOTES

Nature of Confidential Commercial Information

1. *Commercial Plastics Ltd. v Vincent [1964] 3 All E.R. 546 C.A.*
2. *Floydd v Cheney [1970] 1 All E.R.446; Robb v Green [1895] 2 Q.B. 315; Canadian Aero Service Ltd. v O'Malley (1973) 40 D.L.R. (3d) 371.*
3. *for example the racing results known to those present at the race in Exchange Telegraph Ltd v Central News Ltd [1897] 2 Ch.48.*
4. *Franchi v Franchi [1967] R.P.C.149.*
5. *Bjorlow (Great Britain) Ltd. v Minter (1954) 71 R.P.C.321.*
6. *Patents Act 1977 section 30 a patent or application for a patent is personal property.*
7. *On this ground information may be refused under the Employment Protection Act 1975 section 18(1)(e) and the Industry Act 1975 section 31(4)(b).*
8. *Cranleigh Precision Engineering Ltd. v Bryant [1966] R.P.C.81. It is this lack of exclusivity which in the view of some prevents information from being property. e.g. Melville: Precedents on Intellectual Property 2nd ed 1972 pub. Sweet & Maxwell.*
9. *Printers & Finishers Ltd. v Holloway [1964] 3 All E.R.731.*
10. *He may be restrained from competing during employment. Hivac Ltd. v Park Royal Scientific Instruments Ltd. [1946] 1 All E.R.350.*
11. *John Zink Co.Ltd. v Lloyds Bank Ltd. and another [1975] R.P.C.385.*
12. *Initial Services Ltd. v Putterill [1967] 3 All E.R.145.*
13. *Hubbard v Vosper [1972] 1 All E.R.1023.*
14. *Woodward v Hutchins [1977] 2 All E.R.751.*
15. *With the minor exceptions of criminal libel and Rehabilitation of Offenders Act 1974 section 8.*
16. *The Banks Committee on the British Patent System (1970) Cmnd.4407 defined 'know-how' on similar lines as "technical knowledge of industrial significance which has been built up in one organisation and is not in the public domain" but confidential commercial information is wider in that it includes non-technical information.*
17. *Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41.*
18. *(1972) Cmnd.5012 Chapter 18.*
19. *The definition of property in the Theft Act 1968 section 4(1) though including intangible property is thought not to include information: Smith: The Law of Theft 3rd ed. 1977 Pub. Butterworths para.96. If several people are involved it may be criminal conspiracy: Scott v Metropolitan Police Commissioner [1975] A.C.819.*
20. *(1972) Cmnd.5012 para.632.*
21. *apart from market overt and some statutory exceptions.*
22. *an Oxford English Dictionary definition.*
23. *as in Terry v F.Reddaway & Co.Ltd. (1916) 33 R.P.C.269.*

24. This was assumed without argument in Mustad (O) & Son v Allcock (S) & Co Ltd. and Dosen [1963] 3 All E.R.416. (1928 H.L.)

25. For example Webb v Rose 1732 (unrep.); Thompson v Stanhope (1774) 2 Amb.737.

26. (1851) 9 Hare 241.

27. Snell: Principles of Equity 27th ed 1973 pub. Sweet & Maxwell page 25; Gross v Lewis Hillman Ltd. [1970] Ch.445

28. see the discussion in Chapter 5 section 2.

Giving of confidential commercial information

29. There may be a contractual obligation, for example in insurance.

30. The provisions of various statutes are discussed in Chapter 5 section 4.

31. for example Rag Flock Act 1951 section 13(6).

32. for example Control of Pollution Act 1974 section 79(5); the earlier provision in the Clean Air Act 1956 included any manufacturing process.

33. Sex Discrimination Act 1975 section 61(3).

34. Control of Pollution Act 1974 section 79(5).

35. For example Statistics of Trade Act 1947 section 9; Health and Safety at Work etc. Act 1974 section 27(2).

36. For example the inroads into the Statistics of Trade Act 1947 made by the Employment and Training Act 1973 and the Health and Safety at work etc. Act 1974; Industry Act 1975 section 33(1)(a).

37. Section 28(7)(b).

38. Industry Act 1975 section 32; Employment Protection Act 1975 section 19. The Industry Act advisory committee merely recommends to the Minister.

39. Administration of Justice Act 1970 section 32.

40. Re Gaumont-British Picture Corporation Ltd. [1940] 2 All E.R.415.

41. For example Coni v Robertson [1969] 2 All E.R.609.

42. Distillers Co. (Biochemicals) Ltd v Times Newspapers [1975]1 All E.R.41; Riddick v Thames Board Mills Ltd. [1977] 3 All E.R.677.

43. Crompton (Alfred) Amusement Machines Ltd v Customs & Excise Commissioners (No.2) [1974] A.C.405.

44. Attorney-General v Mulholland [1963] 1 All E.R.767.

45. Warner-Lambert Co. v Glaxo Limited [1975] R.P.C.354

46. Scott v Scott [1913] A.C.417

47. Badische Anilin und Soda Fabrik v Levinstein (1883) 24 Ch.D.156.

48. For example Health and Safety Inquiries (Procedure) Regulations (1975) S.I. No.335 reg.8.

49. As in Ackroyds (London) Ltd. v Islington Plastics Ltd. [1962] R.P.C. 97. (a tool for making plastic swizzle-sticks and information about the market).

50. As in Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41.

51. As in Pollard v Photographic Co (1888) 40 Ch.D.345.

52. Seager v Copydex Ltd. [1967] 2 All E.R.415.

53. Younger Report on Privacy (1972) Cmnd.5012 para.579.

54. DuPont (UK) announced that it was refusing to give information to the Health and Safety Executive: The Times May 26 1978.

55. Industry Act 1975 section 31; Employment Protection Act 1975 section 18.

56. Stevens Committee on Planning Control over Mineral Workings 1976 para 16.20.

57. For example the person holding an inquiry under the Health and Safety at Work etc. Act 1974 may decide.

58. Like counsel for the tribunal in a tribunal of inquiry.

59. (1975) S.I. No.335 Reg.8(3) A member of the Council on Tribunals or a representative of employers' or employees' organisations.

The recipient of the information

60. Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41.

61. Ackroyds (London) Ltd. v Islington Plastics Ltd. [1962] R.P.C.97.

62. Seager v Copydex Ltd. [1967] 2 All E.R.415.

63. Saltman Engineering Co.Ltd. v Campbell Engineering Co.Ltd. (1948) 65 R.P.C.203.

64. Boardman v Phipps [1966] 3 All E.R.721.

65. Commercial Plastics Ltd. v Vincent [1964] 3 All E.R.546.

66. Triplex Safety Glass Co.Ltd. v Scorah [1937] 4 All E.R.693.

67. The Littlewoods Organisation v Harris [1978] 1 All E.R.1026.

68. Printers and Finishers Ltd. v Holloway [1964] 3 All E.R.731.

69. Robb v Green [1895] 2 Q.B. 315.

70. As in Morison v Moat (1851) 9 Hare 241.

71. Dean v MacDowell (1878) 8 Ch.D.345; Floydd v Cheney [1970] 1 All E.R.446.

72. Aas v Benham [1891] 2 Ch.244

73. Seager v Copydex Ltd. [1967] 2 All E.R.415 (Lord Denning M.R.)

74. Suggested in Coco v A.N.Clarke (Engineers) Ltd. [1969] R.P.C.41

75. Mustad (O) & Son v Allcock (S) and Co Ltd. and Dosen [1963] 3 All E.R.416; Peter Pan Manuf. Corp. v Corsets Silhouette Ltd. [1963] 3 All E.R. 402.

76. Boardman v Phipps [1966] 3 All E.R.721.

77. Like Mr Gulliver's friends in Regal (Hastings) Ltd. v Gulliver [1942] 1 All E.R.378

78. Industrial Development Consultants Ltd v Cooley [1972] 2 All E.R. 162.

79. Aas v Benham [1891] 2 Ch.244.

80. Printers & Finishers Ltd. v Holloway [1964] 3 All E.R.731.

81. Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41,50.

82. As in Littlewoods Organisation v Harris [1978] 1 All E.R.1026 where the employee honestly thought the restriction void.

83. This question is discussed in Chapter 5 section 2.

84. Employees such as solicitors and accountants have such an obligation imposed by their professional associations.

Defences

85. For example a contract uberrimae fidei.

86. Norwich Pharmacal Co. v Customs and Excise Commissioners [1973] 2 All E.R.943.

87. Tournier v National Provincial and Union Bank of England [1924] 1 K.B.461.

88. Scott v Scott [1913] A.C.417,450. Lord Atkinson cf. personal information.

89. Administration of Justice Act 1960 section 12. Discussed in Chapter 7 Part A section 4(a)(ii).

90. Re R (M.J.) (an infant) [1975] 2 All E.R.749.

91. as in Howard v Odhams Press Ltd. [1938] 1 K.B.1.

92. Fraser v Evans [1969] 1 All E.R.8,11.

93. [1972] Cmnd.5012 Appendix I para.32(iv).

94. Under the Employment Protection Act 1975 if not under the Industry Act 1975.

95. H.C.Deb. 5th series Vol.888 col.58 (written answer).

96. Sunday Times September 24 1978.

97. Referred to in Press Council Annual Report 1963 paras.35-37.

98. Nottingham Evening Post April 19 1978.

99. Beloff v Pressdram Ltd. [1973] 1 All E.R.241.

1. Fraser v Evans [1969] 1 All E.R.8.

2. Southport Corporation v Esso Petroleum Ltd. [1953] 3 W.L.R.773,779 (Devlin J.)

3. For this reason it may be difficult to obtain the information The Times May 31 1978 (letter).

4. This would be a case for court disclosure in private with precautions against disclosure or use by the other party.

5. Woodward v Hutchins [1977] 2 All E.R.751 has been followed by a similar case concerning the Beatles. The basis of these cases is discussed in Chapter 1 section 3(b).

6. [1965] 1 All E.R.611. An employee in a confidential capacity such as the defendant Hutchins would normally be enjoined from disclosing personal information about his employer learned in the course of his work.

Remedies

7. Peter Pan Manuf.Corp. v Corsets Silhouette Ltd. [1963] 3 All E.R. 402.

8. Terrapin Ltd v Builders' Supply Co. (Hayes) Ltd. and others [1960] R.P.C.128.

9. This rule is not affected by American Cyanamid Co. v Ethicon Ltd [1975] 1 All E.R.504.

10. Initial Services Ltd. v Putterill [1967] 3 All E.R.145; Hubbard v Vosper [1972] 1 All E.R.1023. This may be affected by the American Cyanamid case

11. Hubbard v Pitt [1975] 3 All E.R.201 (C.A.) (a restraint of trade case) and Potters-Ballotini Ltd. v Weston-Baker and others [1977] R.P.C.202 both decided since the American Cyanamid case

12. Seager v Copydex Ltd. [1967] 2 All E.R.415.

13. Seager v Copydex Ltd. (above)

14. Suggested in Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C. 41. and applied in Interfirm Comparison (Australia) Pty Ltd. v Law Society of New South Wales [1975] 6 A.L.R.445 cited by Finn: Fiduciary Obligations 1977 Pub. Law Book Co. page 167.

15. Nicrotherm Electrical Co. v Percy [1956] R.P.C.272.

16. Peter Pan Manuf.Corp. v Corsets Silhouette Ltd. [1963] 3 All E.R. 402.

17. Siddell v Vickers (1892) 9 R.P.C.152.

18. Patents Act 1977 section 48.

19. this was apparently being done in Newbery v James (1817) 2 Mer.446 even after the formula for the medicine had been patented.

20. Newbery v James (above).

21. Williams v Williams (1817) 3 Mer.157.

22. Kewanee Oil Co. v Bicron Corp. et al (1974) 40 L.Ed.2d.315. The same point had been made by Turner V.C. in Morison v Moat (1851) 20 L.J.Ch.513,525.

23. Section 2(4), giving effect to the European Patent Convention Articles 54-57.

24. Particularly if the defendant is his one likely competitor.

25. Patents Act 1977 sections 48-54.

26. Ibid. section 48(3).

27. The relevant period under the Patents Act 1977 section 48(1).

28. Such a provision applies in relation to patents, section 48(5).

29. A similar provision is made in relation to the discharge or modification of restrictive covenants by Law of Property Act 1925 section 84(9).

30. twenty years at present. Patents Act 1977 section 25.

31. It is recognised that this rule may work hardship on an innocent purchaser, but it is thought to be justified in the public interest.

32. As in Morison v Moat (1851) 9 Hare 241 perhaps.

33. On this ground injunctions have been awarded against third party purchasers, for example in Prince Albert v Strange (1849) 1 Mac. & G.25 and Abernethy v Hutchinson (1825) 1 H & T 28.

34. *This is somewhat similar to the provision in the Law Reform (Frustrated Contracts) Act 1943 section 1(2) which is also providing for two innocent losers in an unforeseen situation.*

35. *He could not therefore prevent the owner from using it himself or selling it to another. This provision takes advantage of the non-exclusive nature of such information.*

36. *His conduct may also be a criminal offence: Theft Act 1968 section 1(1), 2(1((c).*

37. *Belief that the former owner would consent to his appropriation would be a defence to a charge of theft: Theft Act 1968 section 2(1)(b).*

PART III

Confidential Governmental Information

The nature of confidential governmental information

301. Governmental information is information relating to the governing or managing of a body of people, be it a country, a parish or a club. Governing consists essentially of policy-making and administration and the word "governmental" is used to embrace both.

302. Governmental information which the governing person or group[1] may not want freely disseminated may include preliminary studies and proposals; guidelines of policy; the information which was, or will be, used in coming to a decision; what was said, by whom, in a meeting on a matter of policy-making or administration; what decision will be, or has been, made; as well as such obvious matters as defence secrets, diplomatic exchanges and budget proposals.

303. Although traditionally the problems of information held by central government have been treated separately,[2] the problems of confidentiality are not different in kind from those relating to the governing of any other body, public or private, though the importance to the public interest of some information held by or emanating from central government is obviously greater than that of much information held by other bodies. The significance of the public interest rather than the identity of the holder of the information is now recognised in relation to disclosure of information for legal proceedings;[3] it should also be recognised in the wider context of disclosure of governmental information.

304. Some governmental information cannot be described as confidential. Thus information which is already publicly known or which is readily available elsewhere is not confidential (though central government, at least, has been known to refuse such information on the ground of confidentiality.[4]) Similarly, disclosure of information which had to be made publicly available for a period of time cannot be refused on the ground of confidentiality after that time.[5]

305. A governing group may describe as confidential information received from third parties for a particular purpose or in confidence; they may disclose information to a third party for a

particular purpose or in confidence; they may refuse disclosure or information emanating from the group or relating to its activities, simply on the ground that it is their information and they do not choose to disclose it. Confidential governmental information may be defined as any governmental information which has not been made available to the members of the governed body.

306. Information received by the group from a third party may be personal or commercial information which, as has been seen above,[6] may be protected against unlimited disclosure or use.

307. Governmental information received in confidence may include such matters as the possible effect on industry or groups of people of certain proposals or factual information or assessment required in making an administrative decision. Arguments for confidentiality may include a desire not to have various policy alternatives known before a decision is made and the need to protect sources of information.

308. A governing group who give information about their activities to a third party, whether for a particular purpose, such as a contract, or in consultations for the third party's purposes or for their own purposes, may wish to ensure that the information is not disclosed elsewhere on the ground that they would not otherwise have made it available.

309. The question of disclosure or non-disclosure of governmental information which the group does not wish disclosed and the members[7] do is often resolved as a matter of politics rather than law. The operative constraints, not only in relation to central government, are frequently political. For example, the chance of 'leakage', whether accurate or partial, must be weighed against the value of secrecy to the group. Nevertheless, it is important to know what are the legal rules even though they may not give the full answer in a particular case.

Problems and proposals for reform

The basis of protection

310. Personal information may be said to 'belong to' the subject and his right to keep it secret or impose restrictions on its disclosure is personal to him; confidential commercial information is protected by law because of its commercial value to the owner. The basic question arises whether a governing group have a general right to keep "their" information secret, as if governing

were a private activity[8] or whether such information is only to be protected if there is a good reason, connected with good government, for doing so. It is proposed that the basis for the protection of governmental information relating to public bodies is the protection of the public interest and, similarly, the basis of protection in the case of private bodies is the protection of the interests of the members.

The right of access

311. A subsequent question then arises. If protection is to be limited, should the law enforce a general right of access to information subject to exceptions or should it merely enforce the protections? As will be seen below, at common law the courts have gone some way to enforce rights of access, at least where a proprietary interest can be seen to be affected, but in other circumstances the law has done little[9] and the factual ability of a governing group to prevent disclosure remains the major factor. In relation to information emanating from or held by central government the Official Secrets Acts, based not on the injury to the public interest of disclosure of the content of the information but on the position of the person disclosing it,[10] have prevented any common law extension of rights of access. It is proposed that the Official Secrets Act 1911 section 2 should be repealed, a general right of access to governmental information should be enacted and the necessary exceptions to access should be based on the public interest rather than on the position of the discloser.

Attendance at meetings

The present law

312. There is no right at common law to attend the meetings of a governmental body, except a court of law and a parish meeting.[11] Both Houses of Parliament assert, though they do not often exercise, a right to exclude the public.[12]

313. The rules of a private body may give members a contractual right to attend meetings.

314. Statutory provisions[13] give a public right of attendance at meetings of local authorities and their committees and certain other bodies. The meetings are in public unless publicity would be prejudicial to the public interest by reason of the confidential nature of the business, or because recommendations and advice other than from members or committees are to be considered, or for other special reason.

Problems and proposals for reform

Provision of accommodation

315. The right to attend a meeting requires that accommodation be made available. Most local authority meetings are hardly attended by the public at all; occasionally a matter attracts great public concern and more people wish to attend than can be accommodated. The right to attend is not an absolute one but the decision in R v Liverpool City Council ex parte Liverpool Taxi Fleet Operators Association[14] that the presence of a large number of people was a sufficient special reason for exclusion of them all[15] is unfortunate and wrong. The public should be allowed to attend to the extent of reasonably available accommodation.

Extent of wrongful exclusion

316. In spite of the clear wording of the Act[16] there is much evidence[17] that local authority meetings exclude the public without stating the nature of the 'special reason' and the Divisional Court have refused to hold a decision in such circumstances void.[18] It is proposed that any decision made by the council or committee when the public have wrongly been excluded should be held void and avoidance should not depend on an individual suffering "significant injury."[19]

Exclusion for policy and advice

317. Although some grounds for the exclusion of the public, such as discussion of the personal circumstances of an individual or the conduct of legal proceedings, are clear and reasonable, the right of secrecy to discuss policy or take advice from officers of the authority is more doubtful. The purpose of public access is lost if nothing is known of a matter until the policy is decided;[20] it is no longer thought that public servants will not give frank advice if the public might know what they have said.[21] It is proposed that discussion of policy and the need to take advice or recommendations from officers of the body should not be a ground for exclusion of the public.

Access to information

The present law

318. At common law a corporator has a right to inspect documents "in a matter affecting the members of the corporation"[22] and a beneficiary under a trust has a right to inspect trust documents because "they are, in a sense, his own."[23]

The common law rule has been stated broadly in relation to public documents, so that a person may claim production of

> "every document of a public nature in which any one of the King's subjects can prove himself to be interested."[24]

319. However, the courts require the necessary interest to be direct and tangible; a desire to control or oversee the governing group is not sufficient, even in relation to the levying and spending of money.[25] A 'fishing' application will not be allowed[26] and even a beneficiary's proprietary interest in information may be overridden by the need to protect the trustees' exercise of discretion[27] or legal professional privilege.[28] The extent of the right of inspection depends on the interest of the applicant and what is reasonably necessary for the protection of that interest.[29]

320. At common law a person with a public function to perform has a right to information

> "reasonably necessary to enable *[him]* properly to perform his duties."[30]

The purpose for which the information is required must, therefore, be within the applicant's duties, and an ulterior motive may be a ground for refusing the information.[31]

321. Statutory rights of inspection may be given, in relation to both private[32] and public bodies, and here the extent of the right depends upon the construction of the statute.[33] Inspection may be allowed for "any legitimate purpose,"[34] so long as the request is not so extensive as to be oppressive.[35] But the courts have sometimes imposed upon unlimited statutory powers of inspection requirements that the applicant show a special ground.[36]

322. The requirements of natural justice[37] sometimes allow an individual to see, and perhaps to challenge, information which would otherwise be considered confidential. Thus a person affected by an exercise of discretion is entitled to know the legal basis for the exercise of power, even if it is contained in circulars from central government to a local authority.[38]

323. Similarly, such a person is entitled to know the policy which is to be applied to his case[39] and is entitled to make representations against the application of the policy in his case at least if he has "something new to say."[40] A person who is likely to be adversely affected by a change of policy may be entitled to know what is proposed and challenge the proposal.[41]

324. An individual may be entitled to see and challenge the accuracy of information on the basis of which he may be deprived of property[42] or of an office[43] or may lose, or not obtain,

> "some right or interest or some legitimate expectation."[44]

This right may, however, be subordinated to the need to protect the givers of information[45] though if it would be unfair to the individual to decide the matter on information which he cannot challenge that information should not be used against him.[46]

Problems and proposals for reform

Effect of restricted rights of access.

325. Problems arise from the restricted categories under which individuals have rights to see governmental information. The limited nature of the special interest required by the courts at common law has failed to grow, as have other areas of law such as natural justice, from a protection of property to a recognition and protection of more general rights. The courts do not recognise a democratic "right to know."[47] The concept of public duty has also failed to keep pace with the realities of democratic life, for example in relation to a local councillor's function of looking after the interests of his constituents.[48] Narrow interpretation of statutory provisions had led to unreasonable[49] and illogical[50] restrictions. These problems will be solved by statutory recognition of the principle, stated in para.310, that the basis of non-disclosure of confidential governmental information is protection of the public interest or the interests of the members; there should be a general right to see such information unless there is good reason for non-disclosure.

Framing a request for information

326. A right to see governmental information which the governing group has not made public may be of little use to the individual unless he knows what to ask for. He knows the subject or area about which he seeks information but may not know the details of what information there is. But if he is simply allowed to ask for everything the right of disclosure will become counter-productive as governmental groups are swamped by requests for large amounts of information, which they may have to gather from various sources, and the individual is swamped, perhaps, by the amount of irrelevant information he receives. In Sweden[51] public documents are those

received by a public body and a system of registration of all documents received has been in force for many years. The public can see the register and so the individual knows what to ask for. A similar system operates in United States of America where it is said to make the provision of information for the public very expensive. An alternative method is to allow the applicant merely to state the area or subject in which he seeks disclosure. This is used in Norway and Denmark. There is some risk of particular documents being excluded; this would be a ground for intervention by whatever policing authority were used. It is proposed that in this country the applicant should only have to state the area or subject if he does not know the particular documents which he requires.

But it would be necessary both to prevent swamping applications and to protect the individual against rejection of his claim on the ground that it was "oppressive."[52] It is therefore proposed that the governmental group should be under an obligation to help the individual to frame his application in a sufficiently precise way by telling him of the types of information covered by his request. Unless they have taken all reasonable steps in this way they should not be able to refuse his request on the ground that it is too wide or too vague. The result of such a provision might be an increase in voluntary cataloguing of information by government departments or in areas where many requests for information were made but there would be no blanket obligation to do this in areas where little public demand for information arises in practice and the expense of cataloguing would be disproportionate to the benefit.

Allowing the individual to "fish."

327. The courts generally disapprove of inspection of information unless the applicant has a special interest or reason out of a desire to discourage litigation by not helping people to "fish" for causes of action. This principle applies in the law of discovery[53] and is a major reason for the requirements of a special interest in seeing public information under the present law. Should it apply in this field? Should information be refused to an individual if there is a chance that he might use it to found an action against the governing group or a third party? It is suggested that the individual has a right not to be illegally treated by the governing group, be it central government, any public authority, or the committee of a club to which he belongs. Just as trustees cannot refuse information to a beneficiary because it might disclose

a breach of trust[54] so neither should a governing group be able to withhold information on the ground that it may disclose a cause of action against them. The question of actions against third parties raises somewhat different considerations and is discussed below (para.346). The fact that the individual may wish to criticise a decision or try to get it changed is also no ground for non-disclosure.

Unfair personal gain.

328. Another reason why information may be refused to an individual is because he may in some way be able to gain an advantage from it. A distinction should be drawn here between an unfair and a fair advantage, and non-disclosure to prevent an unfair advantage should not be used to prevent the disclosure of that information at any time. Thus, general disclosure provisions should not be usable as a way of obtaining in litigation documents which are privileged from disclosure on discovery.[55] This would give one party an unfair advantage over the other. But this should not be a reason for never disclosing reports and advice on the matter after the litigation.[56] Financial profit also may be unfair or fair. Knowledge of planning or development proposals or future buying requirements before they are generally known, or sight of tenders before closing date, might enable the individual to obtain an unfair advantage over others. But an individual who is likely to be adversely affected by the change has a legitimate interest in knowing proposals, even if prior knowledge may enable him to make a gain he would not otherwise have made (for example by selling his house before a compulsory acquisition proposal is finalised) or protect himself against a loss he would otherwise have made (for example by ceasing to produce goods which will no longer be needed).

Change of policy

329. While it is important that the governing group be allowed to govern, which includes changing policies, there are circumstances when a person may be adversely affected by a change of policy, either by not receiving some benefit which he would reasonably expect to receive under the present policy or by losing a benefit which he enjoys under the present policy. Fairness would suggest that he should at least have a chance to make representations against the change of policy.[57] But the numbers of people involved could be so great, and their interests so diverse, that a duty to inform and consult everyone concerned might be so onerous that changes could rarely be made. It is proposed that such a person

should have a sufficient interest to be able to claim to see information relating to a proposed change but if he does not come forward until after the change has been made the fact that he was not consulted should not be a ground for avoiding the change of policy provided that reasonable consultation was made. The onus would then be on the governing group to take reasonable steps to consult affected persons or groups (in the absence of express statutory provisions for consultation) but on the individual to take steps to voice his opinion before the decision was made.

Grounds for restricting access to information

The present law

330. No legal ground is usually necessary for non-disclosure of governmental information because there is usually no prima facie right to receive it. Non-authorisation is a sufficient answer to a request to see such information, though there may be political reasons for seeking to justify non-disclosure.

331. If there is a prima facie right to disclosure of governmental information it may be refused on a ground personal to the applicant.[58]

332. Sometimes information may be refused, even to members of the governing group, on the ground that it was sent to an officer personally, but where the information was sent to the officer by virtue of his office it belongs to the group.[59]

333. Though the House of Commons has in theory unlimited power to question individuals, including Ministers and civil servants, there is not an unlimited power to order production of documents (since the House cannot order the Crown) and in practice Ministers refuse to answer Questions on many areas and may refuse to give information to a Select Committee.[60]

334. If confidential governmental information is sought for legal proceedings disclosure may be refused on the ground that disclosure of the contents of the information would be injurious to the public interest or that non-disclosure of information of the type in question is necessary for the proper functioning of a[61] public service. Public interest privilege no longer applies only to organs of central government and may be applied to any public or private body exercising governmental functions which require non-disclosure in the public interest.[62]

335. The grounds[63] relating to the information on which disclosure may be refused are

a) national security;[64]

b) internal security;[65]

c) endangering the lives of individuals;[66]

d) policy making. The reasons behind this ground may be the preservation of collective responsibility,[67] protection from premature discussion and criticism[68] or protecting advisers.[69]

e) administration. The reasons behind this ground may be the protection of informants[70] or advisers or the need for finality of decisions.[71]

f) information given in confidence. This is only a legal ground for non-disclosure if there is a public interest in the confidentiality which is not outweighed by a public interest in disclosure.[72]

Problems and proposals for reform

The public interest

336. Whatever categories are used to describe information which should not be disclosed, the basis of non-disclosure is the public interest (or member interest for a private body). An item of information may be within a category of non-disclosure but its disclosure may cause no harm, for example, if it is out-of-date[73] or readily obtainable[74] or innocuous in content[75] and there is no overwhelming public interest in the protection of the source of the information. It is proposed that disclosure of such information should not be prevented if it would not in fact be contrary to the public interest or member interest.

Categories of information

337. Between the grounds of non-disclosure it is clear that some disclosures may be more harmful than others. It is proposed that criminal sanctions should attach only to disclosures of the most potentially damaging information with civil liability only for unauthorised disclosure of the less damaging information. Confidential governmental information should therefore be classified under various heads and the heads should be divided into two categories, Category A the more potentially damaging types of information and Category B the less harmful information but for which there may be a limited reason for non-disclosure. The duty to classify should

not, however, apply to private bodies though some at least of the heads of non-disclosure may be applicable.

Oversight of classification and disclosure.

338. The classification of information must be made by the public body concerned but there should be oversight of both the types of information placed within a head and the procedures for classification and declassification. Since classification would involve a restriction on the public right to know such information it is right that, for public bodies, the oversight should be under Parliamentary control. The oversight should take two forms. First, the statute having stated broad heads of protection within each Category, each public body should produce detailed regulations specifying information or classes of information to come within each head and making provision for classification and declassification. These regulations would be subject to approval by both Houses of Parliament. Secondly, for general and continuing oversight of the working of the provisions with responsibility to Parliament it is proposed that an Information Commissioner should be appointed. Rather than use the Parliamentary Commissioner for central government,[76] the Local Commissioners for local government and another, new, Commissioner for other public bodies a single new Commissioner would be able to produce a co-ordinated approach. He would be empowered to investigate the classification procedures of the public bodies in relation to particular items or groups of information and could act at the request of an aggrieved person or a Member of Parliament or of his own volition. His tenure of office and powers would be similar to those of the Parliamentary Commissioner for Administration but without any restriction on seeing Cabinet information.[77] The public bodies would submit Annual and other Returns to the Commissioner who, in turn, would submit an Annual Report to each House of Parliament.

Category A

339. The greatest injuries which could be caused by disclosure of confidential governmental information would be injury to national security, to internal security or to the lives of individuals. National security is a recognised head of protection,and should include relations with other states and international bodies which are on a similar footing. The relevant international bodies may

be defined by reference to the International Organisations Act 1968 section 1. Internal security, though very important, is potentially extremely wide.[78] It is proposed that information within this category should be limited to that relating to or affecting the prevention of subversion[79] or crime or the apprehension or punishment of offenders. Where disclosure of certain information would be likely to endanger the lives of individuals disclosure should not be allowed in spite of any public interest there might be in knowing the information. These are the three head within Category A.

Category B

340. Category B should consist of information for which there may be a good reason, if only for a time, for non-disclosure even though the public injury to be expected from disclosure is not so great as in relation to information within Category A. Disclosure may be restricted by time or by recipients.

a) Policy making

Cabinet deliberations

341. The arguments for refusing disclosure of information relating to policymaking must be balanced against the public interest in knowing what is being done and why and, perhaps, in being able to contribute to a policy decision. Any group feels that its decision will command more respect if it is seen to be unanimous but there is no clear public interest in all cases in non-disclosure of background information, various arguments used in coming to a decision and dissenting views. Indeed in many cases full disclosure of the relevant information would be preferable to the rumours and leaks, whether accurate or untrue, which secrecy generates.[80] The convention of Cabinet collective responsibility requires only that the members adhere to the decision or resign, not that the decision must be assumed to have been unanimous. It may perhaps be difficult for a Minister to adhere to a policy decision if contrary statements made by him on an earlier occasion are known, or to put forward an unorthodox view if he is known to have been defeated before, but such inhibitions cannot be of long duration in public life where peoples' views are usually well known. It is proposed that Cabinet deliberations may be excluded from general disclosure during the currency of the then Parliament[81] but this rule should not be applied

to other governing groups because there is no equivalent "established feature of the English form of government" in relation to other bodies.

Background information on policy

342. The argument that those who must make a policy decision are entitled to keep their proposals quiet to protect themselves from premature discussion and criticism is potentially dangerous. Such a rule insulates the governing group from public or member scrutiny until it is too late, or at least difficult, for the group to go back on its decision. Open discussion at the formative stage is most useful in obtaining an informed and acceptable decision and reliance on pressure groups or assumed attitudes is unsatisfactory.[82] The public (or members) should therefore be able to see background information and the various policy alternatives before a decision has been made, unless of course the information comes within one of the heads of Category A.

Internal discussions on policy

343. The argument for protecting advisers receives much support even from bodies advocating more openness[83] but it has been rejected as a basis for a breach of confidence action[84] and judges have criticised it as a basis for privilege from discovery.[85] Clearly it is excessive, and even insulting, to suggest that an adviser would not give frank advice if at some stage his advice might be made known but there is point in the argument that immediate publicity for internal policy discussions might discourage an adviser or group member from advocating an unpopular or imaginative idea which might be rejected or from allowing himself to be seen to be swayed by other arguments. It is significant in this context that those Select Committees of the House of Commons which hear all their evidence in public nevertheless deliberate in private before producing a report. It is proposed that internal policy discussions should not be generally disclosed before the decision has been made.

b) Administration

Background information on administration

344. The information on which an administrative decision is made may be personal information relating to an individual and it has been proposed in Part I[86] that he should normally be able to see such information but others should not. Similarly background information on the basis of which an administrative decision is

made may be confidential commercial information. In Part II[87] it was proposed that such information should not be generally available. Sometimes background information has been provided by informants and there may be a fear that disclosure of the information would reveal the identity of an informant and he might suffer reprisals or other informers might be discouraged from coming forward.[88] In such circumstances if there is a public interest in receiving information from such sources and the fear is a realistic one[89] the information should not be disclosed. But in other cases a person affected by an administrative decision should be able to know, and check the accuracy of, the information on which the decision is to be based.

Internal discussion on administration

345. Internal discussions on the policy to be applied in an administrative matter should be protected from general disclosure before the decision has been made for the same reasons as discussions on the formulation of policy should be protected.[90] The individual affected by a decision should, however, be able to know the arguments and views of those making the decision. His protection from bias and unfairness is more important than the preservation of absolute frankness among those who decide. There is sufficient protection in such circumstances by the law of qualified privilege against libel. A right to see information and know why an administrative decision has been taken does not imply a change of authority. The decision is still made by the governing person or group. The individual should be able to ensure that information on which the decision is taken is accurate and complete, and that the decision is made without malice or unfairness, but in the end the decision is taken not by him but by the governing person or group.

Information received in confidence

346. Information may have been given in confidence to the governing group. If it is confidential personal or confidential commercial information its protection has already been proposed. It may, however, not be within these categories and yet the governing group may not wish to make it available so as to ensure that the flow of such information is not impeded. Examples of such information would be[91] the views of the third party about the likely effects of a type of decision on groups of the community or

on trade or on the economy or estimates, or statements, of the numbers of people within certain categories. Blanket protection for all such information would mean that the accuracy of the basis of much advice could not be challenged and administrative decisions of consequence to individuals might be made on a basis of erroneous information. It is proposed that if there is a public interest in such information being received by the governing group and the information would not have been given at all[92] if it had not been in confidence[93] the information should not be generally available, but a person with a particular interest in seeing the information because it is to be, or has been, used directly to affect him should be able to see it.

Information privileged in legal proceedings

347. Any statutory provision for the disclosure of information should exclude information which is privileged in legal proceedings, or should exclude the parties and their helpers from the group of disclosees,[94] since otherwise the provision could be used to give a litigant unfair knowledge of his adversary's case and the advantage would usually not be reciprocal.[95] It is suggested, though, that in relation to disclosure of governmental information by a public governmental group the exclusion of all information subject to privilege would be excessive. Legal professional privilege has arisen to facilitate

> "an ignorant man safely resorting to professional advice"[96]

and

> "that he should be able to make a clean breast of it to the gentleman whom he consults"[97]

and the privilege lasts indefinitely.[98] This basis of privilege is inappropriate as a reason for excluding legal advice given to a governmental group, or the information on the basis of which the advice was sought, from scrutiny by those they govern; indeed in a sense legal advice received by such a body may belong to the members.[99] It is proposed that only information which would be privileged from disclosure in pending or current legal proceedings should be excluded from general disclosure. When the proceedings are ended the information should become available,[1] and legal advice received or information prepared for the purpose of obtaining legal advice when no litigation is pending should be no more protected from general or member disclosure than is the advice given by anyone else.

Disclosure of information within Category B

348. Some of the information within Category B may have to be disclosed for a particular purpose under the present law. For example, internal policy discussions may have to be made available to the Parliamentary Commissioner or a Local Commissioner for Administration.[2] Judicial decisions in the areas of discovery and natural justice may also be relevant. It would be unfortunate if these proposed provisions were to restrict judicial activity in the areas of public interest privilege or fairness in administration since the proposed heads give broad general rules but judges are considering the circumstances of a particular case. Thus it is proposed that the proposed restrictions on disclosure of Category B information should be subject to any provisions of another statute or court order authorising or requiring disclosure of information.

Limited disclosure

349. Category B information, for the reasons given above (paras. 341-7), should not be made generally available. The public interest relating to Cabinet information requires total non-disclosure for the limited period proposed in para.341. However there may be good reasons why some people should be able to see information under the other heads before it is generally available. The courts have already shown that fairness in administration does not only apply to people whose property is affected but is of wider application.[3] It is proposed that Category B information (other than Cabinet deliberations) should be made available to a person with a particular interest, whether proprietary or personal, in knowing it. It would thus include the prisoner whose category is changed (subject to non-disclosure of Category A information), the couple refused permission to adopt a baby[4] or listed as potential baby-bashers, the student refused a discretionary grant.[5] It has already been proposed that personal information should normally be seen in such circumstances;[6] it is now proposed that a person affected by a decision should be able to know the discussions and reasons for the decision. To know would enable him to ensure that the decision was fair and taken without bias; it would not transfer the decision from the governing person or group to the individual or the court unless the decision was unfair.

Restrictions on use of the information

350. It would be pointless to refuse general disclosure of information if the particular disclosee could immediately publish it to the world, so it is proposed that the holder of the information should be allowed to impose reasonable restrictions such as the purposes for which it may be used, people to whom it may be disclosed, provisions for return of the information. The reasonableness of restrictions could be investigated by the Information Commissioner either in a particular case on the application of the claimant or in general. For this purpose governing groups subject to his jurisdiction would have to include statements on restrictions imposed in their Annual Returns.

Refusal of disclosure

351. It may, nevertheless, be necessary to refuse disclosure of Category B information in a particular case. If it were thought that early access would give the recipient the chance to make unfair personal gain, which could include sale to a newspaper, the information could be refused. What is an unfair, as opposed to a fair, gain in these circumstances has been discussed above (para.328) in relation to information on policy changes; it is equally applicable in relation to the taking of administrative decisions. As a reason for non-disclosure it would be subject both to judicial review and to review by the Information Commissioner.

The other substantial reason for non-disclosure even to those with a particular interest is in circumstances when it is more important to protect informants from reprisals or to protect the sources of information from being diminished. It has already been seen[7] that some information should be placed within Category B rather than being generally available to protect the supply of such information; in more rare circumstances it may be necessary to prevent disclosure even to those likely to be affected by the information. The circumstances would again be subject to scrutiny by judicial review (a task rather similar to that undertaken by the courts in relation to public interest privilege) and by the Information Commissioner.

Remedies

The present law

a) Remedies against unauthorised disclosure.

352. The Official Secrets Act 1911 section 2 provides criminal liability for unauthorised disclosure of information relating to or emanating from central government. Other statutory provisions may provide criminal liability for unauthorised disclosure, though these usually refer to personal or commercial information.[8]

Since the 1911 Act makes unauthorised retaining or receipt of information an offence[9] criminal proceedings may be taken before any public disclosure has been made. There is thus no need for seeking an injunction against a crime, though this would probably be possible, at least for the Attorney-General, to protect the public interest.[10]

It may be possible to obtain an injunction if the proposed disclosure is not a criminal offence but is a breach of confidence but only if the public interest in non-disclosure is not outweighed by the public interest in disclosure.[11] There may be non-legal sanctions such as complaint to the Press Council. Disclosure may be a ground for dismissal of an employee.[12]

b) Remedies against refusal of disclosure.

353. If the applicant has a statutory right to see information there may be a criminal offence of obstruction of his right.[13] An applicant with a statutory or common law right may seek judicial review of a decision not to let him have the information[14] or the quashing of a decision made in the absence of disclosure.[15]

Problems and proposals for reform

a) Unauthorised disclosure

Criminal liability

354. The incidence of criminal liability for disclosure of governmental information is haphazard and based on irrelevant principles. It is attracted sometimes by matters which are trivial or disclosures which may be in the public interest. Criminal liability should be restricted to cases where it is necessary. The Official Secrets Act 1911 section 2 should be repealed and new provisions[16] should impose criminal liability only where there is likelihood of substantial injury to the public interest arising out of the particular disclosure. Information within Category A is of this kind and it is proposed that unauthorised disclosure of information within Category A should be a criminal offence.

Disclosure or use for profit

355. Under the present law it would be possible for a person to use

confidential governmental information for his own private profit without attracting criminal liability, even where disclosure of the information would be within the Official Secrets Acts.[17] The law of conspiracy or of corruption are sometimes relevant but are not applicable to direct use by the holder of the information alone. This problem arises not only in central and local government[18] but also in private organisations where, for example, an employee or member of a governing group may take advantage of prior or superior knowledge of an impending policy change to make a purchase or sale for his own private gain.[19] There is an injury to the public interest when a person necessarily in a position of prior or superior knowledge takes advantage of that position to profit. On the other hand, there is no injury to the public interest if a person uses information which anyone could know to make a profit for himself. It has already been proposed that all governmental information of a public governmental group which is not in Category A or Category B should be available to the public (para 311); use of such information for profit should not be culpable since anyone could have obtained it. It was proposed above that disclosure of Category A information should be a criminal offence since it is injurious to the public interest; similarly improper use (whether for personal profit or not) should be a criminal offence. Disclosure of information within Category B, though wrongful, should not generally be a criminal offence as the injury to the public interest is less great than in relation to Category A (para 340); however unauthorised disclosure or use of such information for personal gain creates a greater injury to the public interest than the mere making known of the information, for the person who was, on grounds of the public interest, in a position of prior knowledge has abused his position. It is proposed that disclosure or use of information within Category B for personal profit should be a criminal offence comparable to that of disclosure or use of Category A information.[20]

Injunctions

356. Prevention of injury to the public interest is preferable to punishment of offenders afterwards. It is not proposed that mere unauthorised retaining or receipt of information should be offences, as at present, and so no offence would be committed until actual disclosure or use. It is proposed that to avoid any doubt there should be statutory power to grant an injunction

against unauthorised disclosure or use of Category A information by a person who has such information already in his possession.[21] Both an action for an injunction and a prosecution under these provisions should require the consent of the Attorney-General as a check that the seriousness to the public interest of the offence, or contemplated offence, is fully considered.

Breach of confidence or contract

357. Apart from disclosure or use for personal profit, Category B information should be protected only by civil remedies. The disclosure or use may be a breach of confidence or of contract but, because the duty not to disclose is imposed in the public interest rather than because of an agreement or relationship between the parties, liability should only arise if the court is satisfied that at the time of disclosure the public interest in non-disclosure outweighed the public interest in disclosure in the particular case. (Given the limited nature of Category B this condition will usually be satisfied.) For the same reason liability in breach of confidence in this area should not depend on the information having been obtained in confidence by the defendant; by definition the information is confidential in nature and protection is based on the public interest rather than a personal relationship so the necessary ingredient should be knowledge rather than breach of a relationship.

Injunction and damages

358. The court should be able to award an injunction to prevent disclosure or use, or to prevent repetition, and also to award damages in a suitable case though there should be no right to damages. There should also be power to grant an injunction against a third party who obtained the information without knowledge that it was within Category B or that he should not have been given it. The public interest in preventing disclosure is greater than the interest in protecting an innocent third party here even if he was a purchaser. But damages should not be awarded against an innocent discloser or user.

No remedies outside the Categories

359. In order to prevent governing groups withholding information by agreement or imposing excessive requirements of confidentiality it should be provided that no action may be brought for breach of confidence or contract in relation to the disclosure of governmental

information which is not within either Category A or Category B.

b) Refusal of disclosure

Refusal to give information

360. The proposed general right of access to governmental information outside the protected Categories should be enacted and reinforced by a criminal offence for refusal to give the information. This should not be a serious offence, since the person concerned may be a junior official acting on instructions, but an offence like that in Local Government Act 1972 section 228(7).

Refusal to disclose classification

361. As explained above (paras 338,351) the individual should also be able to seek judicial review or investigation by the Information Commissioner on whether refused information was properly classified or whether an exception to disclosure was properly operated. It should therefore also be an offence not to inform the applicant of the category and heading under which the information was classified.

Defences to disclosure

The present law

362. It is a defence to a charge under the Official Secrets Act 1911 section 2 that the defendant communicated the information to a person.

> "to whom it is in the interest of the State his duty to communicate it."[22]

The defence does not include, for example, the revelations in the Press of inaccuracies in a Ministerial statement to Parliament[23] but would, it is thought, include disclosure to the police of serious crime. Beyond that, the extent of a duty to give information (though widely construed as a defence to defamation[24]) is highly uncertain.[25]

363. A person who receives information will not commit an offence under section 2 if he can prove that the communication to him was "contrary to his desire."[26]

364. It is a defence to an action for breach of confidence that the information disclosed iniquity and the disclosure is in the public interest.[27] The extent of the defence is unclear but it would cover, for example, corruption or peculation.

365. It is a defence to an action for breach of confidence relating to the disclosure of governmental information that the public

interest in publication outweighs the public interest in confidentiality in the particular case.[28]

366. It may be a defence to disclosure, whether in breach of confidence, contract or implied undertaking, that the public interest required clarification of a matter of great importance of which there had been no official investigation.[29]

Problems and proposals for reform

Mens rea

367. Under the present law, ignorance of the fact that the information is within the protection of the Official Secrets Acts is no defence to a prosecution under section 2, and neither is belief by a recipient that the disclosure to him was authorised.[30] On general principles a defendant should not be convicted of a criminal offence in the absence of guilty intent. It is proposed that it should be a defence to the new criminal offence that the defendant did not know that the information was within Category A or that he believed that his disclosure was authorised or his use was not improper.

Communication in the public interest

368. Under the present law it is no defence to a prosecution under section 2 that the communication of the information was in the public interest, unless it can be said that it was the defendant's duty to communicate it where he did. Still less is there a defence of a belief that communication was in the public interest. It has already been suggested that it should only be an offence to disclose Category A information if the disclosure would be contrary to the public interest (para.336) (which returns to the prosecution the burden of proof which it had under the 1889 Act). Beyond this it is proposed that no offence should be committed if the defendant believed on reasonable grounds that the communication by him was in the public interest.[31] This is a half-way position between making the offence depend solely on the fact of injury and allowing a defendant, however, misguided, to publish with impunity anything if his motive is honest. The imposition of a test of reasonableness would allow jury control over the question of the public interest rather than the whole question being decided by evidence from government officials. Thus if government were to be more sensitive about secrecy than the public in general this would be reflected in jury verdicts of not-guilty where the

defendant pleaded disclosure in the public interest, but a defendant whose views though honestly held went beyond those of his fellow-citizens would be found guilty. The disadvantage of uncertainty of this test is, it is suggested, outweighed by the advantage of a measure of public control over levels of secrecy.

Profit and public interest

369. It is proposed that the defence of reasonable belief that disclosure or use was in the public interest should also apply to the criminal offence of disclosure or use of Category B information for personal gain. If the disclosure is in the public interest the fact that the discloser profits, by writing a book or being paid by a newspaper or, in the case of disclosure by a newspaper or on television, by increasing revenues does not make it less beneficial. The offence without the defence could have the anomalous effect[32] of penalising the producers of a television programme on Independent but not BBC television where the programme was recognised as highly beneficial so that the existing defences to breach of confidence would apply (paras.364-6). The defence would not avail the sharp purchaser of a quick bargain for himself and, it is thought, would give little encouragement for speculative information-hawking. But it would at least ensure that the fact that the discloser was paid for his information did not totally obscure the public benefit to be obtained from the disclosure.[33]

Defences to breach of confidence and contract.

370. As has been seen in paras.364-6 the relevance of the public interest is being recognised in relation to disclosure of confidential governmental information. However there is as yet little authority on the extent of the defence of disclosure in the public interest. The main provision ensuring that information which should in the public interest be known is made available has already been proposed; an action for breach of confidence or contract could only lie in relation to information within Category B. Nevertheless, even in this limited field it is proposed that the defences should be clarified.

First it should be made clear that the basis of an action in this area is detriment to the public interest so it should be a defence to an action for breach of confidence or of contract that no detriment was caused to the public interest by the disclosure or use.

Second, to ensure that other considerations[34] do not outweigh the freedom to publish information on a serious matter where an official inquiry has been refused, it should be a defence that disclosure at that time was in the public interest and publication was not likely to be authorised at that time.

Disclosure by agreement

371. Much governmental information is kept secret by agreement between members of the governing group. It should normally be possible for a member of that group to agree with his colleagues that he will not keep the information secret. An example is the member who is, to the knowledge of his colleagues preparing to write a book about the work of the group. Rarely, though, the confidentiality of the information is imposed in the public interest and mere agreement of the parties should not override that public interest. For example consent of the other jurors should not prevent the obtaining of an injunction against a newspaper article on their deliberations. It is proposed, therefore, that it should be a defence that donors of information consented to the disclosure or use unless the enforcement of such an agreement would be contrary to the public interest.

Governmental information relating to private bodies

Right of members to information

372. The problems of confidential governmental information are basically the same for private as for public bodies, but the basis of protection of information should be the interests of the members rather than the public interest (above para310). The members should therefore have a basic right to information subject to exceptions. In the case of a private body, however, this basic right should be subject to exclusion or modification by agreement of the members. Thus the provision prevents the governing group from unilaterally refusing information but allows contractual freedom to the members.

Limited disclosure

373. Category A information is not likely to be present in relation to private bodies, but Category B concerns matters common to the governing of all bodies. It is proposed that the principles of limited disclosure of Category B information should be applicable to private bodies. Thus policy discussions on a matter not yet decided may be kept secret from members other than a member likely to be directly affected.

No duty to classify

374. Private bodies should not, however, be under a duty to classify information in advance of requests for disclosure, for this would be unduly onerous. The provisions for Parliamentary control of public bodies (above para.338) are also irrelevant.

Need for detriment

375. There is no public interest reason why disclosure rules should not be modified by agreement of the members, so actions for breach of contract or of confidence may be of wider ambit than in relation to public bodies (cf. para.359 above). But governing groups could themselves impose excessive restrictions by their control of information, for example by disclosing only expressly in confidence. It is therefore proposed that in any action for breach of confidence or contract the plaintiff should be required to show that the disclosure caused detriment to the private body or to another member of the body. Similarly, in a claim for an injunction against proposed disclosure or use the plaintiff should be required to show a likelihood of detriment.

SUMMARY OF RECOMMENDATIONS

The following gives a summary of the recommendations in relation to confidential governmental information. Reference is made to the chapters and the paragraphs of this chapter where the matters are discussed and, where the recommendations involve the need for legislation, to the draft clauses in Appendix A.

a) Access to information

1. The basis of protection of governmental information should be the public interest and the interests of members.
   (Chapter 1 section 2; chapter 2 section 3; para.310.)
2. The Official Secrets Act 1911 section 2 should be repealed and a general right of access to governmental information should be enacted with exceptions based on the public interest.
   (Chapter 2 section 4; para.311; clause 19(1),(2).)
3. Where a statutory right of access is given, the public should be allowed to attend public meetings of governmental bodies to the extent of reasonably available accommodation.
   (Chapter 6 section 2(a); para.315; clause 18(a).)
4. A decision made when the public have been wrongly excluded from such a meeting should be void whether or not anyone has suffered any significant injury.
   (Chapter 6 section 2(a); para.316; clause 18(d).)
5. The public should not be excluded from such a meeting for the discussion of policy or the receipt of advice from officers of the governing group.
   (Chapter 6 section 2(a); para.317; clause 18(c).)
6. An applicant for information should need only to state the area or subject in which he seeks disclosure of information. Reasonable steps should be taken to enable him to frame his request by informing him of the types of information covered by his request.
   (Chapter 2 section 3(c); para 326; clause 19(3).)
7. Subject to exceptions, (below proposals 22,24) an applicant for information should not have to show a special reason for seeing it nor should it be refused for a special reason connected with him. Thus the fact that he might discover a cause of action or might use the information to criticize or challenge a decision or might profit should not be sufficient reasons to prevent disclosure.
   (Chapter 6 section 3(d); paras.327,328; clause 19(4).)

8. A person whose interests may be adversely affected by a change of policy should be entitled to see information relating to a proposed change and make representations, but a change of policy should not be invalidated for non-consultation if reasonable steps to consult were taken.
(Chapter 6 section 3(b); para.329; clauses 23 (3),(4).).

9. There should be a minor criminal offence of refusing to give information to which the applicant is entitled.
(para.360; clause 26(3).)

b) Information to be protected

10. Disclosure of information in a category of non-disclosure should not be prevented if the disclosure would not in fact be contrary to the public interest or member interest.
(Chapter 2 section 3; chapter 1 section 2; para.336; clause 20(1).).

11. Public bodies should be under a duty to classify confidential governmental information which ought not to be disclosed into specified heads within Category A and Category B.
(para.337; clause 20(1) (2).)

12. Each public body should provide detailed regulations for classification and declassification to be subject to approval by both Houses of Parliament.
(para.338; clause 20(2).).

13. An Information Commissioner should be appointed to oversee the classification of information by public bodies.
(para.338; clause 27)

c) Category A

14. Category A information should consist of information relating to national security and relations with other states and international organisations; information relating to the prevention of subversion or crime or the apprehension or punishment of offenders; information the disclosure of which would be likely to endanger the lives of individuals.
(Chapter 2 section 3; para 339; clause 20(3).)

15. Unauthorised disclosure or improper use of information within Category A should be a criminal offence.
(para.354; clause 21(1).)

16. An injunction against such disclosure or use should be obtainable against a person who has the information in his possession.
(para.356; clause 21(4).)

17. Any action should require the consent of the Attorney-General.
(para 356; clause 21(5).)

18. There should be a defence to a prosecution that the defendant did not know that the information was within Category A or believed his disclosure was authorised or his use not improper.
(Chapter 2 section 4; para.367; clause 21(2)(a),(b).)

19. There should be a defence to a prosecution that the defendant reasonably believed that disclosure by him was in the public interest.
(Chapter 2 section 4; para.368; clause 21(2)(c).)

d) Category B

20. Category B information should consist of Cabinet deliberations during the currency of the then Parliament; internal policy discussions in a matter not yet decided, but not policy alternatives or background material; information used in making an administrative decision unless it was provided by informers who must be protected; information given in confidence where there is a public interest in receiving the information and it would not have been received except in confidence; information privileged from disclosure in pending or current legal proceedings.
(Chapter 2 section 3; paras 341-347; clauses 20(4); 23(2)(b).)

21. The restrictions on Category B information should be subject to any provisions of another statute or a court order authorising or requiring disclosure of the information.
(para.348; clause 20(5).)

22. Category B information except Cabinet deliberations should normally be made available to a person with a particular interest, whether proprietary or personal, in seeing it.
(para.349; clause 23(2).)

23. Reasonable restrictions may be placed on his use or disclosure of the information. The Information Commissioner should be able to investigate the reasonableness of restrictions.
(para.350; clauses 23(2); 27(2).)

24. Category B information may be refused if it would give the recipient a chance to make an unfair personal gain or for the protection of informants. Refusal of information should be subject to judicial review and scrutiny by the Information Commissioner.
(paras.328,351; clause 23(2)(a) and (b).)

25. Unauthorised disclosure or use of Category B information for personal profit should be a criminal offence.
(para.355; clause 22(1).)

26. It should be a defence to prosecution that the defendant reasonably believed that his disclosure or use was in the public interest.
(para.369; clause 22(2).)

27. Unauthorised disclosure or use of Category B information should be a breach of confidence (or contract) if the public interest in non-disclosure outweighs the public interest in disclosure in the particular case. Liability in breach of confidence should not depend on the defendant having received the information in confidence.
(Chapter 1 section 2; para.357; clause 24(1),(2).)

28. Injunction and damages may be awarded against a defendant with knowledge, and an injunction but not damages against a defendant without knowledge.
(para.358; clause 24(3),(4).)

29. It should be a defence to an action for breach of confidence or of contract that disclosure of the information caused no detriment to the public interest.
(Chapter 2 section 3; Chapter 1 section 2(c); para.370; clause 25(1).)

30. It should be a defence to an action for breach of confidence or of contract that disclosure of the information at that time was in the public interest and publication was not likely to be authorised at that time.
(Chapter 1 section 3(a)(iv); para.370; clause 25(2).)

31. It should be a defence to an action for breach of confidence or of contract that the donors of the information consented to the disclosure or use unless enforcement of such an agreement would be contrary to the public interest.
(Chapter 1 section 2(b)(iii); para.371; clause 25(3).)

32. No action for breach of confidence or of contract should be brought in relation to the disclosure or use of governmental information relating to a public body which is outside Category A and Category B.
(para.359; clause 24(5).)

33. There should be a minor criminal offence of refusing to disclose a classification of information refused to an applicant.
(para.361; clause 26(3).)

e) Information relating to private bodies

34. Members of a private body should have a basic right to information subject to limited disclosure of Category B information. This right should be subject to exclusion or modification by contract between the members of the body.
(paras.372,373; clauses 28(1),(3).)

35. Private bodies should not be under a duty to classify information before disclosure is sought.
(para.374; clause 28(2).)

36. The plaintiff should have to show detriment to the private body or to a member of the private body in an action for breach of confidence or contract and in an application for an injunction against intended disclosure or use of the information.
(para.375; clauses 28(4),(5).)

NOTES

Nature of Confidential Governmental Information

1. *The word 'group' is used for those who are governing and the word 'members' for those who are governed in this Chapter as in Chapter 6.*

2. *The major example is the imposition of criminal liability for unauthorised disclosure or receipt of information relating to or emanating from central government under the Official Secrets Acts.*

3. *Crown privilege has become public interest privilege, and this is not merely a change of name. Rogers v Home Secretary; Gaming Board for Great Britain v Rogers [1973] A.C.388; D v National Society for Prevention of Cruelty to Children [1977] 1 All E.R.589.*

4. *For example, information which had already been seen in United States of America: The Times July 1 1976 mentioned in Chapter 2 section 2(b).*

5. *For example, the report of a Local Commissioners for Administration which must be made available by the local authority for three weeks: Local Government Act 1974 section 30(2),(4),(5) discussed in Chapter 6 section 3(e).*

6. *Part I paras.113-115; Part II para.214.*

7. *see note 1.*

8. *Shils: The torment of secrecy 1956 pub. Heinemann; Sunday Times March 14 1976 article discussed in Chapter 6 section 2(b).*

9. *Parliament has not been inactive. Rights to attend meetings have been extended and some statutes give rights to see information on particular matters.*

10. *Particularly, in this context, Official Secrets Act 1911 section 2. The fallacy of basing protection on the identity of the holder is discussed in Chapter 2 section 3(d).*

Attendance at meetings

11. *Tenby Corporation v Mason [1908] 1 Ch.457.*

12. *Discussed, in relation to the House of Commons, in Chapter 7 Part B section 1.*

13. *Public Bodies (Admission to Meetings) Act 1960; Local Government Act 1972 section 100. The provisions are discussed in Chapter 6 section 2(a).*

14. *[1975] 1 All E.R.379 discussed ibid.*

15. *The press were allowed to remain.*

16. *Public Bodies (Admission to Meetings) Act 1960 section 1(2).*

17. *For example Sunday Times March 14 1976.*

18. *[1975] 1 All E.R.379.*

19. *Ibid.*

20. *Discussed in Chapter 6 section 2(b).*

21. *For example Lord Salmon in Rogers v Home Secretary [1972] 2 All E.R. 1057,1071. The matter is discussed in relation to civil servants in Chapter 2 section 3.*

Access to information

22. *R v Master & Wardens of the Merchant Tailors' Company (1831) 2 B. & Ad.115.*

23. *Lord Wrenbury in O'Rourke v Darbishire [1920] A.C.581.*

24. *R v Justices of Staffordshire (1837) 6 Ad. & El.84.*

25. *Both the Merchant Tailors case and the Justices of Staffordshire case concerned allegations of misuse of money.*

26. *R v Merchant Tailors' Company (above)*

27. *Re Londonderry's Settlement. Peat & others v Walsh [1964] 3 All E.R.855.*

28. *Bristol Corporation v Cox (1884) 26 Ch.D.678 suggesting that the Corporation might be trustees for the ratepayers of information relating to the rates.*

29. *Lindley L.J. in Mutter v Eastern and Midlands Railway Company (1888) 38 Ch.D.92; Conway v Petronius Clothing Co. Ltd. [1978] 1 All E.R. 185.*

30. *R v Barnes Borough Council ex parte Conlan [1938] 3 All E.R.226.*

31. *R v Hampstead Borough Council ex parte Woodward (1917) 15 L.G.R. 309 and other cases discussed in Chapter 6 section 3(d).*

32. *for example Companies Act 1948 sections 87,105,113,146.*

33. *Mutter v Eastern and Midlands Railway Company (above)*

34. *ibid at 105 Lindley L.J.*

35. *Evans v Lloyd [1962] 1 All E.R.239.*

36. *especially R v Bradford on Avon Rural District Council ex parte Thornton (1908) 99 Law Times 89 discussed in Chapter 6 section 2(c).*

37. *Discussed in Chapter 6 section 3(a)-(c); and Chapter 7 Part C.*

38. *Blackpool Corporation v Locker [1948] 1 All E.R.85.*

39. *Lavender (H) and Son Ltd. v Minister of Housing and Local Government [1970] 3 All E.R.871.*

40. *British Oxygen Co Ltd v Minister of Technology [1971] A.C.610.*

41. *Re Liverpool Taxi Owners Association [1972] 2 All E.R.589.*

42. *Cooper v Wandsworth Board of Works (1863) 14 C.B.(N.S.) 180.*

43. *Ridge v Baldwin [1964] A.C.40.*

44. *Breen v Amalgamated Engineering Union [1971] 2 Q.B.175.*

45. *Re D (Infants) [1970] 1 All E.R.1088.*

46. *Re Pergamon Press [1970] 3 All E.R.535.*

47. *There are exceptions, such as Evershed L.J. in Blackpool Corporation v Locker [1948] 1 All E.R.85.*

48. *Discussed in Chapter 6 section 3(d). The law of qualified privilege in libel has been more realistic e.g. Beach v Freeson [1971] 2 All E.R.854 discussed in Chapter 7 Part B.*

49. *R v Bradford on Avon Rural District Council ex parte Thornton (above)*

50. *Wilson v Evans [1962] 1 All E.R.247 discussed in Chapter 6 Section 2(c).*

51. An outline of the various provisions is given in Chapter 2 section 3(c).

52. The court might refuse judicial review on this ground although the statute did not restrict the right of disclosure. Evans v Lloyd [1962] 1 All E.R.239.

53. Discussed in Chapter 3 Part A section 1.

54. In re Mason (1883) 22 Ch.D.609.

55. As in R v Hampstead Borough Council ex parte Woodward (1917) 15 L.G.R.309. See further below para.347.

56. Even more so, documents disclosed on discovery should be generally available after the litigation. cf. Distillers Co. (Biochemicals) Ltd. v Times Newspapers [1975] 1 All E.R.41. for confidential commercial information.

57. Re Liverpool Taxi Owners' Association [1972] 2 All E.R.589. discussed in Chapter 6 section 3(b).

Grounds for restricting access to information

58. Discussed above paras.319-328.

59. Blackpool Corporation v Locker [1948] 1 All E.R.85.

60. The restrictions are discussed in Chapter 7 Part B section 2.

61. In Conway v Rimmer [1968] 1 All E.R.874 Lord Reid in formulating this test, spoke of "the public service." Subsequent extensions of public interest privilege, it is submitted, make it proper to speak of "a public service," meaning any service provided in the public interest whether by a public authority or not.

62. Rogers v Home Secretary [1973] A.C.388; D v NSPCC [1977] 1 All E.R.589.

63. Discussed in Chapter 2 section 3(a).

64. Conway v Rimmer (above)

65. Auten v Rayner [1958] 3 All E.R.566 (but not automatically).

66. R v Home Secretary ex parte Hosenball [1977] 3 All E.R.452.

67. Attorney-General v Jonathan Cape Ltd. [1975] 3 All E.R.484.

68. Conway v Rimmer (above)

69. Report of the Fulton Committee on the Civil Service (1968) Cmnd. 3638 para.279.

70. Rogers v Home Secretary [1973] A.C.388.

71. Ellis v Deheer [1922] 2 K.B.113 (jury).

72. Attorney-General v Jonathan Cape Ltd. (above.)

73. For example the National Coal Board forecasts sought by Nottinghamshire County Councillors.

74. For example the European Commission document refused to Parliament.

75. For example R v Crisp and Homewood (1919) - army clothing contracts.

76. As proposed by Justice: Freedom of Information 1978. His jurisdictional restriction to cases where an individual has 'sustained injustice' could be almost as inhibiting as the old common law rules.

77. *Parliamentary Commissioner Act 1967 section 8(4).*

78. *Discussed in Chapter 2 section 3(a).*

79. *Defined as "contemplat[ing] the overthrow of the Government by unlawful means" (1963) Cmnd.2152 para.230.*

80. *Though disclosure may be risky. A television series, filming all stages of the process, showed clearly how unrelated to the evidence or argument were policy decisions taken by the British Steel Corporation and by a local authority.*

81. *The reasons for this period are discussed in Chapter 2 section 4(b).*

82. *As when the Cabinet assumed a certain trade union reaction to Child Benefit proposals.*

83. *For example the Fulton Report (1968) Cmnd.3638 para.279; the Franks Report (1972) Cmnd.5012 Chapter 11.*

84. *Attorney-General v Jonathan Cape [1975] 3 All E.R.484.*

85. *For example Lord Salmon in Rogers v Home Secretary [1972] 2 All E.R.1057.1071.*

86. *para.123.*

87. *para.214.*

88. *as in Rogers v Home Secretary (above.)*

89. *cf. Norwich Pharmacal Co. v Commissioners of Customs [1973] 2 All E.R.943.*

90. *Above para.343.*

91. *Most of the examples discussed in the text are of personal or commercial information. Possible examples of other information could have been the views of the Trade Unions Congress leaders on what their members would think of Child Benefit payments (leaked Cabinet minutes indicated that the views were assumed rather than sought) and (as alleged) information about the unsuitability of other sites for the mining of a particular mineral (English China Clay's evidence was heard in secret to preserve their commercial secrets so the consequential information was not tested by objectors).*

92. *Thus excluding information given under a statutory duty. If Parliament considers such protection necessary it can be written into the statutory provision. The Justice report The Law and the Press (1965) drew the distinction but the Franks Committee did not. Chapter 2 sections 3(a),4.*

93. *This test has been proposed above where statutory provisions exclude from disclosure commercial information given 'in confidence' para.216.*

94. *As is effectively done by the common law exclusion of an applicant with an ulterior motive: R v Hampstead Borough Council ex parte Woodward (1917) 15 L.G.R.309; above para.320.*

95. *Unless the information held by both parties was affected by the provision.*

96. *Greenough v Gaskell (1833) 1 My.& K.98.*

97. *Anderson v Bank of British Columbia (1876) 2 Ch.D.644.*

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

99. *Bristol Corporation v Cox (1884) 26 Ch.D.678 because the members (ratepayers) have paid for it, on analogy with the ownership of trust documents, including counsel's opinions, by beneficiaries.*

1. *For example, the public could now know the advice of the law officers on why Crossman's executors could not be prosecuted under the Official Secrets Acts. Information within Category A, or another head of Category B, would of course still be protected.*

2. *Parliamentary Commissioner Act 1967 section 8(1),(3); Local Government Act 1974 section 29(1), (3), (4) but cf. section 32 (3).*

3. *Discussed in Chapter 6 section 3(c).*

4. *ibid.*

5. *cf. De Smith: Judicial Review of Administrative Action page 141 who would not allow disclosure when it is a matter of allocation of scarce resources.*

6. *above Part I paras.123-8.*

7. *para.346.*

Remedies

8. *For example Sex Discrimination Act 1975 section 61(2). could include governmental information.*

9. *Official Secrets Act 1911 section 2(1)(b); section 2(2).*

10. *Edwards: The Law Officers of the Crown pub. Sweet & Maxwell 1964 page 287 et.seq.*

11. *Attorney-General v Jonathan Cape Ltd. [1975] 3 All E.R.484.*

12. *for example Mr Thornley discussed in Chapter 2.*

13. *For example Local Government Act 1972 section 228(7).*

14. *For example R v Hampstead Borough Council ex parte Woodward (1917) 15 L.G.R.309.*

15. *For example Ridge v Baldwin [1964] A.C.40.*

16. *Principles of liability are discussed in Chapter 2 section 3.*

17. *Franks Report (1972) Cmnd.5104 para.204.*

18. *The Committee on Conduct in Local Government (1974) Cmnd.5636, paras.84-87 recommended a criminal offence for members and officers.*

19. *The White Paper: Changes in Company Law (1978) recommends a criminal offence for insider trading in companies.*

20. *The Royal Commission on Standards of Conduct in Public Life (1976) Cmnd.6524 para.193 proposed such an offence for corrupt misuse of official information.*

21. *There was such a provision in the 1908 Bill.*

Defences to disclosure

22. *Section 2(1)(a).*

23. *R v Cairns, Roberts and Aitken (1971) discussed in Chapter 2 section 2.*

24. *Discussed in Chapter 7 Part B section 5.*

25. *See discussion in Chapter 4 section 2(d) and proposals concerning the disclosure of personal information (above Part I).*

26. *Section 2(2). This presumably requires active protest rather than mere involuntary receipt.*

27. *Church of Scientology v Kaufman [1973] R.P.C.635*

28. *Attorney-General v Jonathan Cape Ltd. [1975] 3 All E.R.484,495.*

29. *Opinion of the European Commission on Human Rights in relation to the documents on Thalidomide disclosed on discovery 1977 New L.J.749 and Wallersteiner v Moir [1974] 3 All E.R.217,230.*

30. *The secretary to the Cabinet thought this unimportant; "They can always ask."; Franks Report Volume 3 page 318. His evidence indicated that the extent of implied authorisation is unclear.*

31. *This proposed defence is discussed in Chapter 2 section 4(a).*

32. *As would the proposal of the Franks Committee para.205. discussed in Chapter 2 secti on 4(b).*

33. *cf. The strictures of Lord Denning M.R. in Initial Services Ltd. v Putterill [1967] 3 All E.R.145,149 criticized in Chapter 1 section 3(a)(i).*

34. *Such as preventing abuse of discovery: Distillers Co. (Biochemicals) Ltd. v Times Newspapers [1975] 1 All E.R.41.*

APPENDIX A

CONFIDENTIAL INFORMATION (AVAILABILITY) BILL

ARRANGEMENT OF CLAUSES

25. Defences

26. Supplementary provisions

27. Information Commissioner

Governmental Information relating to the Affairs of Private Bodies

28. Private Bodies.

CONFIDENTIAL INFORMATION (AVAILABILITY) BILL

Draft of a

BILL

to

Amend the law with respect to the protection and disclosure of confidential information.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Part I

DEFINITIONS

1. Confidential Personal Information

(1) For the purposes of this Act "confidential personal information" is information relating to the personal life of an individual including his circumstances and personal activities and -

(a) not ascertainable from sources available to the public; or

(b) disclosed or discovered within a relationship of confidence; or

(c) disclosed or obtained for a particular purpose only.

(2) A relationship of confidence exists where the information would not be disclosed or discovered except for the relationship and the protection of the relationship is in the public interest.

(3) Information is presumed to be given for a particular purpose only if -

(a) the nature of the information is such that a person would not be expected to volunteer it readily and there is a public interest inthe purpose for which the information is given; or

(b) the information is given for a purpose under compulsion or persuasion.

(4) In this Act "the owner" of confidential personal information means the person to whom the information relates.

EXPLANATORY NOTES

Clause 1

1. This clause implements the recommendations in paragraphs 113,114, 116 in Part I of the Conclusions.

2. Sub-clause (1) defines "confidential personal information" both in terms of the content of the information and in relation to the circumstances which make it confidential. It brings within the Bill information which has not been disclosed or discovered as well as

information which has.

3. Sub-clause (2) explains what is meant by a "relationship of confidence," giving effect to Argyll v Argyll [1965] 1 All E.R.611.

4. Sub-clause (3) clarifies the circumstances when information given for a purpose but not within a confidential relationship should be treated as confidential information. Clause 8 explains the permissible disclosure and use of such information.

5. Sub-clause (4) gives effect to the basic principle that the person to whom the information relates should have rights in respect of it.

2. Confidential Commercial Information

(1) For the purposes of this Act "confidential commercial information" is information which is of significant actual or potential commercial value to the owner or the disclosure of which would cause substantial injury to his undertaking and -

(a) not ascertainable from sources available to the public; or

(b) disclosed to or discovered by a person owing a duty of fidelity to the owner in respect of such information; or

(c) disclosed or discovered for a particular purpose; or

(d) disclosed expressly in confidence; or

(e) disclosed or discovered in circumstances where a reasonable person would recognise that the information was being obtained in confidence.

(2) In this Act "the owner" of confidential commercial information means the inventor or discoverer of the information or as the case may be the proprietor of the undertaking in which the information is of significant value or in which the loss of the information would cause substantial injury or to which the information relates.

(3) For the purposes of this Act a person obtains confidential commercial information "in confidence" if he obtains it by a disclosure or discovery within subsection (1) of this section.

(4) Notwithstanding any rule of law to the contrary the right of confidentiality attaching to confidential commercial information may be assigned by the owner with the information in the same manner as if the right of confidentiality were a legal thing in action.

EXPLANATORY NOTES

Clause 2

1. This clause implements the recommendations in paragraphs 201-8, 210 in part II of the Conclusions.

2. Sub-clause (1) defines "confidential commercial information" both in terms of the content of the information and in respect of the circumstances which make it confidential. Paragraph (e) gives effect to the test proposed in Coco v A.N.Clark (Engineers) Ltd. [1969] R.P.C.41.

3. Sub-clause (2) defines "the owner" of confidential commercial information without need to decide whether such information may accurately be described as property.

4. Sub-clause (4) implements the recommendation in paragraph 210 by making the right of confidentiality assignable with the information. The method of assignment for legal things in action is provided by the Law of Property Act 1925 section 136.

3. Confidential Governmental Information

For the purposes of this Act "confidential governmental information" is information relating to policy making or administration of any body of persons corporate or unincorporate and which has not been made available to the members of the body.

EXPLANATORY NOTES

Clause 3

1. This clause implements the recommendations in paragraphs 301-5 in Part III of the Conclusions.

2. The clause makes clear that "confidential governmental information" may relate to the governing of any body of persons.

3. Information of this kind is within the provisions of the Bill simply if it has not been made available. Part IV of the Bill regulates its disclosure or use on the basis of its content.

4. Supplementary Provisions

(1) It is hereby declared that information which is in the public domain is not confidential information within this Act. Information is in the public domain if it is a matter of public record open to public inspection or is generally known or readily ascertainable by those who would wish to know it but information known to some people otherwise than by public disclosure by the owner and not known to a substantial number of those who would wish to know it is not in the public domain.

(2) Information which has been disclosed without requirement of confidentiality or in circumstances which negative confidentiality cannot be made confidential within this Act by unilateral declaration of the original discloser or of a subsequent holder.

(3) In this Act "surreptitious taking" means secret and unauthorised taking and "surreptitious taker" and "takes surreptitiously" shall be construed accordingly.

(4) In this Act "the holder" of confidential information includes a subsequent recipient of confidential information whether for valuable consideration or not.

(5) The provisions of this Act do not except where expressly stated affect the validity of express contractual agreements of confidentiality.

EXPLANATORY NOTES

Clause 4

1. This clause makes general provisions applicable to all three kinds of information.

2. Sub-clause (1) limits confidential information to information which is not generally known, though it may be known to some people.

3. Sub-clause (2) prevents a holder later imposing an obligation of confidentiality.

4. Sub-clause (3) defines "surreptitious taking".

5. Sub-clause (4) makes clear that "the holder" of confidential information may be the original holder or a subsequent donee or purchaser.

6. Sub-clause (5) generally allows express contracts to vary the provisions of the Bill, though clause 24(5) forbids contractual variation of the provisions of the Bill concerning governmental information relating to public bodies.

Part II

CONFIDENTIAL PERSONAL INFORMATION

5. The Owner

(1) The owner of confidential personal information shall have a right not to disclose that information except as provided in this Act.

(2) No penalty or disqualification shall be imposed by reason only of the refusal of the owner of confidential personal information to disclose such information unless the person seeking the information can show either -

(a) that the owner was under a duty to disclose it; or

(b) that the information was reasonably required for the purpose for which it was sought.

(3) Where any existing enactment imposing a duty to give information does not expressly provide that a person shall not be excused from giving any information on the ground that to do so may incriminate that person or his spouse and does not provide that any information given by a person shall not be admissible in evidence against that person or his spouse in any proceedings or class of proceedings, that enactment shall be construed as conferring on a person a right to refuse to give information which would tend to incriminate that person or his spouse unless a court is satisfied that the information is necessary for the purpose of the enactment in question and cannot be obtained elsewhere.

(4) Where any existing enactment provides that a person shall not be excused from giving any information on the ground that to do so may incriminate that person or his spouse but does not expressly provide that any information given by a person shall be admissible in evidence against that person or his spouse, that enactment shall be construed as providing that any information given by a person shall not be admissible in evidence in subsequent proceedings against that person or his spouse unless a major aim of the enactment would otherwise be frustrated and the court is satisfied that the information was freely and fairly given.

EXPLANATORY NOTES

Clause 5

1. This clause implements the recommendations of paragraphs 110,111, 112 in Part II of the Conclusions.

2. Sub-clauses (1) and (2) provide a general right not to give confidential *personal information and protection from consequent penalties.*

3. Sub-clauses(3) and (4) provide presumptions against disclosure of incriminating information. They are based on Civil Evidence Act 1968 section 14.

6. The Surreptitious Taker

A person who takes surreptitiously personal information relating to another shall have no right to disclose or make use of that information without the express consent of the owner.

EXPLANATORY NOTES

Clause 6

1. This clause clarifies the existing law as described in paragraph 105.

2. The information protected by this clause need not be confidential information within clause.1.

7. The Holder

The holder of confidential personal information shall not disclose or use that information except with the consent of the owner or as provided in the following sections of this Part of this Act.

EXPLANATORY NOTES

Clause 7

This clause provides the general duty on the holder of confidential personal information.

8. Presumed Consent

(1) The owner of confidential personal information within section 1 (1)(b) or (c) shall be presumed to have given his consent to further disclosure or use -

(a) for the purpose for which the information was obtained; or

(b) for purposes reasonably incidental to or related to that purpose; or

(c) for research or statistical purposes or other public purposes provided that the information is disclosed or used in a form which does not reveal the identity of the owner or whether alone or in conjunction with other information enable his identity to be ascertained.

(2) The presumption of consent within sub-section (1) may be rebutted by -

(a) express refusal of consent by the owner of the information; or

(b) a publicised policy of the original recipient of the information; or

(c) express promise of non-disclosure by the original recipient.

Provided that a subsequent holder of the information shall be entitled to assume that no such express refusal or express promise was made unless he knows or ought to have known to the contrary.

EXPLANATORY NOTES

Clause 8

1. This clause implements the recommendations of paragraphs 115 and 145.

2. Sub-clause (1) specifies the circumstances where consent to disclosure or use of confidential personal information may be presumed.

3. Sub-clause (2) allows rebuttal of the presumption of consent but protects a subsequent holder of the information who does not know the presumption has been rebutted.

9. Authorisation of disclosure

(1) The owner or holder of confidential personal information shall disclose that information if required to do so by -

(a) a duty imposed by express statutory provision or rule of law; or

(b) a court order; or

(c) an order of either House of Parliament for the purpose of a proceeding in Parliament

Provided that the holder of such information may require a court order before disclosing it to a third party for legal proceedings if the information was obtained within his confidential relationship or he has reason to believe that this sources of information may be adversely affected by the disclosure.

(2) A person who in the course of his employment obtains confidential personal information about a member of the organisation shall be under a duty to disclose that information to prevent foreseeable injury to other members of the organisation or third parties affected by his work in the organisation.

(3) The holder of confidential personal information may disclose or use the information if empowered to do so by an enforceable term of any agreement.

EXPLANATORY NOTES

Clause 9

1. This clause implements the recommendations of paragraphs 140 and 141.

2. Sub-clause (1) sets out the general duties to disclose confidential personal information as in the existing law but allows the holder to seek a court order before disclosing to a third party for legal proceedings to protect a confidential relationship or his sources of information.

3. Sub-clause (2) imposes a duty in employment to disclose information to prevent foreseeable injury. (cf. the defence in other circumstances; clause 11(1)(b), 11(2)(b).)

10. Duty to Disclose to the Owner

(1) The holder of confidential personal information shall disclose that information to or at the request of the owner of the information or if the owner is a minor to his parent or guardian unless -

(a) the disclosure of the information would be harmful to the interests of a minor or other person in a position of special vulnerability Provided that the fact that the owner of the information is undergoing or is about to undergo medical treatment is not a ground for refusing disclosure of information necessary for his consent to such treatment; or

(b) non-disclosure is necessary in the interests of national security; or

(c) disclosure of the information would reveal the identity of informants and

(i) the supply of such information is necessary for a public purpose and

(ii) the supply would be likely to diminish as a result of such disclosure or

(iii) the informants would be likely to suffer reprisals.

Provided that the likelihood that an informant may be sued in defamation or that the information may reveal a cause of action hitherto unknown to the owner shall not be a sufficient reason for refusing disclosure.

(2) The Secretary of State may by order provide for such exceptions to the disclosure provisions of sub-section (1) as seem to him appropriate in such cases or classes of case as may be specified in the order. The power to make such an order shall be exercisable by statutory instrument and shall be subject to approval by each House of Parliament.

(3) Where a request is made under sub-section (1) to see information which is not exempt from disclosure by virtue of an order under sub-section (2) the question whether such information comes within an exception in sub-section (1) shall be determined by a County Court or High Court judge who shall inspect the information and hear such evidence as he thinks fit. The evidence may be heard in private by the judge.

(4) The holder of the information shall normally pay the costs of any application within sub-section (3).

(5) Any disclosure of information under this section shall not give rise to proceedings in defamation unless the disclosure is proved to be made with malice.

(6) A holder of confidential personal information who refuses to disclose the information under this section without cause shall be liable on summary conviction to a fine not exceeding £20.

EXPLANATORY NOTES

Clause 10

1. This clause implements the recommendations of paragraphs 123-132.

2. The clause provides a basic right to see information relating to oneself or one's child with machinery to enforce the right.

3. Grounds for non-disclosure are set out in sub-clause (1) and in sub-clause (2) the Secretary of State is empowered to exempt items or classes of information subject to the approval of Parliament.

4. Sub-clauses (3) and (4) provide for the question whether information is within a ground of non-disclosure to be decided by a court, sitting in private if necessary, and for the costs normally to be paid by the holder.

5. Sub-clause (5) protects the discloser from the possibility of liability in defamation for infected malice.

6. Sub-clause (6) makes non-disclosure without cause a criminal offence similar to that in Local Government Act 1972 section 228(7).

11. Defences to disclosure

(1) In an action for breach of contract arising out of the disclosure of confidential personal information it shall be a defence -

(a) that the disclosure was made for the vindication of the defendant's character or activities and the extent and method of disclosure was appropriate for that purpose;

(b) that the disclosure was made for the purpose of preventing foreseeable injury to a third party and the extent and method of disclosure was appropriate for that purpose;

(c) that the disclosure was made for the protection of the interests of the defendant and the extent and method of disclosure was appropriate for that purpose Provided that this ground for disclosure may be excluded by the contract;

(d) that the agreement not to disclose the information is void as contrary to public policy.

(2) In an action for breach of confidence arising out of the disclosure of confidential personal information it shall be a defence -

(a) that the disclosure was made for the vindication of the defendant's character or activities and the extent and method of disclosure was appropriate for that purpose;

(b) that the disclosure was made for the purpose of preventing foreseeable injury to a third party and the extent and method of disclosure was appropriate for that purpose;

(c) that the disclosure was made in the reasonable belief that it was in the interests of the subject and it was not practicable to obtain his consent but the defendant had no reason to believe that his consent would be refused and the extent and method of disclosure was appropriate for that purpose;

(d) that the disclosure was made for the protection of the interests of the defendant and the extent and method of disclosure was appropriate for that purpose;

(e) that if the subject matter disclosed had been the subject matter of a contract of non-disclosure between the plaintiff and the defendant that contract would have been void for illegality.

(3) In an action for breach of confidence arising out of the use or disclosure of confidential personal information -

(a) it shall be a defence to a claim for damages that the defendant received the information in good faith and in a reasonable

belief that it was acquired without any breach of confidence or contract and not surreptitiously;

(b) it shall be a defence to a claim for a final injunction that the defendant received the information in good faith and in a reasonable belief that it was acquired without any breach of confidence or contract and not surreptitiously unless the information was acquired through a confidential relationship which it is in the public interest to protect or it was acquired surreptitiously;

(c) a perpetual injunction may be granted only if the information was acquired through a confidential relationship which it is in the public interest to protect or it was acquired surreptitiously.

EXPLANATORY NOTES

Clause 11

1. This clause implements the recommendations of paragraphs 142-145, 150 and 151.

2. Sub-clause (1) provides defences to action for breach of contract and sub-clause (2) provides defences to action for breach of confidence.

3. Sub-clauses (1)(a) and (2)(a) follow the decision in Scott v Scott [1913] A.C.417. The extent of permissible disclosure within the defence is limited by an objective test.

4. Sub-clauses (1)(b) and (2)(b) provide a new defence (cf the duty in employment under clause 9(2).)

5. Sub-clauses (1)(c) and (2)(d) follow the decision in Tournier v National Provincial and Union Bank of England [1924] 1 K.B.461.

6. Sub-clause (1)(d) follows the decision in Howard v Odhams Press Ltd. [1938] 1 K.B.1.

7. Sub-clause (2)(c) provides a new defence of protecting the interests of the subject where consent could not be obtained.

8. Sub-clause (2)(e) provides a defence to breach of confidence on similar grounds to illegality in contract.

9. Sub-clause 3 restricts the remedies available against a third party defendant who received the information in good faith and without knowledge of breach of contract or confidence except where the public interest in protecting relationships of confidence or discouraging surreptitious taking intervenes.

Part III

CONFIDENTIAL COMMERCIAL INFORMATION

12. The Surreptitious Taker

A person who takes surreptitiously information of commercial value to the owner shall have no right to disclose or make use of that information to the detriment of the owner without his consent.

EXPLANATORY NOTES

Clause 12

1. This clause implements the recommendations of paragraph 209.

2. The information need not be confidential commercial information within clause 2.

3. Remedies against a surreptitious taker or subsequent holder from him are provided in clause 17(1).

13. The Holder

(1) The holder of confidential commercial information shall not take unfair advantage of the information.

(2) A holder of confidential commercial information who received the information for a particular purpose shall not disclose or make use of the information to the detriment of the owner without the consent of the owner except for the purpose for which he received it or under a court order.

(3) It shall be a defence to an action for breach of confidence or contract arising out of the disclosure or use of confidential commercial information within sub-section (1) or (2) of this section -

(a) that the disclosure or use did not cause any detriment to the plaintiff; or

(b) that at the time of the disclosure or use the information was generally known or had been made publicly available by the plaintiff and the defendant had not taken unfair advantage of his prior knowledge.

(4) Notwithstanding the provisions of sub-sections (1) and (2) of this section a holder of confidential commercial information who received the information for purposes of his own whether under statutory powers or not shall not disclose or make use of the information without the consent of the owner except -

(a) for the purpose for which he received it; or

(b) under authorisation by or under another statute; or

(c) under a court order.

(5) An employee whose contract of employment makes no valid provision concerning the use or disclosure of confidential information shall not take surreptitiously information of commercial value to the employer or use or disclose except in the course of his employment confidential commercial information which a reasonable employee would recognise as the property of his employer.

(6) Subject to sub-section (7) of this section a contract of employment which contains valid provisions concerning the use or disclosure of confidential commercial information shall not be construed as containing by implication any further terms concerning such use or disclosure.

(7) An employee or ex-employee shall not use or disclose confidential commercial information belonging to a third party to which he had access in the course of his employment where he can reasonably foresee that such use or disclosure would be likely to cause injury or financial loss to the employer or the third party.

(8) A partner shall not make use of partnership information of commercial value to the partnership without the consent of the other partners.

EXPLANATORY NOTES

Clause 13

1. This clause implements the recommendations of paragraphs 224, 226, 228-231.

2. Sub-clauses (1) and (2) provide general duties on the holder of confidential commercial information not to take unfair advantage of it or disclose or use it to the detriment of the owner.

3. Sub-clause (3) gives general defences of no detriment or public knowledge. Clause 15(4) applies the defence of no detriment to constructive trusts.

4. Sub-clause (4) imposes a stricter duty of non-disclosure on a holder for purposes of his own.

5. Sub-clauses (5) and (6) concern the duties of employees and incorporate the test suggested in Printers and Finishers Ltd. v Holloway [1964] 3 All E.R.731 in the absence of express provision.

6. Sub-clause (7) imposes a new duty on employees not to disclose information belonging to a third party, thus dealing with the problem raised in Easton v Hitchcock [1912] 1 K.B.535.

7. Sub-clause (8) states the duty of partners following Aas v Benham [1891] 2 Ch.244.

14. Duty to disclose

(1) The owner or holder of confidential commercial information shall disclose the information if required to do so by -

(a) a duty imposed by or under another statute or rule of law; or

(b) a court order; or

(c) an order of either House of Parliament for the purpose of a proceeding in Parliament; or

(d) an enforceable term of any agreement.

(2) A court shall not require the disclosure of confidential commercial information recieved by the holder for purposes of his own if the court is satisfied that -

(a) the supply of information to the holder is necessary for a public purpose and

(b) the supply of such information would be likely to diminish as a result of the disclosure or

(c) the supplier or suppliers of such information would be likely to suffer reprisals or financial loss as a result of the disclosure.

EXPLANATORY NOTES

Clause 14

1. Sub-clause (1) sets out the general circumstances imposing a duty to disclose confidential commercial information.

2. Sub-clause (2) provides for non-disclosure to protect informers embodying the principles in Rogers v Home Secretary [1972] 2 All E.R. 1057; Norwich Pharmacal Co. v Commissioners of Customs [1973] 2 All E.R.943. Crompton v Commissioners of Customs [1973] 2 All E.R.1169; D v NSPCC [1977] 1 All E.R.589. Similar provision is made in Part I (clause 10 (1)(c).) and Part III (clause 23 (2)(b).).

15. Defences to disclosure or use

(1) In an action for breach of confidence or contract arising out of the disclosure of confidential commercial information it shall be a defence -

(a) that the disclosure was made for the purpose of preventing foreseeable injury to a third party or fraud on the public and the extent and method of disclosure was appropriate for that purpose;

(b) unless this ground for disclosure is excluded by an enforceable term of any agreement that the disclosure was made for the protection of the interests of the defendant and the extent and method of disclosure was appropriate for that purpose;

(c) that the disclosure was of substantially true information and the only detriment suffered by the plaintiff arises from the justifiable devaluation of his reputation in his name or goods by reason of the disclosure.

(2) In an action for breach of contract arising out of the disclosure or use of confidential commercial information it shall be a defence that the agreement not to disclose or use the information is void for illegality.

(3) In an action for breach of confidence arising out of the disclosure or use of confidential commercial information it shall be a defence that if the subject matter had been the subject matter of a contract of non-disclosure or non-use between the plaintiff and the defendant the contract would have been void for illegality.

(4) In an action for a declaration of constructive trust of profits made by the disclosure or use of confidential commercial information obtained by the use of a fiduciary relationship it shall be a defence that no detriment was caused thereby to the persons to whom the defendant owed a fiduciary duty.

EXPLANATORY NOTES

Clause 15

1. This clause implements the recommendations in paragraphs 237-241.

2. Sub-clause (1)(a) provides a new defence of preventing foreseeable injury or frauds on the public.

3. Sub-clause (1)(b) follows Tournier v National Provincial & Union Bank of England [1924] 1 K.B.461 but subject to contrary agreement.

4. Sub-clause (1)(c) provides a new defence following Woodward v

Hutchins [1977] 2 All E.R.751. and based on a similar principle to the defence of justification in defamation.

5. Sub-clause (3) provides a defence to breach of confidence on similar grounds to illegality in contract.

6. Sub-clause (4) displaces the absolute liability rule for trustees in Boardman v Phipps [1966] 3 All E.R.721.

16. Patentable information

(1) Without prejudice to the generality of section 13(1) -

(a) if within six months of the disclosure or use by the holder the owner of patentable confidential commercial information applies for and subsequently obtains a patent relating to the information the holder shall be liable to pay damages for loss caused to the owner by his disclosure or use unless by his words or conduct the owner had led the holder to believe that he would not apply for a patent.

(b) If the disclosure or use of patentable confidential commercial information by the holder prevents the owner from obtaining a patent the court shall not award additional damages in an action for breach of confidence or contract for the loss of the right to obtain a patent unless the delay in applying for a patent was caused by the defendant.

(2) Unless within three years of the receipt of patentable confidential commercial information by the holder or his predecessor in title a patent has been obtained or an application for a patent has been filed and has not been refused or withdrawn the holder may apply to the court for an order entitling him to disclose or use the information on such terms as the court thinks fit and the court in deciding whether or not to grant such an order or on what terms shall have regard to those matters which are grounds for an application for a compulsory licence under a patent and shall not take into account the fact that the holder received the information in confidence.

(3) If it appears to the court in hearing such an application that the time which has elapsed since the receipt of the information in confidence has for any reason been insufficient to enable the information to be commercially worked or to enable a patent to be applied for the court may by order adjourn the application for such period as will in the opinion of the court give sufficient time for the information to be so worked or the application to be made as the case may be.

(4) In an action for breach of confidence or contract arising out of the disclosure or use of patentable confidential commercial information more than three years after the receipt of the information in confidence the defendant may apply for the action to be stayed while he seeks a court order under sub-section (2) and such an order if made may retrospectively validate the breach of confidence or contract.

(5) In any action for breach of confidence or contract arising out

of the disclosure or use of patentable confidential commercial information the court shall not unless the information was taken surreptitiously grant greater protection to the owner of the information than he would have had if he had obtained a patent relating to the information at the date of the disclosure or use.

(6) Nothing in the foregoing sub-sections of this section shall affect the validity of or remedies for the infringement of a patent.

EXPLANATORY NOTES

Clause 16

1. This clause implements the recommendations in paragraphs 250-253 and resolves the conflict between patent protection and breach of confidence protection for patentable information.

2. Sub-clause (1) provides for the effects on a breach of confidence action of Patents Act 1977 section 2(4). If the owner obtains a patent under the provisions he should normally also get damages for the breach of confidence; if he delays and so loses his right to a patent he should not normally get enhanced damages arising from his own neglect.

3. Sub-clauses (2) to (4) prevent the stifling of patentable information by disclosure in confidence. After three years the holder may apply for a right of use in circumstances analogous to those for a grant of a compulsory licence under a patent (Patents Act 1977 section 48).

4. Sub-clause (4) allows an action to be stayed while an order is sought as may be done in relation to restrictive covenants by Law of Property Act 1925 section 84(9).

5. Sub-clause (5) restricts the extent of remedies normally available in breach of confidence or contract to those which would have been obtainable under a patent.

17. Remedies

(1) Notwithstanding the provisions of section 16 in proceedings against a surreptitious taker of confidential commercial information or a subsequent holder from him the court may if it thinks fit award damages or make an order for an account of profits and grant a perpetual injunction.

(2) Subject to the provisions of section 16 in proceedings for breach of confidence or contract arising out of the disclosure or use of confidential commercial information relief may be granted in accordance with this sub-section -

(a) against the original recipient of the information damages or an account of profits and an injunction unless to grant an injunction would be unfair to the defendant;

(b) against a subsequent holder of the information with knowledge that the disclosure to him or the use whereby he obtained the information was in breach of an obligation of confidence damages or an account of profits and an injunction;

(c) against a subsequent holder of the information without such knowledge but in circumstances when the information could only have been procured by breach of confidence trust or contract damages and an injunction.

(3) In proceedings for breach of confidence against a subsequent holder of confidential commercial information who is found to have obtained the information in good faith and without actual or constructive notice of any breach of confidence trust or contract in circumstances in which it could have been procured without any such breach damages shall be awarded for loss suffered by the plaintiff Provided that if the defendant incurred expenses in or for the purpose of the exploitation of the information before he had notice of the claim of the plaintiff the court may if it considers it just to do so having regard to all the circumstances of the case allow him to set off the expenses or any part thereof against the payment of damages to the plaintiff.

(4) Subject to the provisions of sub-section (1) of this section no final injunction shall be granted against a defendant who in good faith and with no actual or constructive notice of any breach of confidence trust or contract purchased confidential commercial information for value but payment of damages shall give him a right in common with the plaintiff to disclose or use the information.

(5) A finder of confidential commercial information who disclosed or used it with knowledge that the information was confidential and that the owner would not be likely to consent to his disclosure or use shall be liable to pay damages or account for his profits and an

injunction may be granted against him.

(6) A finder of confidential commercial information who at the time of disclosure or use had no knowledge that the information was confidential or that the owner would not be likely to consent to his disclosure or use shall not be liable to pay damages or to account for his profits but an injunction against further disclosure or use may be granted against him.

(7) The provisions of this section are without prejudice to any jurisdiction of the court to grant interlocutory or ancillary relief.

EXPLANATORY NOTES

Clause 17

1. This clause implements the recommendations in paragraphs 227,254-259.

2. Sub-clause (1) gives remedies against a surreptitious taker and subsequent holder from him.

3. Sub-clause (2) gives remedies against the original recipient and subsequent holders with actual or constructive notice.

4. Sub-clause (3) allows an innocent third party to be allowed to set off his expenses against an award of damages.

5. Sub-clause (4) provides that an award of damages against an innocent third party purchaser shall allow him a right in common with the owner to use the information.

6. Sub-clauses (5) and (6) make provisions to penalise a finder who uses the information with knowledge and to prevent further use by a finder without knowledge.

Part IV

CONFIDENTIAL GOVERNMENTAL INFORMATION

Governmental Information Relating to the Affairs of Public Bodies

18. Right to attend meetings

Where by statute a public right to attend the meetings of a governmental body is given -

(a) reasonable provision for the accommodation of members of the public shall be made and the public or a section of the public shall not be excluded on the ground of insufficiency of facilities;

(b) a resolution to exclude the public from a meeting or part of a meeting shall be invalid unless the reasons for the exclusion are stated at the time of the resolution;

(c) discussion of policy and the need to receive or consider recommendations and advice from officers of the body shall not be sufficient reasons for exclusion of the public;

(d) any resolution passed during the wrongful exclusion of the public shall be void whether or not any member of the public shall have suffered significant injury.

EXPLANATORY NOTES

Clause 18

This clause implements the recommendations in paragraphs 315-317 and resolves the difficulties raised by R v Liverpool City Council ex parte Liverpool Taxi Fleet Owners Association [1975] 1 All E.R.379.

19. General rules of disclosure

(1) Section 2 of the Official Secrets Act 1911 is hereby repealed.

(2) The holder of confidential governmental information relating to the affairs of a public body shall disclose that information to a member of the public unless the information has been classified within section twenty of this Act or disclosure is forbidden or restricted by the provisions of this or another statute.

(3) An applicant shall not be refused information on the ground that his request is too wide or too vague unless the holder can show that all reasonable steps have been taken to enable the applicant to frame his request by informing him of the types of information covered by his request.

(4) Subject to the provisions of section 23 an applicant shall not be required to show any special reason for wishing to obtain the information and he shall not be refused information because of any special reason relating to him.

EXPLANATORY NOTES

Clause 19

1. This clause implements the recommendations in paragraphs 311 and 326-328.

2. Sub-clause (2) provides the general rule of disclosure of governmental information relating to a public body.

3. Sub-clause (3) puts a duty on the holder of the information to help applicants to frame their applications for information.

4. Sub-clause (4) abrogates the restrictions imposed by the courts on common law rights of inspection.

20. Categories of exemption

(1) Information within the following categories and the disclosure of which would be contrary to the public interest may be classified as Category A information or Category B information as the case may be.

(2) Each public body shall draw up detailed regulations specifying documents or classes of documents or other information within the following categories, methods of marking or otherwise indicating their classification and provisions for regular review of classification and declassification of information. The regulations shall be subject to approval by each House of Parliament.

(3) Category A information is -

(a) information relating to or affecting national security including relations with other states and organisations within section (1) of the International Organisations Act 1968;

(b) information relating to or affecting the prevention of subversion or crime or the apprehension or punishment of offenders;

(c) information the disclosure of which would be likely to endanger the lives of individuals.

(4) Category B information is -

(a) deliberations of the Cabinet during the currency of the then Parliament;

(b) internal policy discussions in a matter on which a decision has not yet been made but not policy alternatives or background information;

(c) information received in confidence from third parties where there is a public interest in the receipt of such information and it would probably not have been given except in confidence;

(d) information which would be privileged against disclosure in pending or current legal proceedings.

(5) The provisions of this Part of this Act relating to Category A information and Category B information shall take effect subject to any provision of another statute or court order authorising or requiring disclosure of information.

EXPLANATORY NOTES

Clause 20

1. This clause implements the recommendations in paragraphs 336-339 and 341-348.

2. Sub-clauses (1) and (2) provide a duty to classify information which in the public interest ought not to be disclosed and machinery for Parliamentary control.

3. Sub-clause (3) states the heads of Category A (see clause 21).

4. Sub-clause (4) states the heads of Category B (see clauses 22-25).

5. Sub-clause (5) provides for wider disclosure by statute or court order.

21. Category A information

(1) Subject to the provisions of this section a person who discloses without authorisation or makes improper use of information within Category A shall be guilty of an offence.

(2) It shall be a defence for a person charged with an offence under sub-section (1) of this section to prove that at the time of the alleged offence -

(a) he did not know that the information was within Category A; or

(b) he believed that his disclosure of the information was authorised or his use of the information was not improper; or

(c) he reasonably believed that his disclosure of the information was in the public interest.

(3) A person guilty of an offence under sub-section (1) of this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding £1,000 or both.

(4) A court may grant an injunction against a person who has in his possession information within Category A and intends to disclose or improperly use it.

(5) No proceedings shall be instituted under this section without the consent of the Attorney-General.

EXPLANATORY NOTES

Clause 21

1. This clause implements the recommendations in paragraphs 354,356, 367 and 368.

2. Sub-clauses (1), (3) and (5) provide a criminal offence, with consent of the Attorney-General, for unauthorised disclosure or improper use of Category A information.

3. Sub-clause (4) gives power to grant an injunction against intended disclosure or use.

4. Sub-clause (2)(a) and (b) provide defences of lack of knowledge.

5. Sub-clause (2)(c) provides a public interest defence with an objective test thus allowing an element of jury decision about the public interest.

22. Disclosure or use for profit

(1) Subject to the provisions of this section a person who without authorisation discloses or uses information within Category B for personal profit shall be guilty of an offence.

(2) It shall be a defence for a person charged with an offence under sub-section (1) of this section to prove that at the time of the alleged offence -

(a) he did not know that the information was within Category B; or

(b) he reasonably believed that his disclosure or use of the information was in the public interest.

(3) A person guilty of an offence under sub-section (1) of this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding £1,000 or both.

(4) No proceedings shall be instituted under this section without the consent of the Attorney-General.

EXPLANATORY NOTES

Clause 22

1. This clause implements the recommendations in paragraphs 355 and 369.

2. Sub-clauses (1), (3) and (4) provide a criminal offence with similar provisions to that in clause 21 for unauthorised use or disclosure of Category B information for personal profit. Such an offence has been proposed by the Royal Commission on Standards of Conduct in Public Life (1976) Cmnd.6524 para.193.

3. Sub-clause 2(a) provides a defence of lack of knowledge of the classification of the information.

4. Sub-clause 2(b) gives a public interest defence like that in clause 21(2)(c). This will ensure that the fact of profit alone will not lead to conviction, for example for any disclosure in a newspaper.

23. Category B information

(1) Notwithstanding section 19 of this Act but subject to sub-section (2) of this section the holder of information within Category B shall not be under a duty to disclose it.

(2) If the person seeking disclosure of information within Category B, other than Cabinet deliberations, has a particular interest whether proprietary or personal in obtaining the information it shall be disclosed to him subject to such reasonable restrictions if any as may be specified unless -

(a) the disclosure would allow him to make an unfair personal gain; or

(b) disclosure would reveal the identity of informants and

(i) the supply of such information is necessary for a public purpose and

(ii) the supply would be likely to diminish as a result of such disclosure or

(iii) the informants would be likely to suffer reprisals.

(3) Without prejudice to the generality of sub-section (2) of this section a person whose interests may be adversely affected by a change of policy has a particular interest for the purpose of obtaining information relating to that proposed change and shall be entitled to make representations and the fact that such a person may use the information to prevent a loss shall not constitute an unfair personal gain.

(4) Notwithstanding the provisions of sub-section (3) of this section if a governing group has made a change of policy after complying with any relevant statutory provisions relating to consultation or if there are no such provisions after taking reasonable steps to consult with persons or groups whose interests might be affected the change of policy shall not be avoided on the ground that a person whose interests were adversely affected had not been consulted.

(5) A person who makes a disclosure of information which is authorised by this section shall not be liable for breach of confidence or for breach of contract by reason of the disclosure.

EXPLANATORY NOTES

Clause 23

1. This clause implements the recommendations in paragraphs 328, 341-347, 349-351.

2. Sub-clause (1) provides there is no general duty of disclosure of Category B information.

3. Sub-clause (2) provides for disclosure to a person with a particular

interest, subject to reasonable restrictions, unless disclosure would allow unfair personal gain or injure informers. The restrictions and exceptions are subject to review by the Information Commissioner (clause 27 (2),(3),(4).).

4. Sub-clauses (3) and (4) provide for disclosure of proposed policy changes to a person whose interests may be adversely affected.

24. Remedies

(1) In proceedings for breach of confidence or breach of contract arising out of disclosure of information within Category B relief shall be granted only if in the opinion of the court at the time of the disclosure the public interest in non-disclosure of the information outweighed the public interest in disclosure in the particular case.

(2) Subject to sub-section (1) of this section the fact that information was not imparted to the defendant or received by him in confidence is no defence to an action founded on breach of confidence where the defendant discloses without authority information which he knows to be within Category B.

(3) In proceedings for breach of confidence within this section the court may award damages or an injunction or both.

(4) An injunction against further disclosure or use may be awarded against a person who received information within Category B without knowledge that it was so classified if in the opinion of the court the public interest in non-disclosure of the information outweighs the public interest in disclosure in the particular case.

(5) No action shall be brought in breach of confidence or in breach of contract arising out of the disclosure or use of governmental information relating to the affairs of a public body if the information is neither within Category A nor within Category B.

EXPLANATORY NOTES

Clause 24.

1. This clause implements the recommendations in paragraphs 357, 358 and 359.

2. Sub-clauses (1) and (2) provide that the basis of an action in breach of confidence in this area is the detriment to the public interest rather than the capacity in which the information was received.

3. Sub-clause (4) allows for an injunction against an innocent holder if the public interest requires non-disclosure.

4. Sub-clause (5) prevents requirements of confidentiality being placed on governmental information of public bodies outside the Categories in clause 20.

25. Defences

(1) In an action for breach of confidence or breach of contract arising out of the disclosure or use of information within Category B it shall be a defence that no detriment was caused to the public interest by the disclosure or use.

(2) In an action for breach of confidence or breach of contract arising out of the disclosure of information within Category B it shall be a defence that disclosure of the information at that time was in the public interest and publication was not likely to be authorised at that time.

(3) In an action for breach of confidence or breach of contract arising out of the disclosure or use of information within Category B it shall be a defence that the donors of the information consented to the disclosure or use unless the enforcement of such an agreement would be contrary to the public interest.

EXPLANATORY NOTES

Clause 25

1. This clause implements the recommendations of paragraphs 370,371.

2. Sub-clause (2) gives effect to the spirit of the European Commission opinion on the Thalidomide documents case.

3. An agreement to allow disclosure would be contrary to the public interest in relation to the Cabinet: Attorney-General v Jonathan Cape Ltd. [1975] 3 All E.R.484.

26. Supplementary provisions

(1) If the holder of information refuses to disclose it because it is within Category A or Category B he must inform the applicant of the Category and the heading under which the information is classified.

(2) If an applicant who is refused information believes that the information has been wrongly or unnecessarily classified or is not so classified he may apply to the court for judicial review.

(3) If a holder of information -

(a) refuses to disclose the category and heading under which the information is classified or

(b) refuses to disclose information to which the applicant is entitled under this Act

he shall be liable on summary conviction to a fine not exceeding £20.

EXPLANATORY NOTES

Clause 26

1. This clause implements the recommendations in paragraphs 360 and 361.

2. The provisions assist the applicant seeking judicial review under sub-clause (2) or intervention by the Information Commissioner under clause 27 in relation to a refusal of information.

3. The criminal offence in sub-clause (3) is similar to that in Local Government Act 1972 section 228 (7).

27. Information Commissioner

(1) For the purpose of conducting investigations in accordance with the provisions of this Act there shall be appointed a Commissioner to be known as the Information Commissioner whose appointment and tenure of office shall be similar to those of the Parliamentary Commissioner for Administration.

(2) The Information Commissioner may investigate the classification declassification disclosure restricted disclosure and non-disclosure of particular items or groups of information by any public body to which the provisions of this Part of this Act apply and shall from time to time review the regulations made by such bodies.

(3) Each public body to which these provisions apply shall submit an Annual Return to the Information Commissioner detailing all refusals of information and the grounds for refusal and conditions applied to disclosure and such other information as shall be required by the Commissioner.

(4) The Information Commissioner may investigate a matter referred to him by an aggrieved person or by a Member of Parliament or of his own volition and for that purpose may require any person to furnish any information or produce any document notwithstanding any rule of law or statutory provision prohibiting or limiting disclosure or the provisions of this Act restricting disclosure of Category A or Category B information.

(5) The Information Commissioner shall not be precluded from investigating a matter because the aggrieved person may have a remedy in law.

(6) The Information Commissioner shall annually lay before each House of Parliament a general report on the performance of his functions and may from time to time lay before each House of Parliament such other reports as he thinks fit.

(7) No action in respect of defamation or breach of confidence shall lie in respect of any communication by or to the Information Commissioner under this Act.

EXPLANATORY NOTES

Clause 27.

1. This clause implements the recommendations in paragraphs 338 and 350.

2. The Information Commissioner, who reports to Parliament, (sub-clause 6) is given a duty to review from time to time the regulations for classification and declassification of information made under clause 20(2).

3. He is also given power to investigate disclosure and restrictions on disclosure of particular items or classes of information either at the request of an individual or a Member of Parliament or of his own volition (sub-clauses (2) and (4).)

4. By sub-clause (3) Annual Returns must be submitted to him.

5. His powers of obtaining information do not exclude Cabinet information as do the powers of the Parliamentary Commissioner for Administration (sub-clause (4).).

6. It is not necessary for an aggrieved person to show that he has 'sustained injustice' as under the Parliamentary Commissioner Act 1967 section 5(1) and the Local Government Act 1974 section 26(1).

7. Investigation is not excluded by a remedy in law (sub-clause (5).).

8. Sub-clause (7) protects the Commissioner from any action in breach of confidence or defamation.

Governmental Information Relating to the Affairs of Private Bodies

28. Private Bodies

(1) So far as relevant the provisions of sections 19, 20(4), 20(5) and 23 shall apply to confidential governmental information relating to private bodies except insofar as they are excluded or modified by an enforceable term of any agreement.

(2) Private bodies shall be under no duty to classify information before disclosure is sought.

(3) The persons who may require disclosure of information under this section are the members of the private body.

(4) If a person discloses confidential governmental information relating to the affairs of a private body without authorisation by this section and in breach of confidence or of contract he shall be liable only if the plaintiff can show that the disclosure caused detriment to the private body or to another member of the private body.

(5) An injunction may be granted against a person who has in his possession confidential governmental information relating to the affairs of a private body and intends to disclose it or use it where the proposed disclosure or use would be likely to cause detriment to the private body or to another member of the private body.

EXPLANATORY NOTES

Clause 28

1. This clause implements the recommendations of paragraphs 372-375.

2. This clause applies Part IV of the Bill to governmental information relating to private bodies so far as it is relevant and subject to contrary agreement.

3. Disclosure of information is to be made not to the public but to the members of the private body (sub-clause (3).).

4. Liability in breach of confidence or contract outside the provisions of the Bill (as amended by agreement) depends on the plaintiff showing that the disclosure caused detriment to the private body or to a member.

5. An injunction may be awarded against a proposed disclosure which would cause detriment.

Law of Libel Amendment Act 1888
Law of Property Act 1925
Local Authorities (Admission of the Press to Meetings) Act 1908
Local Government Act 1894
Local Government Act 1972
Local Government Act 1974
London Government Act 1939

Magistrates Courts Act 1952
Matrimonial Causes Act 1973
Mental Health Act 1959
Municipal Corporations Act 1882

National Health Service Act 1946
National Health Service Reorganisation Act 1973

Offences against the Person Act 1861
Offices, Shops and Railway Premises Act 1963
Official Secrets Act 1889
Official Secrets Bill 1908
Official Secrets Act 1911
Official Secrets Act 1920
Official Secrets Act 1939

Parliamentary Commissioner Act 1967
Parliamentary Papers Act 1840
Partnership Act 1890
Patents Act 1977
Public Bodies (Admission to Meetings) Act 1960
Public Records Act 1958
Public Records Act 1967
Purchase Tax Act 1963

Race Relations Act 1976
Rag Flock Act 1951
Rehabilitation of Offenders Act 1974
Representation of the People Act 1949
Road Safety Act 1967
Road Traffic Act 1972

Sex Discrimination Act 1975
Sexual Offences (Amendment) Act 1975
Solicitors Act 1974
Special Commissions Act 1888
Statistics of Trade Act 1947

Taxes Management Act 1970
Torts (Interference with Goods) Act 1977
Tribunals of Inquiry (Evidence) Act 1921
Trustee Act 1925

Variation of Trusts Act 1958
Witnesses (Public Inquiries) Protection Act 1892.

Denmark
Law of Publicity in Administration.

France
Data Processing and Freedom Act 1978

W. Germany
Federal Data Protection Act 1977

Sweden
Data Act 1973
Freedom of the Press Act
Secrecy Act

United States of America
Privacy Act 1974
Public Information Act 1967

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