PRIVILEGE IN ACADEMIA: A CONSIDERATION OF THE POWER TO RESISTS DISCLOSURE OF INFORMATION OBTAINED BY ACADEMICS IN CONFIDENCE

by Suzanne B. McNicol *

INTRODUCTION

While the general subject of privilege is accorded detailed treatment in the standard text and periodical literature on evidence, the specific application of its general principles to particular classes of persons other than those upon whom are conferred recognized privileges (the clients of lawyers and patients of doctors, for example) has been largely ignored. The aim of the present article is to remedy that defect in the existing literature in relation to two classes of potential claimant; academic researchers and those who supply them with information.[1] The subject is an important one, for in the course of their research and professional work academics may receive information on a confidential basis, that is, on the basis that the information will not be disclosed to others, or else will not be disclosed except for certain purposes. That information may not infrequently be relevant to issues raised for determination in courts of law or administrative tribunals, or to inquiries by boards or commissions of inquiry.

Section 1 of this article will consider the powers of courts, tribunals and other administrative agencies to compel the giving and production of evidence. The sanctions for non-compliance with a subpoena issued by a court of law or administrative body will also be examined. Briefly stated, failure to comply with a subpoena requiring the attendance of witnesses,

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[1] There has, however, been a small amount of research in America on this topic, see for example, L A Day, "In Search of a Scholar's Privilege' (1983) 5 *Communications and the Law* 3; J Graham Mathune, 'Forced Disclosure of Academic Research' (1984) 37 *Vanderbilt Law R* 585; P. Nejelski and L Miller Leiman, 'A Research-Subject Testimonial Privilege: What to do before the Subpoena arrives' [1971] *Wisc LR* 1085; R M O'Neill, 'Scientific Research and the First Amendment: An Academic Privilege' (1983) 16 *Univ Calif Davis LR* 837 and 'Protection from Discovery of Researchers Confidential Information' (1977) 9 *Connecticut LR* 326.

the production of documents and the answering of questions can be a criminal offence and/or punished as contempt of court.

There are, however, certain circumstances in which witnesses are excused from the duty to produce the evidence sought of them. If, for example, a witness can claim protection under the rules of privilege, then the witness can still refuse to answer questions (or produce certain documents) even though he or she is a compellable witness at law. Such circumstances will be examined in sections 2, 3 and 4. It will be seen in those sections that the privileges recognized at common law and conferred by statute are few in number and that unless the academic researcher can clearly satisfy the court that the evidence is protected by a privilege recognized by law, he or she will be forced to disclose all knowledge no matter how confidential that information may be.[2] The recent proposals of the Australian Law Reform Commission for reform of the relevant law will also be considered in section 2.

Finally, even when no privilege is available to a witness, a court (or other body having power to require the giving of evidence) may still have the power to restrict, in various ways, the use made of communications disclosed under compulsion of law. Such powers, such as the power to hear in camera, to allow production of evidence on a limited basis, not to insist on evidence being given or to grant protective orders are considered in detail in section 5.

1. OBLIGATION OF RESEARCHER TO DISCLOSE BY COMPULSION OF LAW.

(a) Duty to disclose confidential information.

There is a normal obligation of a citizen to provide the judicial arm of the state with the information and documents which are required for the determination of litigation.[3] A witness is competent if the witness may lawfully be called to give evidence. Nowadays most people are competent witnesses.[4] A witness is compellable if the witness can lawfully be obliged to give evidence. The general rule is that all competent witnesses are compellable with very few exceptions.[5] In Australia it has been clear law since 1940 that very few categories of people are entitled to refuse to disclose to the courts information acquired in confidential circumstances.[6]

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[2] P K Waight and C R Williams, *Cases and Materials on Evidence*, 2nd ed., Law Book Co., 1985, 64.

[3] D M Byrne and J D Heydon, *Cross on Evidence*, Butterworths, 3rd Aust ed., 1986, 612.

[4] *Ibid*, 308.

[5] *Ibid.*

[6] Exceptions in specialized circumstances have been made for spouses (eg *Crimes Act* 1958 (Vic) s 400, attorneys (eg legal professional privilege) jurors (eg *Jackson v Williamson*

The result of this is that journalists have been sentenced to gaol for failure to disclose their sources, many psychologists and social workers are said to keep dummy files, one for their own use and one for the courts and doctors have had their patients' notes subpoenaed in criminal and family law proceedings.[7]

(b) Powers of Courts

By the process of subpoena a party may secure the attendance of a person before the court for the purpose of giving evidence or producing a document or of doing both those things.[8] Under the new *Rules of the Supreme Court of Victoria*[9], in civil cases a subpoena is in the nature of an order of the court for attendance of the person to whom the subpoena is addressed. Essentially there are two kinds of subpoena - a subpoena to give evidence and a subpoena for production.[10] The first is an order in writing requiring the person to whom the order is addressed to attend as directed by the order for the purpose of giving evidence, and a subpoena for production is an order in writing requiring the person to whom the order is addressed to attend as directed by the order for the purpose of producing a document or thing for evidence.[11]

The difference between a subpoena to give evidence and a subpoena for production is significant in the area of privilege (which will be considered in detail below). A witness who is intending to rely on privilege must still respond to the court subpoena to give evidence and, being called and sworn, may then object to answer specific questions on grounds the sufficiency of which may be determined by the court.[12] If the recipient fails to respond to the subpoena to give evidence then that

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(1788) 2 Term Rep 281, 100 ER 153, 13) and in some states, doctors and priests (eg *Evidence Act* 1958 (Vic) s 28).

[7] I Freckelton, 'Social Scientists in the Witness Box' [1986] *LIJ* 1096, 1097. Note, however, the creation of a special statutory privilege for journalists in England, s 10 *Contempt of Court Act* 1981. See also *Secretary of State for Defence v. Guardian Newspapers* [1985] AC 339 and *In re an Inquiry under the Company Securities (Insider Dealing) Act* [1988] 1 All ER 203.

[8] N J Williams, *Supreme Court Civil Procedure Victoria*, Butterworths, 1987, 257 para 17.21.

[9] The *General Rules of Procedure in Civil Proceedings* 1986 by the *Supreme Court (Rules of Procedure) Act* 1986 (Vic) have ratified, validated and approved Chap I of the Rules of the Supreme Court, see N J Williams, *ibid*, ix.

[10] N J Williams, *ibid*, 257. The subpoena to give evidence corresponds to the former *Subpoena ad testificandum* (duty to testify before a court or tribunal) and the subpoena for production corresponds to the former *subpoena duces tecum* (duty to produce documents to a court or tribunal) N J Williams, *ibid*, 258.

[11] Order 42.01, *ibid*, 258.

[12] *Scanlon v. Swan* [1984] 1 Qd R 21; *Price v McCabe* (1984) 55 ALR 319, 325; *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *Rochfort v Trade Practices Commission* (1983) 153 CLR 134, 143.

person may be guilty of contempt of court or alternatively, the court may serve an order of attendance on the witness which may be enforced by committal if the person served does not obey or, further, the court may issue a warrant to apprehend the witness and bring her or him before the court.[13] On the other hand, a person who is required by subpoena to produce a document to the court is entitled to refuse to produce the document on the ground that the document is privileged. If the recipient does make such an objection to produce the documents, that person should state her or his grounds of objection on oath so that the court may determine the sufficiency of those grounds.[14]

Similarly, in criminal cases in Victoria, witnesses may be compelled to attend at a preliminary examination into an indictable offence (often described as 'committal proceedings') either by summons or warrant[15] and to give evidence on oath.[16] To ensure their presence to give evidence at the accused's trial, material witnesses may be bound over on a recognizance.[17] Witnesses not so bound over are subject to being called upon to give evidence at the trial on a notice signed by a crown prosecutor or the Director of Public Prosecutions, and failure to so attend is punishable by a fine.[18] Witnesses who refuse to be bound over to appear at the trial may be imprisoned to await the trial of the accused[19], or arrested if they attempt to absent themselves.[20]

There are also various search and seizure powers under the *Crimes Act* 1958 in Victoria and other related Acts. For instance, the police are authorized to search with a warrant under a number of Australian State and Commonwealth Acts.[21] In general, in order to be valid, search warrants must identify the offence or offences in relation to which they are issued and must, with reasonable certainty and particularity, delimit the

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[13] *R v Daye* [1980] 32 KB 333, Orders 40.12, 60.05, 66.10, *Evidence Act* 1958 (Vic) s 150. These three alternatives are all discussed in para 17.22, N J Williams, *op cit* 258.

[14] N J Williams, *ibid*, para 17.26, 259.

[15] *Magistrates' Courts Act* 1971 (Vic) s 22A(d). The following information in the text concerning the powers of courts in criminal cases is taken from R G Fox, *Victorian Criminal Procedure*, Monash Law Book Co-operative Ltd, 6th Edition, 1988, 65-66, 128-132.

[16] *Magistrates (Summary Proceedings) Act* 1975 (Vic) ss 53 and 54.

[17] Material witnesses may be bound over on a recognizance of $200 each to give evidence at the accused's trial, *Magistrates (Summary Proceedings) Act* 1975 (Vic) s 63.

[18] *Ibid*, s 64.

[19] *Ibid*, s 66.

[20] *Ibid*, s 67. See also *Crimes Act* 1958 (Vic), s 415.

[21] For example, *Crimes Act* 1914 (Cwth) s 10 and 82; *Extradition Act* 1988 (Cwth) s 14 and 31; *Community Welfare Services Act* 1970 (Vic) s 81; *Crimes Act* 1958 (Vic) ss 465, 469A, 470; *Drugs Poisons and Controlled Substances Act* 1981 (Vic) s 81; *Liquor Control Act* 1968 (Vic) s 117; *Lotteries Gaming and Betting Act* 1966 (Vic) s 45; *Magistrates (Summary Proceedings Act* 1975 (Vic) s 13. For a complete list of the legislation see R G Fox, *op cit* n 15, 65.

thing or class of things the search and seizure of which is authorized.[22] In any event, under s. 459A(1) of the *Crimes Act* 1958 (Vic), the police are authorized to enter and search any place without a warrant for the purpose of arresting persons who, on reasonable grounds, are believed to be there and to have committed a serious indictable offence or to have escaped from legal custody. Furthermore, a warrant to apprehend a person is broadly defined to authorize the breaking, entering and searching of the places specified in the warrant as ones in which the person named is suspected to be found.[23]

Police have no general common law power to seize goods solely for the purpose of preserving them as evidence in a prosecution which they intend to launch.[24] However, at common law, whenever police are authorized to arrest a person for an indictable offence, whether with or without a warrant, they may, at the time of the arrest and as an incident of it, seize all the material documents and articles found on the arrested person or under her or his control.[25] However, it will be seen below in section 3 that documents whose confidentiality would be protected in the courts by the doctrine of legal professional privilege cannot be seized under a search warrant unless the statute under which the warrant is issued expressly or by necessary implication excludes the doctrine.[26] For instance, in the case of s 10 *Crimes Act* 1914 (Cwth) it has recently been held by the Federal Court of Australia that s 10 must be construed as excluding from the 'things' it authorizes to be inspected or seized, documents whose confidentiality would be protected in the courts by legal professional privilege.[27] Finally, in some instances, legislation may also specifically allow legal practitioners to resist search and seizure under warrant where the relevant documents contain privileged communications.[28]

(c) Powers of Tribunals and other Non-Curial Bodies

Most administrative and non-curial bodies such as royal commissions, tribunals and boards of inquiry[29] have statutory powers similar to those of

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[22] *Arno v Forsyth* (1986) 65 ALR 125; *Trimboli v Onley* (1981) 37 ALR 38; *Trimboli v Onley (No 2)* (1981) 37 ALR 364.

[23] *Magistrates (Summary Proceedings) Act* 1975 (Vic) s 13 (1)(a).

[24] *Levine v O'Keefe* [1930] VLR 70. R G Fox, *op cit* n 15, 66.

[25] *Field v Sullivan* [1923] VLR 70.

[26] *Arno v Forsyth* (1986) 65 ALR 125; *Baker v Campbell* (1983) 49 ALR 385.

[27] *Arno v Forsyth, ibid,* (per Lockhart J).

[28] For instance, *Companies (Victoria) Code* 1981, s 16. R G Fox, *op cit* n 15, 66.

[29] In Victoria and New South Wales statutory provision has been made for the appointment, by executive act, of *ad hoc* bodies of inquiry having powers similar to royal commissions. In Victoria, these bodies are called boards of inquiry, see *Evidence Act* 1958 (Vic) ss 14-16 and in New South Wales special commissions of inquiry, see *Special Commissions of Inquiry Act* 1983 (NSW). E Campbell, *Contempt of Royal Commissions*, Contemporary Legal Issues No 3, Faculty of Law, Monash University, 1984, 5.

the courts to require the attendance of witnesses, the production of documents and the answering of questions. Where such a statutory power exists, it is invariably the case that failure or refusal to attend on summons, failure or refusal to produce documents and failure or refusal to answer are declared to be criminal offences. For instance, all Australian statutes on royal commissions confer the power on royal commissions to require the attendance of persons to give evidence and to produce documents.[30] Sanctions are imposed for disobedience to summonses and for failure or refusal to answer questions a witness is obliged to answer.[31] The Commonwealth, New South Wales, Queensland and Western Australian Acts also permit the chairman of a royal commission, on proof that a summons has been served, to issue a warrant for the arrest of a person who has been summoned to appear and has failed to attend at the appointed time and place, and the detention of that person in custody.[32]

Similarly, in proceedings before royal commissions a witness may refuse to produce documents or answer questions on the ground of privilege, unless the governing legislation has abrogated the relevant privilege, expressly or by necessary implication.[33] To avoid the risk of being prosecuted for refusing to answer a question which he or she cannot be compelled to answer (because, for example, of privilege) the witness should take objection at the hearing before the commission. Otherwise it may be too late.[34]

Finally, it should be noted that the Australian Law Reform Commission recommended in their Report on *Contempt* that the offence of prevarication or refusal to answer a question should be created in

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[30] Cwth: *Royal Commissions Act* 1902, ss 2, 7A; NSW: *Royal Commission Act* 1923, ss 8, 10; Qld: *Commissions of Inquiry Acts* 1950 to 1954, ss 5, 7; SA: *Royal Commission Act* 1917-1982, ss 10(2)(3), 12; Tas: *Evidence Act* 1910 s 14; Vic: *Evidence Act* 1958 ss 14, 17, 20A; WA: *Royal Commissions Act* 1968 ss 9, 10; NSW: *Special Commissions of Inquiry Act* 1983, s 14. E Campbell *Ibid*, 11. Hereafter, notes referring to particular provisions in these Acts will be in short form, eg Cwth s 6.

[31] Cwth s 3; NSW ss 4, 19; Qld ss 7, 9; SA ss 11, 12(2); Tas s 16; Vic ss 16, 19; WA ss 13, 18; NSW *Special Commissions of Inquiry Act* 1983, ss 17, 24, 25 26. See also *Evidence Act* 1958 (Vic) s 16 re boards of inquiry, s 19 re commissions and s 20.

[32] Cwth s 6B; NSW s 16; Qld ss 3, 8; WA s 1. See also NSW *Special Commissions of Inquiry Act* 1983 ss 21 and 22. E Campbell *ibid*, 11-12.

[33] An example of very broad powers to require the giving of information where the privilege against self incrimination has been excluded is the legislation considered recently in *Attorney-General for the Northern Territory v. Maurice* (1986) 65 ALR 230 (FCA) and (1987) 61 ALJR 91 (HCA). Under the *Aboriginal Land Rights (NT) Act* 1976 (Cwth) s 54 the Land Commissioner has the power to compel 'any person whom be believes to be capable of giving information relating to a matter being inquired into by the Commissioner in carrying out his functions' to answer questions. Not even the privilege against self-incrimination applies, s 54(3).

[34] E Campbell, *op cit*, 34.

partial substitution for contempt in the face of the court. This new offence would apply in cases where there is no privilege exonerating the witness (who, for example, may be a journalist or academic researcher concerned to protect confidential sources) from the obligation to answer questions and where the presiding judge or magistrate insists upon an answer and where the answer is or may reasonably be expected to be of substantial importance for the proceedings in question.[35]

2. TESTAMENTARY PRIVILEGES: GENERAL

(a) Nature of Privilege

There is no rule of law which allows a witness in court proceedings to refuse to give evidence or disclose information merely because the evidence was supplied to the witness in confidence. However, in certain circumstances a witness can claim privilege and this means that certain information which is otherwise relevant to the issues to be tried and which the witness would otherwise be under an obligation to disclose may be withheld from the court or administrative tribunal. A successful claim to privilege relieves the claimant of the obligation to answer *particular* questions or to produce *particular* documents to a court, tribunal or other person. It does not confer a right to refuse to attend before that tribunal and to give any evidence whatsoever.[36] A witness who therefore intends to rely on privilege must respond to the court subpoena and, being called and sworn, must object to answer specific questions on a ground of privilege which must be made apparent to the court.[37] However, it should also be noted that privilege is often claimed in interlocutory proceedings at the stage of discovery, that is, at the early stage of production of documents in a party's possession or in answering interrogatories, before the actual trial of a civil action.

There are certainly situations in which academic researchers particularly those involved in human sciences such as psychologists, criminologists and anthropologists, would be loath to produce all their field notes or research data for public examination. As Freckelton suggests[38], social scientists such as anthropologists may have been particularly 'privileged' to receive certain information from their subject/informant or there may even have been strings of secrecy attached to it on whose condition it was imparted. There are three testamentary privileges which are potentially available to such academic researchers - legal professional privilege, medical professional privilege and the privilege against self-incrimination. All three heads of privilege are

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[35] Australian Law Reform Commission, *Contempt: Disruption, Disobedience and Deliberate Interference* 1987.

[36] D M Byrne and J D Heydon, *Cross on Evidence, op cit*, 612.

[37] *Scanlon v Swan* [1984] 1 Qd R 21; *Price v McCabe* (1984) 55 ALR 319, 325.

[38] I Freckelton, 'The Anthropologist on Trial' (1985) 15 *MULR* 360, 383.

discussed in the next section although it is suggested that legal professional privilege is the only privilege likely to be successfully invoked by the academic researcher.

(b) Absence of any special privilege based on confidential relationship of researcher and subject/informant.

It will be seen in section 3 below that there is a special legal professional privilege recognized by law which covers confidential communications between client and legal adviser in the course of obtaining advice. Such a professional privilege has never, however, been extended to other relationships, despite claims in the past for special common law protection to be given to confidential communications between friends[39], between an accountant and his client[40], between a newspaper proprietor or journalist and his source of information[41] and between a social scientist and Aboriginal communities.[42] It is clear then that no special privilege based on the confidential relationship of academic researcher and subject/informant has or will be recognized by the law. As Dixon J stated in *McGuinness v. Attorney-General of Victoria*, except for the restricted categories of relationships already established by statute[43] or the common law, an inflexible rule had been

> established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.[44]

In a comprehensive study by the Australian Law Reform Commission in 1985[45] on the question whether professional privilege should be extended to other relationships such as doctor and patient, psychotherapist and client, cleric and communicant, social worker and client, newspersons and their sources, spousal communications etc, the conclusion was reached that no new special categories of privilege should be created.

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39 *Duchess of Kingston's Case* (1776) 20 State Trials 355.

40 *Chantrey Martin & Co v Martin* [1953] 2 QB 286.

41 *McGuiness v Attorney-General of Victoria* (1940) 63 CLR 73; *A G v Mulholland* [1963] 2 QB 477; *Andrews and Anor v John Fairfax and Sons Ltd* [1978] 2 NSWLR 300; *In re an Inquiry under the Company Securities (Insider Dealing) Act* 1985 (HL) [1988] 1 All ER 203.

42 *Attorney-General for the Northern Territory v Maurice* (FCA) (1986) 65 ALR 230; See I Freckelton, *op cit*, n 7, 1098.

43 There is today in England a special statutory privilege protecting journalists from disclosing 'in court proceedings' their sources of information: s 10 *Contempt of Court Act* 1981 (UK). There is also a medical professional privilege created by statute in Victoria, Tasmania and the Northern Territory. See s 28(2) *Evidence Act* 1958 (Vic); s 96(2) *Evidence Act* 1910 (Tas); s 12(2) *Evidence Act* 1939 (NT).

44 (1940) 63 CLR 73, 102-3.

45 Law Reform Commission (Australia), *Evidence* Report No 26 (Interim) 1985.

However, what the Commission did propose was that all claims to withhold confidential communications and records be dealt with as a matter of discretion.[46] The Commission stated that such an approach has the benefit of introducing greater flexibility in allowing the courts to assess the individual merits of each case and that the judicial discretion would be available 'to protect any communications and records of them made in circumstances where one of the parties is under an obligation (whether legal, ethical or moral) not to disclose them.[47] Furthermore, the Commission believed it was preferable that the court concentrate on the quality and nature of the whole relationship rather than simply on the nature of the precise obligation to preserve the confidence.[48] This proposal for a judicial discretion to protect confidential communications generally, has, however, met with mixed reactions and in its 1987 Report on *Evidence* the Australian Law Reform Commission noted that many of those involved in the prosecution of offences were strongly opposed to any such proposal.[49]

Nevertheless the Commission used a similar approach in its report on *Aboriginal Customary Law* (1986)[50] where the more particular question whether a special privilege should be created in respect of confidential

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[46] The Draft Bill included in *Evidence* Report (Interim) (1985) contains the following clause:-

Confidential communications and records

103(1) Where on the application of a person who is an interested person in relation to a confidential communication or a confidential record, the court finds that, if evidence of the communication or record were to be given in the proceeding, the likelihood of -

(a) harm to an interested person;

(b) harm to the relationship in the course of which the confidential communication was made or the confidential record prepared; or

(c) harm to relationships of the kind concerned, together with the extent of that harm, outweigh the desirability of admitting the evidence, the court may direct that the evidence not be given.

(2) For the purpose of sub-section (1), the matters that the court shall take into account include -

(a) The importance of the evidence in the proceeding;

(b) if the proceeding is a criminal proceeding - whether the evidence is adduced by the defendant or by the prosecutor;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings; and

(d) any means available to limit publication of the evidence ibid *paras* 909, 917-8, 923-4, 939-41, 947, 954-6.

[47] *Ibid* para 909.

[48] *Ibid.*

[49] Law Reform Commission (Australia) *Evidence* Report No 38, 1987 para 202, p 116.

[50] Law Reform Commission (Australia) *Report on the Recognition of Aboriginal Customary Laws* 1986.

communications between anthropologists and their clients/informants was dealt with. The Commission believed that the creation of such an absolute privilege protecting only anthropologist-informant relationships was inappropriate because other groups, such as linguists and community advisers, may also be entrusted with Aboriginal secrets and it would be unfair to leave such groups unprotected. The Commission was also satisfied that in the context of particular legal or administrative processes (eg land claim hearings) in which anthropologists play a role, reports or other material prepared by anthropologists for the purpose of preparing a claim would already be protected by legal professional privilege, even though it was conceded that the doctrine of waiver of privilege may also operate in this area.[51]

It appears that as a result of the recent Federal Court decision in *AG (NT) v Maurice* that moves have been made towards recognising the importance of confidentiality when Aboriginal customs and lifestyles are the subject of study by social scientists.[52] However, because the Federal Court declined to guarantee any special 'privileged' protection for the relationship between social scientist and Aboriginal communities, commentators such as Freckelton have concluded rather dismayfully:

> In practice, this means that anthropologists and linguists doing post graduate research or assisting in land claim proceedings cannot be confident that their notes and recordings will not be subpoenaed at some later stage. This places them in the same uncertain position as other professionals such as doctors, ministers of religion, psychologists and journalists.[53]

It is suggested that for present purposes (that is, until such time as a general judicial discretion to protect confidential communications is introduced or, although unlikely, until a special privilege is created to protect confidential communications between an academic researcher and subject) that the advice of Professor Cross be adopted. Cross argued that the non-recognition by the law of privilege of other relationships (compared with the 'peculiar treatment by English law of the lawyer-client relationship') is not as unsatisfactory as it may seem at first. He stated that it is a mistake to suppose that the choice lies between a privilege of complete secrecy on the one hand, and on the other hand, compulsory disclosure without restriction.[54] On the contrary, it is possible and sometimes desirable that the claimant to the privilege should decline to produce documents or give evidence until ordered to do so by the court.[55]

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[51] *Ibid* para 661.

[52] I Freckelton, *op cit* n 7, 1097-8.

[53] *Ibid* 1098.

[54] Sir R Cross, *Cross on Evidence*, Butterworths, London 5th ed, 1979, 294. See also R Cross and C Tapper, *Cross on Evidence*, Butterworths, London, 6th ed, 1985, 403.

[55] *Ibid.*

This refusal would be based not on the grounds that the claim is totally privileged but because when the court does order disclosure it may be on restricted terms, for example, on terms that no use will be made of the information disclosed outside the particular proceedings before the court. The court's power to impose restrictions will be examined below in section 5. It is recommended here by the present author that such procedure should be adopted by an academic researcher who has been entrusted with confidential information from his subject or informant and who is reluctant to reveal such information for public scrutiny.

(c) Availability of Privileges in Non-curial Proceedings.

In Australia it has been decided that both legal professional privilege[56] and the privilege against self-incrimination[57] are not merely rules of evidence applicable in judicial or quasi-judicial proceedings, but are fundamental principles capable of applying in non-judicial proceedings. After some equivocation as to the status of the doctrine of legal professional privilege, the High Court in *Baker v Campbell*[58] decided, by a four to three majority, that the privilege is available not only in court proceedings but in proceedings before other bodies which have statutory power to require the giving of information. Furthermore the majority of the High Court held that documents covered by legal professional privilege could not be properly made the subject of a search warrant unless the statutory authority which issues the warrant specifically abrogates the privilege. This extension of the scope of the privilege in Australia[59] is to be strongly contrasted with the common law position in England, where legal professional privilege has been regarded as a mere rule of evidence, and applied only to prevent compulsory disclosure either by way of pre-trial discovery (that is, at the early stage of production of documents in a party's possession or in answering interrogatories before the actual trial of a civil action), or in the actual course of judicial or quasi-

[56] *Baker v Campbell* (1983) 57 ALJR 749 overruling *O'Reilly v The Commissioners of the State Bank of Victoria* (1982) 57 ALJR 130.

[57] *Sorby and Another v The Commonwealth of Australia and Others* (1983) 57 ALJR 248 and *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1983) 57 ALJR 236. Such extension will also apply to public interest immunity, see *Bercove v Hermes (No 3)* (1983) 51 ALR 109, 115-6. It is not entirely clear, however, whether such extension will also apply in the case of medical professional privilege (in those jurisdictions where such a privilege in a limited form has been held to exist eg *Evidence Act* (Vic) s 28).

[58] (1983) 57 ALJR 749; 49 ALR 385.

[59] Some of the practical difficulties that can arise once the broad view of legal professional privilege from *Baker v. Campbell* is accepted are exhibited in recent cases. See, eg *Brewer v Castles (No 3)* (1984) 52 ALR 582; *Arno v Forsyth* (1986) 65 ALR 125 and the article by A J Sing, *'Search Warrants and Legal Professional Privilege'* (1986) 10 Crim LJ 32. It appears from the decision in *Arno v Forsyth, ibid*, that in certain cases the question of privilege should be raised at the early stage of issue of the warrant rather than at the later stage of execution.

judicial proceedings.[60] The English common law position has, however, recently been altered as a result of the enactment of the *Police and Criminal Evidence Act* 1984 (U.K.).[61]

(d) Waiver of Privilege

Privilege is personal in that it attaches to a particular person or class of persons. The person entitled to the protection of the privilege can waive the privilege by disclosing the material the subject of the privilege to the other side or to the court. The privilege may be waived expressly or impliedly, deliberately or inadvertently.[62] The consequence of waiver is that the person becomes subject to the normal requirements of disclosure of the communication.[63]

It is important to stress the fact that privilege is personal - for example, where legal professional privilege applies, the privilege will attach to the client. The particular privilege-holder may be a witness in proceedings in which case he or she may waive the privilege automatically, by disclosing the privileged material to the other side or to the court. On the other hand, the privilege-holder may be a third party, who is not giving evidence in the proceedings, in which case the witness *must* refuse to answer questions or produce documents unless the third party has consented to the waiver of the privilege. In the specific context of the academic researcher who is called as a witness at trial or required under subpoena to produce documents to the court, it is submitted that the position would be as follows. If the documents were protected by legal professional privilege and the academic is regarded as an agent of the supplier of the information, then it is arguable that the academic, as the *alter ego* of the supplier, could waive the privilege.[64] This position is not, however, firmly established and there are some who would argue[65] that even in this situation an intermediary who is the agent of the supplier cannot properly waive the privilege. If, however, the documents were privileged and the

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60 Diplock LJ in *Parry-Jones v Law Society* [1969] 1 Ch 1, 9, [1968] 1 All ER 177, 180.

61 Since the enactment of the *Police and Criminal Evidence Act* 1984 (U.K.), the privilege now appears to have a much broader application in England as the Act expressly excepts 'items subject to legal privilege' from material which can be seized with or without a warrant. The combined effects of ss 8-10, 18, 19 and 78 of the English Act have arguably rendered nugatory some of the more drastic effects of the decision in *Parry-Jones*. See also T R S Allan, *'Legal Privilege and the Principle of Fairness in the Criminal Trial'*, [1987] Crim LR 449 at 452.

62 D M Byrne and J D Heydon, op cit, *614.*

63 *Ibid.*

64 Refer section 3(a) below - this is discussed as the first method by which legal professional privilege is likely to be available to academics.

65 See, for example, Woodward J in *Attorney-General (NT) v Maurice* (FCA) (1986) 65 ALR 230, 235.

academic is regarded as a third party then the academic cannot waive the privilege without the consent of the client.

Partial Disclosure

Where a document deals with a single subject-matter, it has been held that it would be unfair to allow the party entitled to the privilege to disclose part of the document and claim privilege as to the remainder.[66] The reasoning behind the rule against partial disclosure is explained by Professor Wigmore:

> ... when [a privileged person's] conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.[67]

Waiver of Associated Material

In the decision of *General Accident Corporation Ltd v Tanter*[68], Hobhouse J affirmed the doctrine of waiver of related or associated material and also restricted its scope. This doctrine, which is sometimes referred to as waiver by implication or associative waiver, states that documents mentioned in or connected with a document for which privilege has been waived themselves become liable to disclosure.[69] Hobhouse J in *Tanter's* case attempted to limit the doctrine of waiver of associated material by stating that the doctrine only applies when the document for which privilege has been waived has been adduced in evidence at the trial. In such a situation, only the 'deploying in court' of evidence which would otherwise be privileged has the effect of also waiving the privilege attaching to any document related to the topics dealt with in the disclosed document.

This distinction, which has been heavily criticized by Phipson[70], again came up for close scrutiny in the recent High Court decision of *A G (NT) v Maurice.*[71] In the course of the hearing of the Warumungu Land Claim

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[66] *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 approved in Attorney *General (NT) v Maurice* (HCA) (1987) 61 ALJR 92, 94.

[67] *Wigmore on Evidence,* McNaughton rev, vol VIII, para 2327.

[68] [1984] 1 WLR 100; 1 All ER 35.

[69] *Phipson on Evidence,* 13th edn 1st suppl (1984) para 15-20, quoted by Dawson J in *Maurice* (HCA) (1987) 61 ALJR 92, 101.

[70] *Phipson on Evidence,* 13th edn 1st suppl (1984) para 15-20, quoted by Dawson J in *Maurice* (FCA) (1987) 6 ALJR 92, 101. FCA (1986) 65 ALR 230, 242.

[71] (1987) 61 ALJR 92.

before the then Aboriginal Land Commissioner, Justice Kearney, the Central Land Council sought to tender a document entitled the 1982 Claim Book. The Claim Book had been prepared by several anthropologists and linguists (who had been employed to assist the Aboriginal claimants' lawyers to prepare and present the land claim) and copies of the Claim Book were distributed to those participating in the land claim hearing, including the lawyers representing other parties. Objection was taken to the tendering of the Claim Book but Kearney J never formally ruled on the question whether the tender was accepted or rejected. The hearing before Kearney J was eventually adjourned and in 1985 the hearing resumed *de novo* before Maurice J. The claimants at this resumed hearing did not rely on the 1982 Claim Book (which was neither filed nor tendered) but instead filed a document described as a 'guide book', which was a shorter version of the 1982 Claim Book. The Attorney-General sought disclosure of some of the documents that provided source material for the 1982 Claim Book. Maurice J held that the claimants had waived any legal professional privilege attaching to the 1982 Claim Book itself, when they filed, exchanged and tendered it in the first proceedings before Kearney J. However, Maurice J also held that that waiver did not extend to the background and source materials (such as the field notes and working reports of anthropologists and linguists) on which the Claim Book had been based. The Full Court of the Federal Court affirmed the decision of Maurice J that production and distribution of the 1982 Claim Book did not effect an associative waiver of legal professional privilege attaching to the background and source material. The Attorney-General for the Northern Territory then appealed to the High Court on the specific question of whether there had been an associative waiver of the source materials. The High Court dismissed the appeals and held that the Aboriginal claimants had no intention to waive, and had not waived privilege in the source materials and that no such waiver could be implied.

In dismissing the appeals of the Attorney-General (NT), all five justices of the High Court tended towards a fairness test in rejecting the application of associative waiver. Indeed, Gibbs CJ stated that the same fairness test which is used for partial disclosure (as set out by Wigmore above) must be used in deciding whether associative waiver applies.[72] In applying that test, His Honour held that it was not unfair or misleading, nor would it otherwise prejudice or embarrass the appellant in the conduct of the case, to lodge the Claim Book with the Land Commissioner and to disclose it to the other parties without also disclosing the source materials from which it was derived.[73] Although Gibbs CJ did not go so far as to reject Hobhouse J's test in *Tanter's* case, His Honour stated that such an inflexible test is not decisive.[74]

72 *Ibid*, 94.

73 *Ibid*, 95.

74 *Ibid*, 94.

In a similar fashion, Mason and Brennan JJ also considered it to be relevant but not conclusive that the Claim Book had 'never found its way into evidence'.[75] On the contrary, it is clear that their Honours based their decision not to impute a waiver of the source materials on the fact that there had been no unfairness or prejudice to the appellants in the distribution of the Claim Book. Deane J also adopted a fairness test although it is arguable that part of his judgment came quite close to applying Hobhouse J's test.[76] Finally, Dawson J approved, in *obiter dicta*, a fairness criterion to be applied in cases of potential associative waiver although His Honour held that there was no basis for the application of the doctrine of associative waiver on the immediate facts because there had been no waiver of privilege in respect of a privileged communication in the first place.[77]

3. TESTAMENTARY PRIVILEGES: SPECIFIC PRIVILEGES WHICH MAY BE AVAILABLE TO ACADEMICS.

(a) Legal Professional Privilege

It is a substantive general principle of the common law and not a mere rule of evidence that, subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the sole purpose of his or her seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings.[78] This rule is most commonly applied to communications between a client and her or his legal adviser. In this context it is important to note that such communications also include communications between the legal adviser and an agent of the client. However, legal professional privilege is not confined to communications between a client (or his agents) and his legal adviser. It can also cover -

(a) communications between a lawyer and third parties if made for the purpose of actual or contemplated litigation; and

(b) communications between a client (or her or his agents) and third parties if made for the purpose of obtaining information for the client's lawyer in order to obtain advice on actual or contemplated litigation.[79]

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[75] *Ibid*, 97.

[76] *Ibid*, 98.

[77] *Ibid*, 101.

[78] *Ibid*, 97 (per Deane J).

[79] For evidence that the two heads of privilege (ie Lawyer-Client Communications and Third Party Communications) should be treated separately, see *Kennedy v Lyell* (1883) 23 Ch D 387 at 404 (Cotton LJ); *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at

It has been seen above that, by statute and common law, certain confidential relationships are privileged but that there is no recognized privilege based on the confidential relationship of researcher/academic and subject/informant. However, there are two possible methods by which legal professional privilege may be available to academics when they appear as witnesses and are asked to divulge information conveyed to them in confidence. First, the academic could be regarded as an agent either of the client or of the solicitor. This is, in fact, the manner in which Woodward J in *A-G (NT) v Maurice*[80] treated the anthropologist Mr Reyburn in that case. The advantage of treating the academic as an agent of the client (or, for that matter, as an agent of the solicitor) is that legal professional privilege will then attach to any communications made solely for the purpose of enabling or obtaining legal advice or for the purpose of obtaining information necessary for actual or contemplated litigation. As Woodward J stated in *A-G (NT) v Maurice:*

> (1) legal professional privilege attaches to communications for purposes of litigation or advice passing from a client to his solicitor through an intermediary who is the agent of one or other of them (in this case an anthropologist);
>
> (2) the privilege is that of the client and neither the solicitor nor the intermediary can properly waive the privilege, or be compelled to answer questions about the communications, or produce documents dealing with them, without the consent of the client;
>
> (3) the powers and duties of the solicitor and the agent are not affected by the termination of the solicitor - client relationship or the agency;
>
> (4) since the agent could not be compelled to answer questions about things he learnt while carrying out his agency role, he cannot be compelled to produce notes which he later made, for his own purposes, about those matters ... In my view the position of Mr. Reyburn, as a former agent of the solicitor or the claimants, is no different from that of a solicitor or former solicitor of the claimants.[81]

It can be seen from the above that this method of treating the academic as an agent of either the client or the legal adviser would enable the privilege to operate widely. In fact, it would be possible for the

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656 (James LJ), 658 (Mellish LJ) *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 at 320 (Brett LJ); *Aydin v Australian Iron and Steel Pty Ltd* [1984] 3 NSWLR 684 at 689 (Hodgson J); *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 360 (Deane J).

[80] (1986) 65 ALR 230, 235.

[81] *Ibid.*

privilege to attach to communications between an academic and informant if made for the purpose of seeking or being furnished with legal advice even where no litigation is pending or contemplated. It seems further that communications of this class are not confined to communications between a lawyer and an agent of the client but also extend to reports to the client from his agent.[82] Hence a report or manuscript prepared by an academic acting as an agent of the client and which is submitted to the client for the purpose of seeking legal advice will attract privilege.

The second method by which legal professional privilege may be available to academics is where the academic is treated as a third party and the communication is made in contemplation of existing or anticipated litigation.[83] Third parties are persons who are not the agents of the client or the solicitor.[84] In the case of *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd*[85] Wood J confirmed that legal professional privilege protects communications between third parties and the lawyer or the client. The privilege will extend to documents and reports prepared by third parties but only when they are prepared for or in contemplation of litigation or for the purpose of giving advice or obtaining evidence with reference to such litigation. Wood J also explained clearly the distinction between documents or communications from third parties acting as agents of the client seeking advice, and from third parties not acting as agents.[86]

SOLE PURPOSE TEST IN AUSTRALIA

In Australia, legal professional privilege is confined to communications or documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or for use in legal proceedings. A document which would in any event have been brought into existence for another purpose is not privileged from production on that ground. In the case of *Grant v Downs*[87] the High Court rejected a

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[82] *Wheeler v Le Marchant* (1881) 17 Ch D 675; *Grant v Downs* (1976) 135 CLR 674 - see D M Byrne and J D Heydon, *op cit*, 638.

[83] *Wheeler v Le Marchant, ibid, Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44. Note that litigation must either have commenced or have been contemplated by the client. It is not sufficient that there was some mere vague apprehension of litigation: *Lawrenson v Wellington City Corporation* [1927] NZLR 510 at 511; *Warner v The Women's Hospital* [1954] VLR 410; *Zammit v Lazenby & Anor* (1986) Tas SC (unreptd).

[84] D M Byrne and J D Heydon, op cit, *638.*

[85] (1985) 3 NSWLR 44.

[86] *Ibid*, 53-4.

[87] (1976) 135 CLR 674. The majority's 'sole purpose' test of *Grant v Downs* has been referred to and applied in many subsequent Australian cases, often resulting in the rejection of a claim to legal professional privilege. See eg *Electrona Carbide Industries Pty Ltd v Tasmanian Government Insurance Office* (1982) Tas R 21; *Wade v Jackson's*

claim to privilege made with respect to certain reports made by hospital employees of the Department of Public Health following the death of a patient in a Psychiatric Centre. A majority of the High Court (Stephen, Mason and Murphy JJ) held that only those documents which are brought into existence for the sole purpose of submission to legal advisers or for use in legal proceedings are entitled to privilege. This means that if a document is brought into existence for a plurality of purposes then it will not be privileged. In the case of *Grant v Downs* an affidavit was sworn to the effect that the documents prepared by certain employees of the Department of Public Health were brought into existence for a number of purposes and hence the documents could not attract privilege. Barwick CJ, on the other hand, preferred a more liberal 'dominant purpose' test but even when His Honour applied this test to the facts of the case, he was unable to conclude that the dominant purpose of producing the report was to obtain advice or to aid the conduct of litigation then in reasonable contemplation.[88] Jacobs J, who, along with Stephen, Mason and Murphy JJ preferred to narrow the scope of the privilege, simply stated,

> I think that the question which the court should pose to itself is this - does the purpose of supplying the material to the legal adviser account for the existence of the material?[89]

It is arguable that the introduction of the 'sole purpose' test in Australia has both narrowed the ambit of the privilege and has caused difficulty in application in some cases.[90] When it is also considered that the relevant purpose is that for which the documents were brought into existence and not that for which they were delivered to the legal adviser[91] then it becomes even more apparent that the privilege may be limited in scope. Gibbs CJ recently demonstrated the narrowing effect of the 'sole purpose' test when His Honour pointed out, in *obiter dicta* that the '1982 Claim Book' in the *Maurice* decision was never privileged in the first

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Transport Services Pty Ltd [1979] Tas R 215; *Commonwealth v Frost* (1982) 41 ALR 626; *Packer v Deputy Commissioner of Taxation (Qld)* (1984) 55 ALR 242; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *Cahill & Anor; ex parte McGregor* (1985) 61 ACTR 7; *Attorney-General (NT) v Maurice* (1987) 61 ALJR 92; *Handley v Baddock* (1987) WAR 98; *Waterford v The Commonwealth* (1987) 61 ALJR 350.

88 *Ibid*, 677-8. Note that Barwick CJ's test has been adopted in England: *Waugh v British Railways Board* [1980] AC 521; *Guinness Peat Properties Ltd v Fitzroy Robinson* [1987] 2 All ER 716; *Re Highgrade Traders Ltd* [1984] BCLC 151.

89 This test of Jacobs J was also used by Woodward J in *A G (NT) v Maurice* (1986) 65 ALR 230, 236.

90 D M Byrne and J D Heydon, *op cit*, 640-1 list three situations where difficulty may arise - where the document is brought into existence by a company, where it is brought into existence as part of a routine procedure and in the case of third party communications.

91 *National Employers Mutual General Insurance Association Ltd v Waind* (1979) 24 ALR 86, 141 CLR 648, 654; *R v King* [1983] 1 All ER 929; *R v Justice of the Peace for Peterborough; Ex parte Hicks* [1978] 1 All ER 225. Note however Woodward J's attempt to limit the effect of *Waind's case* in *Maurice* (FCA) (1986) 65 ALR 230, 235.

place.[92] However, in the present author's opinion, the difficulties in gleaning a purpose (for example where the document is a routine or corporate document) will arise whether the test be a 'dominant' or 'sole' purpose test.[93]

OTHER RESTRICTIONS ON THE PRIVILEGE

For legal professional privilege to apply there must be in existence an identifiable legal adviser on the one hand and a client who is the holder of the privilege on the other. The relationship of lawyer-client must be in existence or at the very least contemplated.[94] It is not sufficient that the documents merely pass through the hands of solicitors or are handed to solicitors for safekeeping.[95] Legal professional privilege will apply to protect confidential, professional communications made for the purposes of litigation or advice which are fairly referable to the relationship of lawyer-client.[96] Communications made before the client contemplated obtaining legal advice on the matter in question are not privileged.[97] Recent judicial statements have also indicated that the legal adviser must be both competent and independent[98] although the precise extent to which

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[92] (1986) 61 ALJR 92, 93. See also Dawson J *ibid*, 100 who, agreeing with Gibbs CJ on this point, stated: 'it (the 1982 Claim Book) is not in any sense a confidential communication nor is it intended to be. In those circumstances I am unable to see how it is a document to which legal professional privilege attaches'.

[93] The difficulty, for example, which faced Hodgson J in *Aydin v Australian Iron and Steel Pty Ltd* [1984] 3 NSWLR 684 because the document was a routine document created by a company was not attributable to the High Court's adoption of a 'sole purpose' test. Even in the English cases where the 'dominant purpose' test applies, the difficulties in gleaning a corporate purpose or in gleaning the purpose for creating a routine document still arise. The only difference it seems is that in the English cases the purpose which is ultimately discovered is more likely to be held a privileged one than in the Australian cases. See also *Registrar of the Worker's Compensation Commission of New South Wales v F A I Insurance Ltd* [1983] 3 NSWLR 362; *Young v Quin* (1984) 5 ALR 168; *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 362 and 365 (Deane J).

[94] *Minter v Priest* [1930] AC 558 at 568.

[95] *Cheng Kui v Quinn* (1986) 67 ALR 231 at 234 (Fox J); A F Smith, '*Erosion of the Doctrine of Privilege*' (1982) 56 LIJ 461 at 464.

[96] 'In order to attract that privilege [*viz* legal professional privilege], the communications must be confidential and the legal adviser must be acting in his professional capacity': Dawson J in *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 366 citing *Minet v Morgan* (1873) 8 Ch App 361; *Wheeler v Le Marchant* (1881) Ch D 675; *Smith v Daniel* (1874) LR 18 Eq 649; *Bullivant v Attorney-General of Victoria* [1901] AC 196; *Jones v. Great Central Railway Company* [1910] AC 4; *O'Rourke v Darbishire* [1920] AC 581.

[97] D M Byrne and J D Heydon, *op cit*, 642.

[98] 'If the purpose of privilege is to be fulfilled, the legal adviser must be competent and independent. Competent, in order that the legal advice be sound and the conduct of litigation be efficient; independent, in order that the personal loyalties, duties or interests of the adviser should not influence the legal advice he gives or the fairness of his conduct of

the legal adviser must be independent of his client and not his employee for communications between them to be privileged has recently been seriously questioned by the High Court in *Waterford v The Commonwealth.*[99]

(b) Medical Professional Privilege

In several jurisdictions and in certain very limited situations, an academic researcher who is compelled to produce documents or to testify in court may object to such production and may refuse to answer specific questions by claiming medical professional privilege. At common law there is no such privilege as would protect a patient's confidential communications to her or his doctor.[100] However, in Victoria, Tasmania[101] and the Northern Territory[102] a statutory privilege is created arising out of the doctor-patient relationship. In Victoria, s 28(2) *Evidence Act* 1958 states:

> 28(2) No physician or surgeon shall without the consent of his patient divulge in any civil suit action or proceeding any information which he has acquired in attending the patient and which was necessary to enable him to prescribe or act for the patient.

The privilege is conferred on the patient and of course can be waived only by her or his consent, express or implied.

Apart from the obvious limitation that this statutory privilege does not apply in criminal proceedings, there are several phrases in s 28(2), such as 'physician or surgeon', 'information acquired' and 'attending the patient'

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litigation on behalf of his client': Brennan J in *Waterford v The Commonwealth* (1987) 61 ALJR 350 at 355.

[99] (1987) 61 ALJR 350.

[100] *Duchess of Kingston's Trial* (1776) 11 St Tr 198, 143; *Wilston v Rastall* (1792) 4 Term Rep 753, 759-60; *Falmouth v Moss* (1822) 11 Price 455, 470-1; *Broad v Pitt* (1828) 3 Car + P 578, 579; *Greenough v Gaskell* (1833) 1 My and K 98, 103; *Greenlaw v King* (1838) 1 Beav 137, 145; *Russell v Jackson* (1851) 9 Hare 387, 391; *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681; *R v Gibbons* (1823) 1 C + P 97; *Garner v Garner* (1920) 36 TLR 196, 197; *Nuttall v Nuttall and Tuyman* (1964) 108 Sol J 605 (re a psychiatrist) and *Parry-Jones v The Law Society* [1969] 1 Ch 1, 9. Despite the lack of a common law privilege, the courts,particularly the United Kingdom courts, have disapproved of the volunteering of medical evidence of a confidential nature and have not always compelled a witness to attend court and testify in breach of confidence: *Seyfang v G D Searle & Co* [1973] QB 148; *McAuliffe v McAuliffe* (1973) 4 ACTR 9, 10-11; *Hunger v Mann* [1974] QB 767. See The Law Reform Commission (Australia), *Evidence, op cit* n 45, Vol 2, 248.

[101] *Evidence Act* 1910 (Tas) s 96(2).

[102] *Evidence Act* 1939 (NT) s 12(2).

which, upon interpretation, also tend to have a limiting effect on the scope of the privilege.

The first limitation in the context of academic research is that the researcher would have to be a 'physician or surgeon' for the statutory privilege to apply. This is, however, subject to Norris J's opinion in *Hare v Riley*[103] that the privilege extends to communications made to persons performing paramedical services. The second limitation is the use of the phrase 'information acquired'. This was originally interpreted to mean only statements made by patients.[104] However, it is now recognised as including all knowledge, howsoever acquired, whether from medical examination or from statements by the patient.[105] It also covers verbal confidences communicated to the physician by other medical practitioners or by persons providing paramedical services for the treatment of the patient.[106]

The third and most serious limitation on the application of the statutory privilege is the requirement that the doctor must be 'attending the patient' when he or she acquires the information. In *National Mutual Life Association of Australasia Ltd v Godrich*[107] Griffith CJ stated that the phrase 'attending the patient' suggests 'a period co-extensive with the continuance of the relation of personal confidence which may be assumed to exist between the physician and the patient' and that a person is not constituted a patient within the meaning of the section just because a physician or surgeon prescribes or operates on him.[108] This is to be compared with O'Connor J who, in the same case, decided that 'attendance' should not be interpreted as requiring a relation of personal confidence.[109] At the very least, however, the information or communication must take place at a time when there exists a relationship of doctor and patient, and thus no privilege is created, for example, by a compulsory medical examination.[110]

It is submitted that even if a broad interpretation of the phrase 'attending the patient' is taken, it is unlikely that an academic researcher, even one engaged in human science research, will be treated as one who is 'attending the patient' whilst he is conducting his research and liaising with his informant/patient.

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[103] [1974] VR 577, 582.

[104] *Warnecke v The Equitable Life Assurance Society of the United States* [1906] VLR 482 (A'Beckett ACJ).

[105] *National Mutual Life Association of Australasia Ltd v Godrich* (1910) 10 CLR 1, 3-4, 9. *Warnecke v The Equitable Life Assurance Society of the United States, ibid,* 486; *Hare v Riley & A M P Society* [1974] VR 577, 582.

[106] *Hare v Riley & A M P Society, ibid,* 582 (Norris J).

[107] (1910) 10 CLR 1.

[108] *Ibid*, 10.

[109] *Ibid*, 28.

[110] *X v Y (No 1)* [1954] VLR 708; *Johnston v Commonwealth* [1974] VR 638.

(c) Privilege Against Self-Incrimination

The only remaining privilege which should be briefly mentioned in this article is the privilege against self-incrimination.[111] It is, however, suggested that it is unlikely that the privilege against self-incrimination will be available to academic researchers who appear as witnesses or are asked to divulge information conveyed to them in confidence. This is because the privilege can only be invoked whenever a person is compelled by law to answer any question or produce any document and the supplying of such answer or document would tend to expose *that person* to the risk of a criminal conviction, the imposition of a penalty or to establish the forfeiture of an estate.[112] It is difficult, therefore to envisage a situation where an academic researcher who has merely *received* or *obtained* information from another in confidence will expose himself or herself to criminal punishment or a penalty if he or she reveals that information. As Gibbs CJ, Mason and Dawson JJ recently stated: 'the privilege is not a privilege against incrimination; it is a privilege against self-incrimination'.[113]

4. PUBLIC INTEREST IMMUNITY

It is possible that on some occasions information supplied to academics may be protected from compulsory disclosure in court proceedings, or in proceedings before other bodies having the power to coerce the giving of evidence, through the application of the doctrine of public interest immunity. The governing legal principle is that otherwise relevant evidence must be excluded if its disclosure would be injurious to the public interest. This doctrine operates differently from the other rules of privilege considered in this article. In the case of public interest immunity the court is obliged in each individual case to balance competing public interests. As Gibbs ACJ said in *Sankey v Whitlam*,

> ... the public interest has two aspects which may conflict... There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the

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[111] This privilege is a right inherent in the common law and it is expressly preserved in the Evidence Acts of all the States (and Territories) of Australia except South Australia. ACT: *Evidence Ordinance* 1971 s 57; NSW: *Evidence Act* 1898 s 9; NT: *Evidence Act* 1939 s 10; Qld: *Evidence Act* 1977-1984 s 10; Vic: *Evidence Act*1958 ss 26 and 29; WA: *Evidence Act* 1906-1982 ss 11 and 24; Tas: *Evidence Act* 1910 ss 87 and 101.

[112] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609; 57 ALJR 236; *Sorby v The Commonwealth of Australia* (1983) 46 ALR 237; 57 ALJR 248. Emphasis added.

[113] In *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 59 ALJR 254, 257.

> administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.[114]

Thus, in each individual case the court is called upon to determine whether the public interest is better served by disclosure or non-disclosure and a determination of that kind *does* require the courts to actively engage in a balancing exercise.[115] In contrast, in the case of privileges such as legal professional privilege the issue of where the public interest lies has been 'pre-determined as a matter of law'[116] and has 'hitherto been concluded in favour of confidentiality'.[117] This difference in operation of the doctrine which requires in effect the court to reopen the question of public interest from case to case makes it more difficult to state with precision the limits of the doctrine and renders it even more difficult to state with certainty the rationale of the doctrine which may also appear to vary from case to case.

CLASS CLAIMS AND CONTENTS CLAIMS

An objection may be made to the production of a document on the ground that it would be injurious to the public interest to disclose its 'contents', or because it belongs to a 'class' of documents which in the public interest ought not to be produced, irrespective of whether it would be injurious to the public interest to disclose the contents of the particular document.[118] The 'class' claim[119] is based on the fact that the documents in question belong to an identifiable class of documents, common examples of which are Cabinet papers, minutes of discussion between heads of department, diplomatic despatches and documents relating to the framing of government policy at a high level[120] , whereas the 'contents'

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[114] (1978) 142 CLR 1, 38.

[115] *A-G (NT) v Kearney* (1985) 61 ALR 55 at 77 (Dawson J).

[116] *Ibid.*

[117] *Waterford v The Commonwealth* (1987) 61 ALR 350 at 368 (Dawson J). Note that McMullin J also stated in relation to legal professional privilege in *R v Uljee* [1982] 1 NZLR 561 at 576, 'It is not now a question of weighing the public interest in each case to see whether the rule should be applied. Whether the principle operates as a bar to the emergence of the truth and to the overall public detriment is not now a relevant legal consideration'.

[118] *Sankey v Whitlam* (1978) 142 CLR 1, 39 (Gibbs ACJ).

[119] Note that with a class claim the burden of securing the exclusion of documents is a heavy one and the court will examine such a claim with great care: *Rogers v Home Secretary* [1973] AC 388 at 400; *Sankey v Whitlam* (1978) 53 ALJR 11 at 31; *R v Robertson; ex parte McAulay* [1983] 21 NTR 11.

[120] Less familiar examples are those based on the character of the source of the information eg police informers etc: *Cain v Glass (No 2)* [1958] 3 NSWLR 230; *Blayney v Barrow and Stobart* (1987) Vic Sup Crt (unrept'd); *Neilson v Laugherne* [1981] QB 736; *Hehir v Commissioner of Police of the Metropolis* [1982] 2 All ER 335; *Tipene v Apperley*

claim is based purely on the fact that a particular document or documents should be immune from production because sensitive material which is damaging to the interests of state is contained therein.

DETERMINING THE VALIDITY OF THE CLAIM

An objection in a proceeding that the disclosure of information relevant to the questions in dispute would injure the public interest may be taken by a party, by the Crown or by the court itself.[121] Where the public interest objection is made by the Crown, the objection should be supported by evidence on affidavit made by the responsible Minister for the Crown or departmental head.[122] The affidavit should state precisely the grounds on which it is contended that disclosure would prejudice the public interest and identify the documents for which the claim is made.[123] Recent Australian decisions have consistently exhibited a distaste for vague, amorphous or deficient affidavits.[124] On the other hand, it could be argued that the overriding power of the court in relation to the doctrine of public interest immunity (which was firmly established in the decision of *Sankey v Whitlam*) may have correlatively diminished the importance of the requirement that a formal claim be made.[125] It is the function of the court to decide whether public interest immunity should be granted and a certificate or affidavit from the responsible Minister can never be conclusive in itself.[126] The court's duty is to engage in a balancing

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[1978] 1 NZLR 761; *Marks v Beyfus* (1890) 25 QBD 494; *Alister v The Queen* (1983) 50 ALR 41.

121 *Buttes Gas & Oil Co v Hammer (No 3)* [1980] 3 All ER 475, 499.

122 N J Williams, *op cit*, n 8, 195-6.

123 *Sankey v Whitlam*, *op cit*, 44, 62, 96.

124 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353. See also appeal to the High Court (although not relevant to this issue) (1987) 61 ALJR 612 (Deane J) and (1988) 62 ALJR 344 (Full Court); *R v Robertson; ex parte McAulay* (1983) 21 NTR 11; *Alister v R* (1983) 50 ALR 41 at 45, 78, 81; *Barton v Csidei* [1979] 1 NSWLR 524. In the latter case the New South Wales Court of Appeal went so far as to state that 'certificates' signed by the Minister claiming public interest immunity have no evidentiary value and that such a practice should not be countenanced by the court. *Ibid*, at 535.

125 As Stephen J pointed out in *Sankey v Whitlam*, 'a claim to Crown privilege, supported by whatever material may be thought appropriate to the occasion, does no more than draw the court's attention to what is said to be the entitlement to the privilege and provide the court with material which may assist in determining whether or not Crown privilege should be accorded. A claim to the privilege is not essential to the invoking of Crown privilege.' (1978) 53 ALJR 11 at 29.

126 *Sankey v Whitlam*, *op cit* 38 (Gibbs ACJ). Note, however, recent legislation in New South Wales (*Evidence Act* 1898 Pt VI, amended in 1979) and in the Northern Territory (*Evidence Act* 1939, Pt IVA amended in 1982) which provides that the Attorney-General may certify that a certain communication relating to the business of government at a senior level is confidential and that its disclosure is not in the public interest. Such a certificate, once issued, is conclusive. See also *Alister v R* (1983) 50 ALR 41; *Sankey v Whitlam, op cit,*

exercise weighing the public interest in the judicial process which requires disclosure against the risk that disclosure would be injurious to the state interest. In order to assist it in its balancing task, the court may privately inspect the documents, particularly if the court were of the preliminary view that the balance of the public interest required disclosure.

PUBLIC INTEREST IMMUNITY IN NON-CURIAL PROCEEDINGS

There has been no judicial decision which has faced directly the issue of whether public interest immunity can apply in non-curial proceedings such as in administrative, executive and investigative proceedings, in the extra judicial processes of search and seizure and in proceedings before bodies which have statutory power to require the giving of information. In the Federal Court decision of *Aboriginal Sacred Sites Protection Authority v Maurice*[127], Bowen CJ expressed the view that it is 'not entirely clear' whether the rules relating to public interest immunity apply to proceedings other than court proceedings. Nevertheless on the facts of the case before him, his Honour stated that it was 'common ground' that the rules relating to public interest immunity did apply to proceedings before the Aboriginal Land Commissioner.[128] In England, the courts have proceeded on the assumption that public interest immunity is capable of applying in non-judicial proceedings and appear to have decided *sub silentio* in a number of cases that public interest immunity does operate to exclude relevant evidence from forensic investigation not only in a court of law.[129]

In the author's view, there are very strong grounds for arguing that the doctrine of public interest immunity should be capable of applying in non-judicial proceedings.[130] First there is the general argument (which has

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46; *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582, 592.

127 (1986) 65 ALR 247 at 250.

128 *Ibid.*

129 In *Science Research Council v Nassé* [1980] AC 1028 all the Law Lords treated the question of public interest immunity as relevant to 'courts and tribunals'. See, for example, at 1071 where Lord Salmon states, 'In most cases, whether before the High Court, the county court or an industrial tribunal, there has been discovery of documents with no claim for privilege or immunity from production.' See also *D v NSPCC* [1978] AC 171 at 221 (Lord Hailsham) and *Rogers v Home Secretary* [1973] AC 388 at 410-411 (Lord Salmon).

130 Note that statutes which create administrative tribunals and other non-curial bodies commonly provide that these bodies shall not be bound by the rules of evidence, that is, the rules of evidence which must be applied in courts of law. Provisions of this kind, do not, however, necessarily have the effect of making public interest immunity inapplicable to proceedings before those tribunals. The public policies which have been held to require the exclusion of certain evidence, otherwise relevant to proof of facts in issue before courts of law, on the ground that its disclosure would be contrary to the public interest, may apply

been used in relation to private privileges to support their use in non-curial proceedings[131]) that it would be strange for a court to be in a weaker position than a tribunal in securing relevant evidence. This argument was recently used by Slade LJ in the English Court of Appeal to argue that a journalist claiming a statutory privilege which applied expressly to 'court proceedings' should be in no worse position because the inspectors before whom he appeared were not a court of law.[132] Second and more importantly, public interest immunity is not a private testimonial privilege. It is not dependent upon a claim being made by one of the parties. If there is a recognised public interest to be protected then it must be raised by the chairman or judge if not taken by the parties or the crown. Furthermore it can never be waived.[133] The fact that the public interest requires certain documents to be withheld from forensic scrutiny and the secondary evidence of those documents must also be withheld in the public interest indicates that the whole doctrine of public interest immunity would be rendered nugatory if it were not also to apply in non-judicial forums. The rationale of public interest immunity applies with no less force to tribunals and other bodies outside the ordinary court system.[134] Logic and common sense dictate that a doctrine designed to protect the public interest should be capable of applying in both curial and non-curial arenas.

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with no less force to tribunals outside the ordinary court system; see *Bercove v Hermes (No 3)* (1983) 51 ALR 109 at 115-6.

131 *A M & S Europe Ltd v E C Commission* [1983] QB 878 at 896.

132 In *re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] BCLC 76. Note that the appeal against the Court of Appeal decision by the journalist to the House of Lords was dismissed: [1988] 1 All ER 203. Note that the statutory privilege concerned was created under S 10 *Contempt of Court Act* 1981 (UK) entitling journalists in 'court proceedings' to refuse to disclose their sources of information. The inspectors before whom the journalist appeared were appointed under the *Financial Services Act* 1986 (UK).

133 *Science Research Council v Nassé* [1980] AC 1028 at 1074 (Lord Edmund-Davies); *Neilson v Laugherne* [1981] QB 736 at 753.

134 In practice, however, the question whether the rules which operate in the ordinary courts regarding public interest apply in a given tribunal will often fall to be determined by reference to the legislative provisions which define the tribunal's power to compel attendance and to administer an oath and which prescribe penalties for failure to give evidence. If the tribunal's power to require the giving of evidence is qualified by a provision that a person shall not be obliged to give evidence or produce documents which he could not be compelled to give or produce in proceedings before a court of law, the proviso will generally have the effect of picking up any common law exclusionary principle. Clauses which qualify a statutory duty to answer questions or produce documents in terms such as 'without lawful excuse', 'without reasonable excuse' or 'without just cause' will generally have the same effect' *Signorotto v Nicholson* [1982] VR 413 (cf *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 59 ALJR 254). In some situations the application to a tribunal of the public interest immunity doctrine is placed beyond doubt by the inclusion of an express statutory provision on the subject, for example, *Administrative Appeals Tribunal Act* 1975 (Cwth) ss 28(2), (3), 36, 36A, 37, 39, 43(3) and 46.

There is, however, the practical problem of the judicial balancing test which must be performed by the court. As Lord Pearson stated in *Rogers v Home Secretary*[135]

> The Court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore the court, though naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney-General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed.

In the present author's view, where the evidence falls into a recognised class of public interest immunity, for example, state documents relating to national security, then there will be no difficulty in recognising that such evidence must be immune from production in non-curial proceedings. Where, however, the evidence falls into a doubtful class of public interest immunity, or where, to use Lord Simon's words[136], the

> evidence may fall into a class which has not previously received judicial recognition; or it may be questionably of a previously recognised class; or it may fall outside any class of evidence which should be excluded in the public interest

then it is submitted that there may be problems with the application of the doctrine of public interest immunity in non-curial forums. In many of these situations, however, the matter may ultimately find its way to a court hearing, just as the original decisions of both the National Society for Prevention of Cruelty to Children[137] and the Gaming Board[138] to withhold documents in the public interest found their way into the judicial appellate process, in which case the judge will be able to adequately perform the balancing test of competing public interests.

EXTENSION OF THE SCOPE OF PUBLIC INTEREST IMMUNITY

The public interest which justifies the suppression of relevant information in proceedings before courts of law bears several aspects and it was stated by Lord Hailsham in *D v National Society for the Prevention*

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135 [1973] AC 388 at 406.

136 *Rogers v Home Secretary* [1973] AC 388 at 407.

137 *D v NSPCC* [1978] AC 171.

138 *Rogers v Home Secretary* [1973] AC 388.

of Cruelty to Children that the categories of public interest which may call for protection are not closed and may indeed change with social attitudes.[139] The traditional protection of 'state interest' was concerned with the 'higher levels of state' matters, the disclosure of which would be injurious to national security or to the proper functioning of government business at the highest level.

However, there has been a recent, marked extension of the scope of public interest immunity, and this extension is evident in cases such as *D v NSPCC*[140], *Rogers v Home Secretary*[141] and *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)*[142] in the United Kingdom and *Aboriginal Sacred Sites Protection Authority v Maurice and Others*[143] in Australia. For a start, it seems that the doctrine of public interest immunity may now be invoked to protect documents which are not in the possession of the Crown and which are brought into existence by another party when those documents contain confidential information supplied by the Crown.[144] Second, the House of Lords has recognized that the immunity will extend beyond the protection of internal communications between different departments of government to communications between members of the public and the State.[145] Such latter cases have been described by Tapper as the 'lower level cases'[146] mainly because they are not so directly connected with the actual interests of the State or central government.

Most often the objection to disclosure in these lower level cases is based on the necessity of maintaining confidentiality of communications with persons upon whose information the public service or a statutory authority relies for the effective discharge of its duties.[147] Also, it is usually the case that the objection is based on the need to preserve the confidentiality of a 'class' of documents. Common arguments employed are that disclosure would impair or substantially impede the proper functioning of a 'limb of government' or that the machinery of government or the public service would be impeded (with consequent detriment to the public) by a lack of reliable information if informants were unable to rely on the absolute confidence of the state as to their identity or to the

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139 [1978] AC 171, 230. Hereinafter referred to as *D v NSPCC*.

140 [1978] AC 171.

141 [1973] AC 388.

142 [1974] AC 405.

143 (1986) 65 ALR 247.

144 *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582, 591 (Mason J).

145 *Rogers v Home Secretary* [1973] AC 388; *Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405; although such extended protection was denied in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133.

146 R Cross and C Tapper, *op cit*, 419.

147 For a list of bodies to which protection in these lower level cases has been extended, see N J Williams, *op cit*, 194 para 15.23.

character of their information.[148] However, confidentiality is not a separate head of privilege[149] and hence the fact that information has been communicated by one person to another in confidence is not, of itself, a sufficient reason for protecting from disclosure the information or its source if such disclosure would assist the court to find the relevant facts.

THE CASE FOR EXTENSION BY ANALOGY

It appears from the House of Lords decision in *D v NSPCC* that public interest immunity will extend to protect information coming into the possession of statutory bodies which are not accurately described as government departments or organs of central government, provided that the claim to immunity is clearly analogous to a previously recognized head of public policy. In that case the National Society for Prevention of Cruelty to Children received information about the alleged ill-treatment of a fourteen month old girl. An inspector of the Society thereupon visited the house of the parents of the child where they found no evidence of such alleged ill-treatment. The mother of the child later brought an action against the Society for damages for personal injuries resulting from the Society's negligence. The Society defended the action and sought an order that there should be no discovery or inspection of any documents which revealed the identity of the informant. The Society's argument which was ultimately successful in the House of Lords was that the proper performance by the Society of its duties under its charter and the relevant statute requires that absolute confidentiality of information given in confidence should be maintained, that if disclosure were ordered the Society's sources of information would dry up and that that would be contrary to the public interest. The House of Lords was unanimous in deciding three important principles:

(1) There is no rule of law which protects documents from production or information from disclosure merely because they are given in confidence.

(2) The categories giving rise to immunity are not closed but they may only be extended by analogy and legitimate extrapolation.

(3) Information about child abuse, provided to organisations concerned with protection of children, falls within the concept of public interest immunity as a legitimate extension of the immunity

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[148] Such arguments will not succeed, however, if the documents are relevant to a defence in criminal proceedings. Public interest immunity may not be claimed in such a situation: *Cain v Glass (No 2)* (1985) 3 NSWLR 230. See also *Alister v R* (1983) 56 ALR 415.

[149] *Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, 433 (Lord Cross); *Science Research Council v Nassé* [1980] AC 1928, 1065; *Sankey v Whitlam* (1978) 142 CLR 1, 42-3; *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247, 251.

already given to informants to the police: see also *Rogers v Home Secretary.*[150]

It was generally recognized by the House of Lords in *D v NSPCC* that there are two possible methods of extending the doctrine of public interest immunity - the 'narrow' approach (which was ultimately approved by the House of Lords in that case) and the 'broad' or 'wide' approach. The 'narrow' method of extension is simply to find a clear analogy with a known category of public interest exception.[151] On the other hand, the 'broad' approach to extending public interest immunity is to recognise that 'wherever a party to legal proceedings claims that there is a public interest to be served by withholding documents or information from disclosure in those proceedings, it is the duty of the court to weigh that interest against the countervailing public interest in the administration of justice in the particular case and to refuse disclosure if the balance tilts that way'.[152] This broad approach to extending the immunity has not yet received the endorsement of the United Kingdom[153] or the Australian courts although at least one Australian judge, Woodward J in *Aboriginal Sacred Sites Protection Authority v Maurice* was prepared to recognize a fresh category of public interest (in the protection of minority rights) and clearly disapproved of the 'narrow' analogy approach.[154]

The 'Maurice' Decision

The case of *Aboriginal Sacred Sites Protection Authority v Maurice* was concerned with a claim by the Aboriginal Sacred Sites Protection Authority for public interest immunity in respect of documents prepared by its employees and persons under contract to it (anthropologists, linguists and others) in relation to the Warumungu land claim to have sacred sites recorded under the *Aboriginal Sacred Sites Act.* The Aboriginal Land Commission (Justice Maurice) had issued orders under s 54 of the *Aboriginal Land Rights (Northern Territory) Act* 1976 for the production of these documents prepared for the Aboriginal Sacred Sites Authority in the course of the land claim hearing. The Authority objected to the production of these documents on the ground that disclosure would

150 [1973] AC 388; *Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247, 268 (Toohey J).

151 [1978] AC 171, 219.

152 *Ibid; Aboriginal Sacred Sites Protection Authority v Maurice* (1986) 65 ALR 247, 267 (Toohey J).

153 The subsequent case of *Science Research Council v Nassé* [1980] AC 1028 rejected a claim to public interest immunity and most of the members of the House of Lords were concerned to point out that 'here there was no such analogy to a recognized form of public interest immunity as there had been in *D v NSPCC*'; D M Byrne and J D Heydon, *op cit*, 677.

154 (1986) 65 ALR 247, 255-6.

be injurious to the public interest in that it would involve revelation of information conveyed in confidence by Aboriginal informants. The relevant public interest was said to be that of 'fostering a relationship between Aboriginal informants on the one hand, and the Authority and its agents on the other, in order to enable the Authority to effectively perform its functions'.[155]

Bowen CJ and Woodward J held that public interest immunity could be claimed by the Authority in respect of documents sought to be produced. However, they held that when the public interest in the suppression of the documents was weighed against the public interest in favour of disclosure, the balance was in favour of disclosure subject to restrictions.[156] Toohey J on the other hand held that public interest immunity did not attach to the class of documents sought to be protected by the Authority although His Honour conceded that there might be, in respect of a particular document, an aspect of public interest immunity which the court must balance against the public interest in favour of disclosure.

Bowen CJ attempted to isolate the factors which are of critical importance in deciding whether public interest immunity should attach to the 'lower level' cases - that is, cases of statutory bodies which have been created by governments in vast profusion in recent years in order to perform various functions. Essentially Bowen CJ isolated four main factors:

(i) the confidentiality of the material (although on its own this is never sufficient);

(ii) the fact that disclosure may dry up a source of information;

(iii) the protection of informers against disclosure; and

(iv) if the information is necessary for the statutory body to perform its functions whether these involve the prosecution of offenders or not (although it is not entirely clear whether the informer will be protected in this situation).[157]

In the present case, Bowen CJ found that all four factors would be detrimentally affected if the Aboriginal Sacred Sites Protection Authority were obliged to disclose the information and hence the Authority could claim public interest immunity (particularly as the categories of public interest were not closed and that extension by analogy was an acceptable, but not the only, method of proceeding). In the final result, however,

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[155] *Ibid*, 254 (Wood J) quoting the Land Commissioner in that case, Maurice J.

[156] Bowen CJ and Woodward J were not prepared to interfere with Maurice J's balancing exercise as no error had been shown by Maurice J in engaging in it.

[157] *Ibid*, 251.

Bowen CJ agreed with the Land Commissioner that upon balancing the public interest in favour of suppression against the countervailing elements of public interest in favour of disclosure, the latter should prevail subject to restrictions.

Of the three Federal Court judges in the *Maurice* decision, Woodward J was the most prepared to extend the scope of the doctrine of public interest immunity. After analysing the more liberal approach towards public interest immunity taken by Lord Hailsham in *D v NSPCC* and referring to Stephen J's judgment in *Sankey v Whitlam*, Woodward J openly disapproved of the 'narrow' analogy approach and added,

> It is my opinion that, in this country, a fresh category of public interest immunity should be recognized, covering secret and sacred Aboriginal information and beliefs. Just who should be entitled to invoke such a category need not be decided in the present case.[158]

This indeed represents a significant extension of the doctrine of public interest immunity by the creation of this new aspect of the public interest. It may be, also, that had the public interest in the disclosure of all material in the land claim proceedings not been so manifestly weighty as it was in that case[159], then this new 'public interest' might have prevailed over the traditional public interest in the disclosure of all relevant material necessary for a just result in litigation. It is also important to note Woodward J's somewhat adventurous opinion that for public interest immunity to apply it is not necessary that the party claiming its protection be connected in any way with central government.[160]

The third judgment in the case, that of Toohey J, is to be contrasted to a certain extent with that of Woodward J. This is particularly so with Toohey J's view that public interest immunity exists to protect information necessary for the proper workings of the government of the state.[161] Toohey J was prepared to concede that public interest immunity may exist in the case of statutory bodies as well as departments or organs of central government. However His Honour was also quick to rely on Lord Scarman's warning that 'We are in the realm of public law, not private

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158 *Ibid*, 255-6.

159 In the *Maurice* decision there were said to be substantial public interest arguments in favour of disclosure of the materials which may serve to test the validity of claims: 'Many people would be affected ... by the granting of the substantial areas claimed - particularly the residents of Tennant Creek, local miners and graziers and their families, and commercial enterprises which have invested in the area.' *Ibid*, 257.

160 *Ibid*, 256 cf *Science Research Council v Nassé* [1980] AC 1028 where the House of Lords refused to recognize public interest immunity as the interest of the employers was of a private and not of a public nature. The House of Lords used the analogy approach in that case.

161 *Ibid*, 270.

right'.[162] Furthermore, Toohey J relied on the fact that in the case of *Sankey v Whitlam*, much emphasis was placed on the relationship between the public interest and the proper functioning of government.[163] Toohey J thereupon rejected the concept of public interest immunity in the case of documents which were generally in the possession of the Authority and was content to rely on the strict protective measures which were to be attached to the disclosure of the documents.

THE ACADEMIC RESEARCHER AND PUBLIC INTEREST IMMUNITY

In conclusion, it is submitted that if the academic researcher were to claim public interest immunity in respect of documents or information which he or she has received from an informant on a confidential basis, the argument would have to be presented as follows. First, the academic researcher would have to argue that disclosure of the information would be detrimental to *some* aspect of the public interest. It is suggested that at this point the academic researcher should argue in favour of the 'public interest' that sources of valuable and important information necessary for academic research do not dry up and the 'public interest' in the candour and effective functioning of tertiary institutions or universities (and particularly in the research conducted by such bodies). Another possible factor which could be raised is that it is in the 'public interest' to preserve confidentiality, although it has been seen that this aspect of the public interest, whilst a material consideration, alone cannot be a sufficient ground of public interest. Second, the academic researcher would have to argue that, on balance, this public interest in favour of suppression outweighs the public interest in the administration of justice (that a court of justice or administrative tribunal should not be denied access to relevant evidence).[164]

On the present state of the law, it is submitted that the academic researcher will find that neither of these two steps will be easy to satisfy. Although two of the three judges in the Federal Court decision in *Maurice* were prepared to recognize a 'public interest' in the 'fostering of the relationship between Aboriginal informants and the Aboriginal Sacred Sites Protection Authority'[165], it is submitted that the threshold requirement that the academic researcher identify a 'public interest' which will be adversely affected if disclosure is ordered will be the most difficult.

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[162] *Ibid.*

[163] *Ibid.*

[164] *Ibid*, 251 (Bowen CJ) but quaere Lord Hailsham's words in *D v NSPCC* where His Lordship said, 'There are however cases when confidentiality is itself a public interest... This is one of those cases... Whether there be other cases, and what these may be, must fall to be decided in the future.' [1978] AC 171, 225.

[165] See the list of five factors which were relevant to the existence of this public interest, *ibid*, 251 (Bowen CJ). Note, however, that this 'recognized' public interest was later outweighed by the public interest in favour of disclosure.

It is of course obvious that the researcher must rely on what has been described as the 'lower level cases' because the researcher's claim will be presumably unconnected with the affairs of central government. In particular, the researcher should rely on the decisions in *D v NSPCC* (especially the judgments of Lords Hailsham and Edmund-Davies) and *Maurice* (the judgment of Woodward J and, to a lesser extent, that of Bowen CJ). We have seen from *D v NSPCC* that the 'narrow' approach to the extension of categories of public interest may occur by 'analogy and legitimate extrapolation'[166] from known categories of exception. Such an approach may be difficult in the researcher's case.[167] If, however, the so-called 'broad' approach is adopted then the researcher may be more successful in identifying a category of public interest favouring suppression. For example, Lord Edmund-Davies, in supporting the broad approach in *D v NSPCC* stated that wherever a confidential relationship exists (other than that of lawyer and client) and disclosure would be in breach of some ethical or social value involving the public interest, the court has a discretion to uphold a refusal to disclose relevant evidence provided it considers that, on balance, the public interest would be better served by excluding such evidence.[168]

It may be that such a 'broad' approach to the extension of categories of public interest could be favoured by the courts in the future. Nevertheless, even if such a broad approach were adopted, it is not clear whether the courts would ever be prepared to extend the protection of public interest immunity beyond statutory bodies to private bodies or individuals. There are indeed some judges who today are still concerned to connect the relevant 'public interest' as closely as possible to the proper workings of the government of the state or at least to a recognized limb of government or the public sector.[169] In contrast with this approach, Woodward J in the *Maurice* decision has conceded, albeit in *obiter dicta*, that public interest immunity may also protect, in certain specialised situations, 'private foundations' as well as public statutory bodies[170] and Lord Edmund-Davies in *D v NSPCC* stated that

> the presence (or absence) of the involvement of the central government in the matter of disclosure is not conclusive either way, though in practice it may affect the cogency of the argument against disclosure.[171]

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166 [1978] AC 171, 226 (Lord Hailsham).

167 See, for instance, Toohey J's attempt to apply the 'narrow' analogy approach in *Maurice, op cit*, 268.

168 [1978] AC 171, 245.

169 Lord Scarman in *Science Research Council v Nassé* [1980] AC 1028, 1087 and Toohey J in *Maurice, ibid*, 270. Note also that Toohey J is now a member of the High Court of Australia.

170 *Op cit*, 256.

171 [1978] AC 171, 245.

Overall, however, given the current judicial attitudes to the concept of 'public interest', it is suggested that the academic researcher should be careful to argue that disclosure would impede the effective functioning of the University as an institution (which is arguably part of the public sector or a function of government)[172] and that it is in the public interest that valuable and important sources of information to the University's employees or persons under contract to it do not dry up.

5. RESTRICTING THE USE MADE OF COMMUNICATIONS DISCLOSED UNDER COMPULSION OF LAW

In situations where an academic is compelled to supply confidential information by process of law and where there is either no established privilege in existence or the academic makes an unsuccessful claim to be privileged from disclosing the information, there may still be certain measures which the court may adopt in order to limit disclosure in the interests of justice. In the last two decades there has been a movement, particularly by the English courts, to attempt to preserve the privacy and confidentiality of information even where the law demands compulsory disclosure.[173] The preferred approach of these courts has been to attempt to elicit the evidence in an alternative way, if that is reasonably possible.

There are three main methods by which the confidential nature of a communication may be reconciled with the conflicting policy under the law which requires disclosure. First, the court may have a special discretion not to insist on evidence being given if, for example, embarrassment would be caused to the witness or a violation of his or her code of ethics would result.[174] Second, the court has an inherent power to impose restrictions on the use to be made of the information, for example, to order that the evidence be produced on a limited basis or that the proceedings be heard in camera. Third, disclosure may be protected as an incident of the court process.

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[172] By analogy with the arguments used in the *Railways* case: (1906) 4 CLR 488. (*Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association*). See in particular the judgment of Griffith CJ at 538-9.

[173] *Attorney-General v Clough* [1963] 1 QB 773; *Attorney-General v Mulholland* [1963] 2 QB 477; *British Steel Corporation v Granada* [1981] QC 1096; *Attorney-General v Lundin* (1982) 75 CR App R 90; *Secretary of State for Defence v Guardian Newspapers* [1984] 1 All ER 453; *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 All ER 203. See Y Cripps, 'Judicial Proceedings and Refusal to Disclose the Identity of Sources of Information' (1984) 43 *Camb LJ* 266.

[174] D M Byrne and J D Heydon, *op cit*, 650.

(A) DISCRETION NOT TO INSIST ON EVIDENCE BEING GIVEN.

In a court of law a witness is not excused from answering questions relevant to the issues to be determined simply because, by answering, he would be betraying confidences - in breach of a moral obligation or perhaps even in violation of a legal duty to another - for the public interest in discovering the truth prevails over the private duty to respect confidences.[175] However it may be that the judge has a special residual discretion not to insist on the evidence being given.[176] It seems that this discretion only arises when a witness makes an unsuccessful claim to be privileged from answering a question.[177] As Lord Denning MR pointed out in *Attorney-General v Mulholland*[178] one circumstance in which a court might properly exercise its discretion not to require answers would be a case in which a professional person was asked to betray confidences not protected by the law of privilege. Donovan LJ, in the same case, observed that:

> there may be considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstances which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer ... [I]t would be wrong to hold that a judge is tied hand and foot in such a case ...[179]

Two years after the decision in *Mulholland*, however, the New South Wales Supreme Court in *Re Buchanan*[180] held that the court did not possess a discretion to excuse a witness from answering questions in such a situation. There has, since then, been very little close attention given to the existence of the discretion in Australia. Meanwhile, however, in the

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[175] E Campbell, *Contempt of Royal Commissions, op cit*, n 29, 28. Note also that a witness appearing before a non-curial body could not claim any greater privileges against disclosure than he would be allowed were he appearing as a witness before a court of law unless he can point to some special provision, E Campbell *ibid*. See, for example, s 21A *Evidence Act* 1958 (Vic). See, however, the recent statutory protection given to journalists in the United Kingdom - *Contempt of Court Act* 1981 (UK) s 10 - under this section it is no longer contempt of court or of a tribunal of inquiry for a journalist to refuse to disclose his source unless it is established that disclosure is necessary in the interests of justice, or national security or for the prevention of crime or disorder.

[176] The uncertainty results from the lack of clear authority in Australia and at least one authority which is against the existence of the discretion - see *Re Buchanan* [1964-5] NSWR 1379, 1381. But see also *McGuiness v Attorney-General of Victoria* (1940) 63 CLR 73, 104.

[177] R Cross and C Tapper, *ibid*, 180.

[178] [1963] 2 QB 477, 490.

[179] *Ibid*, 492; approved in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

[180] (1964-5) NSWR 1379, 1381; (1964) 65 SR (NSW) 9, 11.

United Kingdom the discretion has gained strength. Lord Hailsham, in *D v National Society for the Prevention of Cruelty to Children*[181] supported the existence of the discretion and accepted the views of the English Law Reform Committee on privilege in civil proceedings that a judge has a 'wide discretion to permit the witness ... to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed'.[182]

(B) THE COURT'S POWER TO IMPOSE RESTRICTIONS.

The court has inherent power to relieve a party of the obligation to disclose or produce documents for inspection or to limit that obligation in order to prevent an abuse of process or to avoid injustice.[183] The right under the Rules of the Supreme Court of Victoria to discovery and inspection of documents is not absolute.[184]

The Australian Law Reform Committee's *Report* on *Aboriginal Customary Law*[185] provides a good summary of the various ways in which a court may impose restrictions on the use to be made of information disclosed under compulsion of law. In that Report the Commission deals with the ways and means by which evidence of those secrets is relevant. Reference is made by the Commission to the existing legal powers which enable courts and tribunals to preserve secrecy or confidentiality: powers to 'regulate judicial procedure, to hear evidence in camera, to allow production of evidence on a restricted basis, to grant protective orders including orders suppressing publication of proceedings'.[186]

The courts exercise the power to prevent unnecessary disclosure in various ways - it is often said to depend on the 'good sense and sensitivity of the trial judge'.[187] Examples would be a direction by the judge that no

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[181] [1978] AC 171 with whom Lord Kilbrandon agreed. The House of Lords was equally divided but in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1113 Megarry VC believed that the balance favoured Lord Hailsham's view.

[182] 16th Report, Law Reform Committee, *Privilege in Civil Proceedings* para 1, quoted in R Cross and C Tapper, *op cit*, 181. It should be noted however that Lord Justice Slade in *In re an Inquiry Under the Company Securities (Insider Dealing) Act* 1985 was not in favour of retaining a wide and flexible discretion in respect of journalists not disclosing their sources, particularly since the enactment of s 10 of the *Contempt of Court Act* 1981 which in any event conferred a statutory privilege on journalists: [1988] BCLC 76.

[183] N J Williams, *op cit* n 8, 205 para 15.46.

[184] *Ibid.*

[185] *Op cit* n 50.

[186] *Ibid*, para 653.

[187] D M Byrne and J D Heydon, *op cit* 618.

use will be made of the information outside particular proceedings[188], that the names of the parties and certain material not be published, that only a limited group of people (for example, the judge, associate and counsel) have access to the material or, in rare cases, a direction that the hearing take place in camera. It has also been claimed that even when no power to give such directions exists, the press will normally act upon the 'advice' of a judge that certain material not be published.[189]

The court's inherent jurisdiction to ensure that the ambit of discovery is not wider than necessary to dispose fairly of the action or to prevent an abuse of process or a contempt of court will also be invoked if, for example, discovery or inspection of documents is used, not for the purpose of the instant litigation, but for a collateral purpose or if discovery is directed exclusively to the credit of the other party. The English Court of Appeal in the case of *Church of Scientology of California v Department of Health and Social Security*[190] confirmed the general power of the court to impose restrictions on inspection, if, for example, there was a real risk of the right of unrestricted inspection being used for a collateral purpose.

(c) PROTECTED DISCLOSURE AS AN INCIDENT OF COURT PROCESS.

The case of *Riddick v Thomas Board Mills Ltd*[191] confirmed the principle that the fruits of discovery may be used only in the proceeding in which the discovery was employed.[192] In that case the Court of Appeal stated that it was an abuse of the court process to rely upon a document obtained on discovery in one proceeding either as the basis for or as evidence in support of a cause of action in another proceeding.[193] Furthermore it was held in *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd*[194] that there is an implied undertaking made by a party to whom documents are produced on discovery not to use the documents for any collateral or ulterior purpose without the consent of the party giving discovery. The enduring character of this implied undertaking was established in *Home Office v Harman*.[195] The House of Lords there held that the implied undertaking continues to bind the party even after the documents in question have been read out in open court. *Harman's* case has, however, been criticized because the protection given to the party giving discovery which is a natural incident of the court process has now

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188 *Chantrey Martin & Co v Martin* [1953] 2 QB 286. Non-compliance with the order would constitute a contempt of court, D M Byrne and J D Heyson, *ibid*, 650.

189 D M Byrne and J D Heydon, *ibid*, 618.

190 [1979] 3 All ER 97.

191 [1977] 3 All ER 677.

192 N J Williams, *op cit*, 205, para 15.47.

193 This principle was extended by Goulding J in *Medway v Doublelock Ltd* [1978] 1 All ER 1261.

194 [1975] 1 All ER 41.

195 [1982] 1 All ER 532.

been rendered illusory simply because of the public nature of court proceedings.[196]

In conclusion, it should be cautioned that there are two possible disadvantages associated with a witness relying on the court's power to impose restrictions or to order disclosure on a limited basis. The first is that just referred to in *Harman's* case. Although the powers of the court to impose restrictions upon access to information are wide, the value of those powers is sharply reduced once the confidential information is disclosed at trial.[197] The second disadvantage may be only a marginal or theoretical one but is nonetheless hinted at by Freckelton in his article 'Social Scientists in the Witness Box'.[198] Freckelton there reviewed the decision of the Federal Court in *Attorney-General (NT) v Maurice*[199] that the anthropologists and linguists in that case, together with the Aboriginal Sacred Sites Protection Authority by which they were employed, were not able to withhold information supplied to them by Aborigines which was relevant to land claim hearings. It is suggested by Freckelton that in reaching this decision, the Court was influenced by the fact that the Land Commissioner, Justice Maurice, had undertaken that only he, his associate, the barristers involved and possibly his consulting anthropologist and researcher would have access to the material.[200]

If this is correct and the court was so influenced then it may be that to place too much emphasis on the court's power to impose restrictions on the use of evidence disclosed by compulsion of law will be counter-productive. It would, for instance, surely be unsatisfactory for a witness to have his valid claim to withhold confidential information sacrificed on the altar of compromise simply because the court was aware that it could 'keep everyone happy' by ordering restricted disclosure on a limited basis. Nevertheless, it seems clear that Woodward J in *Maurice* was of the opinion that a court's procedural decision to restrict access to a limited group of people would reduce the strength of the substantive argument against disclosure on the grounds of public interest.[201]

CONCLUSION

It can be seen from this article that the power of the common law to compel a person to produce information and documents to a court or tribunal is extremely extensive. There are very few categories of persons who are entitled to refuse to disclose to judicial bodies information acquired in confidence. The academic researcher certainly does not fall

196 D M Byrne and J D Heydon, *op cit*, 617.
197 *Ibid.*
198 *Op cit*, n 7.
199 (1986) 65 ALR 247.
200 *Op cit* n 7, 1097.
201 (1986) 65 ALR 247, 256-7.

into any specialized or exceptional category and hence is in no special position to resist disclosure. However, the academic researcher who is reluctant to disclose information received in confidence may overcome some of the difficulties inherent in the harshness of the common law's requirement of compulsory disclosure by resort to the law of privilege.

Although the law of privilege has been traditionally perceived as applying to recognized classes of claimants in the general areas of the law of evidence and civil procedure, it nonetheless remains an untapped source for other claimants who do not fall easily into any of the common law's recognized classes. In this article, it has been seen that the academic researcher may, in certain situations, claim legal professional privilege, medical professional privilege, public interest immunity and to a lesser extent, the privilege against self-incrimination in order to resist disclosure of information to a court or non-curial body. Further, if these substantive claims to privilege are unsuccessful, there are various procedural methods which may be adopted whereby the court or other body may order disclosure on a restricted basis. It may be, therefore, that the law of privilege as a whole is merely awaiting invocation in other areas and by other potential claimants who also do not fall into any of those categories which have been treated traditionally by the courts as having safely secured a foothold of recognition at common law.