Scottish Law Commission

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BREACH OF CONFIDENCE

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*) OF THE LAW COMMISSIONS ACT 1965

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SCOTTISH LAW COMMISSION

BREACH OF CONFIDENCE

Report on a reference under Section 3(1)(*e*)
of the Law Commissions Act 1965

To: The Right Honourable George Younger, M.P.,
Her Majesty's Secretary of State for Scotland

We have the honour to submit our Report on Breach of Confidence.

(Signed) PETER MAXWELL, *Chairman*
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GORDON NICHOLSON

R. EADIE, *Secretary*
26th October 1984

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PART I INTRODUCTION

Background to Report

1.1 Our work in connection with breach of confidence, and that of the Law Commission for England and Wales, derives directly from a recommendation of the Younger Committee on Privacy. On 13 May 1970 the Younger Committee was appointed with the following terms of reference:

> "To consider whether legislation is needed to give further protection to the individual citizen and to commercial and industrial interests against intrusions into privacy by private persons and organisations, or by companies, and to make recommendations."

Their Report was published in July 1972.[1] In Chapter 21 of that Report[2] the Committee recommended that the law relating to breach of confidence should be referred to the Law Commissions with a view to its clarification and statement in legislative form.[3] They also expressed the hope that if this were done, the Law Commissions would take into account and co-ordinate their work with the recommendation that it should be a civil wrong, actionable at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means.[4] The Committee envisaged that it would be necessary to provide defences to cover situations where the disclosure of the information was in the public interest or was made in privileged circumstances. They also envisaged that the remedies available would be similar to those appropriate to an action for breach of confidence.

1.2 The reason for these proposals was that the survey of the existing law which the Younger Committee had carried out led them to two conclusions: first, that the action for breach of confidence afforded, or at least was potentially capable of affording, much greater protection of privacy than was generally realised; and second, that it would not be satisfactory simply to leave this branch of the law, with its many uncertainties, to await further development and clarification by the courts.[5]

1.3 The Committee also set out the broad aims which, in their view, the law of breach of confidence should have "as far as the protection of privacy is concerned". These were:

> "(*a*) to provide remedies against the disclosure or other use of information (not already generally known) by persons in possession of that information under an obligation of confidence;
>
> (*b*) to make remedies available not only against a person who was entrusted by another with information in confidence but also against a third party to whom that person disclosed the information;
>
> (*c*) to protect the public interest in the disclosure of certain kinds of information, and the defend[er]'s right of disclosure in certain privileged situations, by the provision of appropriate defences;

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[1](1972) Cmnd. 5012.
[2]The only chapter in Part III, entitled "Disclosure or other use of Information".
[3]Para. 633.
[4]Para. 632.
[5]Para. 630.

(*d*) to afford remedies, whether by way of [interdict], damages or claims for loss of profit which do justice to the reasonable claims of [pursuers] and defend[ers] in differing situations."[1]

1.4 The Government of the day decided to accept these recommendations of the Younger Committee. Accordingly on 6 June 1973 the Secretary of State for Scotland requested us, under section 3(1)(*e*) of the Law Commissions Act 1965:

"With a view to the protection of privacy —

(1) to consider the law of Scotland relating to breach of confidence and to advise what statutory provisions, if any, are required to clarify or improve it;

(2) to consider and advise what remedies, if any, should be provided in the law of Scotland for persons who have suffered loss or damage in consequence of the disclosure or use of information unlawfully obtained, and in what circumstances such remedies should be available."

1.5 On 14 April 1977 we published our Consultative Memorandum No. 40 setting out the present law of Scotland on this subject and a series of provisional proposals for its amendment. The Law Commission for England and Wales were requested by the Lord Chancellor to carry out a similar review of English law. A working paper setting out their provisional conclusions was published in 1974,[2] and a report containing their final recommendations was published in October 1981.[3]

1.6 We received many valuable comments in response to our consultative memorandum.[4] Those comments, however, and further analysis of the problems persuaded us that our earlier approach was too ambitious, since we impinged upon wider issues of privacy and data protection quite unrelated to questions of breach of confidence. On 3 June 1982, therefore, we published a further consultation paper, for more specialised circulation,[5] which was limited, as far as practicable, to questions of breach of confidence as that term is generally understood. We received a large and helpful response to the subsequent consultation paper[6] and, in general, this response was favourable to our revised approach. We have, however, found it necessary to reconsider a number of the propositions contained in the consultation paper and, in the event, we have been able to effect further significant simplications.

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[1]Para. 631. The words and suffixes in parentheses substitute the appropriate Scottish terminology.

[2]Working Paper No. 58: Breach of Confidence.

[3]Breach of Confidence (Law Com. No. 110, Cmnd. 8388).

[4]A list of those who submitted written comments on the consultative memorandum is contained in Appendix B.

[5]This paper was not published by HMSO as one of our regular series of consultative memoranda but was sent to certain regular commentators and, additionally, to representatives of the media and others with a particular interest in the subject matter.

[6]A list of those who submitted written comments on the consultation paper is contained in Appendix C.

Scope of Report

1.7 Even if our terms of reference had not precluded us from considering wider aspects of the law of privacy, we would have hesitated to do so in view of the consideration of aspects of the law of privacy by governmental committees and other bodies concerned with the Official Secrets Act 1911,[1] Contempt of Court,[2] Defamation,[3] and The Press,[4] and more especially having regard to the consideration of the general law of privacy by the Younger Committee.[5] Accordingly this Report includes no recommendations along the lines of Provisional Proposal 10 in our consultative memorandum (which suggested an extension of the delict of *injuria* to cover unwarranted aggressions upon the pursuer's person, dignity, or reputation) or of Provisional Proposals 11 to 13 (which suggested the introduction of a statutory delict consisting of the use or disclosure of information amounting to a substantial infringement of a right of privacy.)

1.8 We have thought it appropriate, moreover, to avoid dealing with issues of data protection other than those relating to the use and disclosure of confidential information. Data protection is in some respects a wider field, because it is concerned with the use or disclosure of information whether or not this has been imparted in confidence and with such issues as the accuracy of the information recorded and access to the information recorded on the part of the subject of the information.[6] We concluded that the separate examination of issues of data protection by the Lindop Committee in their report on data protection[7] and by Government in the White Papers, "Computers and Privacy",[8] "Computers: Safeguards for Privacy",[9] and "Data Protection: The Government's Proposals for Legislation",[10] and, above all, the fact that a Bill sponsored by the Government was before Parliament at the time we were preparing our Report,[11] made it inappropriate for us to enter into questions of data protection other than those directly concerned with the use or disclosure of confidential information. We have noted, however, in this context the conclusion of the Lindop Committee:

> "We see no reason why the presence or absence of computers should make any difference to the legal rights and obligations of the parties who handle such information or are affected by it, whether under the law of defamation or any other branch of the law."[12]

We have concluded, therefore, that, while in considering the law relating to breach of confidence and the disclosure or use of information unlawfully obtained we should pay careful attention to the related problems of data

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[1]Cmnd. 5104 (1972).
[2]Cmnd. 5794 (1974).
[3]Cmnd. 5909 (1975).
[4]Cmnd. 6810 (1977).
[5]Cmnd. 5012 (1972).
[6]See Report of the Committee on Data Protection (the Lindop Report), Cmnd. 7341 (1978) para. 34.11.
[7]Cmnd. 7341 (1978).
[8]Cmnd. 6353 (1975).
[9]Cmnd. 6354 (1975).
[10]Cmnd. 8539 (1982).
[11]See now the Data Protection Act 1984.
[12]Cmnd. 7341 (1978), para 32.14.

protection, our Report should not enter the field of data protection as such. Accordingly our Report contains no recommendation precisely on the lines of Provisional Proposal 7 in our consultative memorandum. This suggested *inter alia* that:

> "where information is communicated for the purpose of being stored in a computer, the person to whom the information is communicated and the person responsible for the maintenance of the computer system should both be under an obligation that the information shall neither be disclosed nor used without the consent of the communicator except for the purposes for which it is communicated."[1]

1.9 In the consultative memorandum we considered criminal law aspects of breach of confidence[2] and proposed that it should be made an offence to enter premises or to search or examine property owned or lawfully possessed by another without his consent or lawful authority, for the purpose of obtaining confidential information. We also proposed, like the Younger Committee,[3] that the use of certain surveillance devices should be made a criminal offence. These proposals were considered by consultees to be too wide, and it was pointed out that it would be difficult to establish when a person entered premises with a view to obtaining confidential information. There is, indeed, a danger that a criminal offence designed solely to provide sanctions in the field of confidentiality might, to be effective, have to be couched in terms sufficiently wide to enable it to embrace conduct of a quite different character. Irrespective of these comments, however, our conclusion that wider issues of privacy are not within our terms of reference means that we are concerned with the unauthorised divulging or use of information rather than with the methods of obtaining it.

1.10 To sum up, therefore, we are dealing only with the circumstances in which, in our view, the law should recognise civil obligations of confidentiality (including the case where confidential information is or may be disclosed in judicial proceedings); the defences which should be available in an action for breach of confidence; and the provision of appropriate remedies. We are not dealing with the possibility of introducing a law protecting personal privacy in Scotland. We are not dealing with data protection, except insofar as the data relate to the use and disclosure of confidential information, and in particular we are not concerned with administrative procedures or codes of conduct affecting individuals and agencies who may be entrusted with data.[4] We make no recommendations for the reform of branches of the law such as copyright and patents. We are not concerned with the possibility of creating criminal offences as a sanction against breach of confidence, entering premises without lawful authority or using certain surveillance devices. Nor are we concerned with contempt of court, which is quasi-criminal.

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[1]This proposal in any event received a mixed reception on consultation. In particular, it was objected that there was no reason for making a distinction in law between the unauthorised use or disclosure of information from a computer system and similar use or disclosure from a clerically maintained system.

[2]Provisional Proposals 17 and 18.

[3]Paras. 560-5.

[4]Such as are contained in the Data Protection Act 1984.

PART II PRESENT LAW

2.1 In this Part of the Report we shall confine ourselves mainly to an examination of the existing Scottish authorities. Breach of confidence is not a self-contained branch of Scots law which has clearly defined boundaries and its own rules, remedies and defences. Most of the Scottish authorities are based on express or implied contractual obligations, there being very few cases which can clearly be discerned to derive from some other branch of the law such as delict. We shall therefore describe first the ways in which Scots law recognises obligations arising out of express or implied agreements or undertakings. We shall then examine the extent to which the law of delict already recognises duties of confidence or may potentially be developed in the future. Finally we examine the extent to which other branches of the law, such as property, may in certain circumstances provide protection. We shall examine the existing law relating to judicial proceedings, defences and remedies in Part IV.

2.2 For reasons of space we shall only refer in outline to developments in English law. We refer the interested reader to Parts III and IV of the Law Commission Report for a comprehensive description of the state of English law (as it had developed by 1981). Since the middle of last century the English courts have developed a civil remedy affording protection against the unauthorised disclosure or use of information which is the subject of an obligation of confidence. They have done so with little or no assistance from the legislature. The starting point of the cases was the view that there had been a breach of an express or implied term of a contract but, following the case of *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.*[1] increasing emphasis has been placed upon the existence of a general equitable doctrine of good faith, and the law has been said to depend on "the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it."[2]

Express contract or undertaking

2.3 It has for long been the law of Scotland that the use and disclosure of confidential information may be regulated by the express terms of a contract between the parties. Lord Fraser explained that

> ". . . a contract not to divulge a trade secret, need not be qualified at all as to place; and the same applies to a restriction upon trading, where such restriction is only a consequence of a clearly lawful restriction against divulging a trade secret. Accordingly, upon the sale of a secret process of manufacture, it is reasonable that the seller should stipulate not to communicate the process or carry on the manufacture anywhere."[3]

2.4 Express obligations of confidence are commonly contained in certain types of contracts of employment, and also in contracts for the sale or licensing

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[1](1948) 65 R.P.C. 203; and later reported also in [1963] 3 All E.R. 413.

[2]*Seager* v. *Copydex Ltd.* [1967] 1 W.L.R. 923 per Lord Denning M.R. at 931.

[3]*Master and Servant*, 3rd edn., (1882) p. 95. See, e.g., *Exchange Telegraph Co.* v. *Giulianotti* 1959 S.C. 19.

of the use of "know-how". These contracts may be extremely complex.[1] Their essential features are undertakings by one party to disclose information to the other and to give him the right to use it and undertakings by the other party to pay for the information and to keep it confidential. There are likely also to be supporting provisions by which the transferee is required to cause its present and future employees to give appropriate undertakings of confidentiality, and, conversely, which permit disclosure to subsidiaries of the transferee and to Government regulatory bodies. Moreover, the parties to the agreement may undertake reciprocally to disclose to each other additional know-how gained in the subsequent operation of the processes envisaged. The duration of the agreement will also be specified.

2.5 We formed the impression, which was confirmed on consultation, that the law relating to the constitution of obligations of confidence by express contract was in a satisfactory state. Subject to public policy considerations, there seems to be no reason why the parties to any contract should not be free to regulate, with as much or as little detail as they may desire, the transfer and use of confidential information. Possibly the most important of these public policy considerations is that an employee under a contract of employment should not be prohibited from using information which is no more than an enhancement of the personal knowledge, skills or experience gained by him in the course of his career. We refer to this later.[2]

2.6 In relation to express contracts the transferor of information has, we think, adequate remedies under the present law against the immediate transferee if the latter breaches his obligations. What is, however, far less clear is whether he has adequate remedies against any third party to whom that information has been disclosed by the transferee. We revert also to this problem later.[3] Although other problems arise in this field they are of a minor character and allow us to conclude that the present rules concerning the effect of express contracts relating to confidential information should be retained, subject only to certain supplementary rules clarifying and possibly extending the existing duties of the parties to such contracts.

Implied contract or undertaking

2.7 It is also apparent that, apart from expressly constituted obligations of confidence, an obligation of confidence may arise as an implied term of a contract between the parties. This is most clearly seen in contracts of employment. In *Liverpool Victoria Legal Friendly Society* v. *Houston*[4] the Lord Ordinary, Lord Pearson, put the matter in this way:

> "But this leaves unaffected the principle which is at the bottom of the pursuers' case, namely, that where a servant acquires confidential information in the course of his service, the law implies a contract that the information shall not then or afterwards be ultroneously disclosed to a third

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[1]The World Intellectual Property Organisation (W.I.P.O.) has published a helpful guide to the legal aspects of their negotiation and preparation. (Licensing Guide for Developing Countries, Geneva, 1977).

[2]See paras. 4.83-6 below.

[3]See paras. 4.21 *et seq.*

[4](1900) 3 F. 42 at 47-8.

party. To constitute a breach of this contract, it is not necessary that the confidential information should be published to the world, nor that the information is communicated gratuitously. It is enough that the information so acquired is supplied to a third person without any just or legitimate occasion for supplying it."

The case was reclaimed to the Inner House, who by a majority adhered to the Lord Ordinary's interlocutor, in which he awarded damages for breach of the implied contract. The general principle is also illustrated, however, in cases where services are rendered by professional persons, such as doctors or accountants.[1] Thus in *A.B.* v. *C.D.*[2] the Inner House approved an issue in these terms:

"Whether, on or about the said 12th October 1849, the pursuer employed the defender and Dr J. A. to inspect his infant child, and to report confidentially to him their opinion as to its birth being premature; and whether, in breach of the duty undertaken by him in respect of such employment, and to which he was bound, the defender delivered a copy of the said report to the Reverend , minister of the parish of , to the loss, injury, and damage of the pursuer?"

An obligation of confidence, too, may be implied in contracts for the provision of services, as where a tailor employs a printer to prepare advertising material.[3]

2.8 An obligation of confidence may perhaps most clearly be implied as a term of the contract when there is a usage of trade to this effect. For example, it has been held to be implied in the lace trade that goods will not be manufactured from pattern cards except for the owner of the designs.[4] In other cases, however, it may prove more difficult to infer the existence of an obligation of confidentiality between the parties. Thus in *Craig* v. *Collie*[5] the court held that the relationship between a member of a dissenting Church and the Synod thereof was not such as to entitle the former to an interdict restraining publication of a report of proceedings before the Synod regarding a charge against him. The relationship between the parties and the purpose of the Synod's proceedings was such as necessarily to entail that the proceedings could not be kept entirely secret, and so no contract to that effect could be implied.

2.9 The mere fact that disclosure might be personally embarrassing to the pursuer, or might hurt his feelings or his patrimonial interests, would not by itself create an implied obligation of confidentiality. No such obligation, for example, binds a creditor who attends a meeting called by a debtor to consider a composition contract. In *Fulton* v. *Stubbs Ltd.*[6] the Lord Ordinary (Stormonth-Darling), whose judgment was upheld on appeal, tested the issue in this way:

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[1] *A.B.* v. *C.D.* (1851) 14 D. 177; *Brown's Trs.* v. *Hay* (1898) 25 R. 1112; *A.B.* v. *C.D.* (1904) 7 F. 72.

[2] (1851) 14 D. 177.

[3] *Neuman & Co. Ltd.* v. *A. & W. Kennedy* 1905, 12 S.L.T. 763.

[4] *Wm. Morton & Co.* v. *Muir Bros. & Co.* 1907 S.C. 1211; cf. *Lord Eldon* v. *Hedley Bros.* [1935] 2 K.B. 1.

[5] (1828) 6 S. 1147.

[6] (1903) 5 F. 814 at 816-7.

"I take the case of a creditor, or the representative of a creditor, having been present at this meeting, and having joined the other creditors in accepting the composition offered. He then goes into the street and tells a friend of what has passed. Has he any legal duty to refrain from doing so? Such conduct may be shabby, and may result in injurious consequences to the insolvent, but I know no law against his doing so. The person to whom the information has thus been communicated may equally pass it on to another. It may be no better than gossip — malevolent gossip if you will — but such action is not illegal, for the persons I have been figuring are under no sort of obligation towards the insolvent to keep silent; there is no relation of confidentiality between them. The case would have been entirely different had these persons been in the employment of the insolvent, or had they obtained the information through having had access to private papers for a limited purpose. That was the case in *Brown's Trustees* v. *Hay*, 25 R. 1112. I do not think that decision has any application here."

2.10 There is little certainty as to the relationships in which the law will infer the assumption of a contractual obligation of confidence. This is not a matter of surprise. The courts are naturally reluctant to infer an undertaking where none has been given.

Delict

2.11 Apart from contract, express or implied, certain Scottish authorities suggest that an obligation of confidence may arise by virtue of the relationship of the parties and that the breach of such obligation is actionable as a delict under Scots law. The position is obscure, not least because the decisions in some earlier cases, while bearing strong similarities to a delictual approach, were in fact decided on principles of common law copyright, which extended to unpublished material.[1]

2.12 In *Brown's Trustees* v. *Hay*[2] an accountant was employed by a firm of law agents to wind up its affairs. While so engaged the accountant obtained possession of certain documents belonging to a client of the firm, which he communicated to the Inland Revenue. In an action at the instance of the client

[1]Common law copyright was abolished by the Copyright Act 1911, s.31. In *Cadell and Davies* v. *Stewart* (1804) Mor. Appx. "Literary Property", No. 4, the holders of the copyright in Robert Burns's compositions successfully sought to interdict the publication of the poet's letters to "Clarinda", who had sold the letters to the defender and had consented to their publication. In *White* v. *Dickson* (1881) 8 R. 896, 900 it was declared that the de quo was whether secret thoughts were communicated in a letter "in full reliance that they are confided to a friendly ear" and that their publication would injure the pursuer; in that case the court held that those results could not reasonably be contemplated from publication, and in consequence refused to grant interdict. In *Caird* v. *Sime* (1887) 14 R. (H.L.) 37 the question was whether the pursuer, a professor in a Scottish University, authorized those who attended his lectures to publish what they heard without restriction, or whether he accepted their presence at his lectures subject to a condition that they were entitled to use what they heard solely for their own instruction and were thus precluded from publishing it further. Although there was otherwise no contractual relationship between the professor and the students, it appears from the speeches that the majority of the House held that the delivery of the lectures, as part of his ordinary course, was not equivalent to publication, and accordingly those who attended were under an obligation not to publish.

[2](1898) 25 R. 1112.

against the accountant it was held that the client was entitled to interdict and to damages. The precise juristic basis of the decision is not clear: the remedy can hardly have been a contractual one, since there was no contractual relationship between the client and the accountant. Although the idea of the client's property in the papers was given prominence in the decision,[1] it could be argued — as we argued in the memorandum — that the case reflects the existence of an implied obligation of a non-contractual character on the part of the accountant not to disclose information which he knew or ought to have known had been supplied to the law agents in confidence by their clients.

2.13 The existence of an extra-contractual obligation of confidence was the basis of the decision in the case of *Levin* v. *Caledonian Produce (Holdings) Ltd.*[2] The pursuer concluded for damages for breach of contract and, alternatively, if there was no breach of contract, for damages for breach of confidence. Lord Robertson held that the pursuer's case based on breach of contract was irrelevant and fell to be dismissed. With regard to the pursuer's conclusion relating to breach of confidentiality he allowed proof before answer and said:

> "It is well settled in law that a relationship of trust or confidence may exist independently of contract, such as to entitle one party to restrain the other from disclosing, using or publishing something communicated under the cover of confidence."[3]

Though the judgment as reported presents certain difficulties, the decision is in consonance both with earlier Scottish and more recent English authority, that obligations of confidence may arise by virtue of the relationship of the parties.

2.14 In the later case of *Roxburgh* v. *Seven Seas Engineering Ltd.*[4], however, Lord Robertson appears to have envisaged that, before a third party can be liable, the relationship of the original parties must be a specific one (such as between employer and employee, doctor and patient). The decision also suggests that there must have been some kind of agreement or undertaking to maintain confidentiality between them. The case was one in which a partner of a firm sought to interdict the divulging by a third party of information disclosed to him by another partner of the firm. Lord Robertson recalled interim interdict on the ground that the petition was irrelevant. He said:

> "In order to state a relevant case based upon breach of confidentiality a pursuer or petitioner must aver primarily an agreement to treat the material as confidential and a relationship giving rise to the duty. Here there is no such relationship and no basis for any such agreement. The respondents have no relationship with the petitioner giving rise to any such duty. Whatever may be thought of the propriety or morals of the respondents' action they have in my opinion committed no wrong in law against the petitioner."[5]

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[1] Cf. *Roxburgh* v. *Seven Seas Engineering Ltd.* 1980 S.L.T. (Notes) 49 per Lord Robertson at 51.
[2] 1975 S.L.T. (Notes) 69.
[3] At 70.
[4] 1980 S.L.T. (Notes) 49.
[5] At 50.

2.15 In view of this decision it cannot be said with assurance that an obligation of confidence may arise simply by virtue of the fact that the recipient of confidential information knows or ought to know that the information was disclosed to him in breach of an obligation of confidence. Nor is it clear that an obligation of confidence may arise as a consequence of the circumstances in which the disclosure was made outside the cases where, traditionally, it has been held that obligations of confidence arise.

Property

2.16 Both in Scotland[1] and in England[2] the courts have frequently referred to confidential information as property. For certain purposes at least, it may be convenient, though not strictly accurate, to refer to "know-how" as a proprietary right. "Know-how" may be sold or otherwise disposed of by its holder and the use of it may be licensed by him. Inventions, until patented, may fall within the category of confidential information or "know-how", and section 39 of the Patents Act 1977 declares that an invention made by an employee shall be taken to belong to his employer if it was made *inter alia* in the course of the employee's normal duties. The right to confidential information is clearly of an incorporeal character, but it can be disposed of along with corporeal assets as part of a trade or business.[3] The right to it, it is thought, passes as an asset in the holder's estate to his executors and it may pass to its holders' trustee in bankruptcy.[4] A right to "know-how", however, is a proprietary right only in a limited sense. The right may disappear following disclosure of the confidential information to the world at large.

2.17 The property analogy has been criticised by several writers[5] founding on the remarks of Holmes J. in *E.I. Du Pont de Nemours Powder Co.* v. *Masland* 244 U.S. 100 (1917) where he declared:

> "The word 'property' as applied to trademarks and trade secrets is an unanalysed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs."

The same analogy was also criticised by Lord Upjohn in *Phipps* v. *Boardman*[6] where he remarked:

> "In general, information is not property at all. It is normally open to all who have eyes to read and ears to hear. The true test is to determine in what circumstances the information has been acquired. If it has been acquired in

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[1]Cf. *Brown's Trustees* v. *Hay* (1898) 25 R. 1112, per Lord McLaren at 1117 and 1118.

[2]*Dean* v. *Macdowell* (1878) 8 Ch. D. 345, per Cotton L.J. at 354; *Aas* v. *Benham* [1891] 2 Ch. 244, per Bowen L.J. at 258; *Phipps* v. *Boardman* [1967] 2 A.C. 46 per Lord Hodson at 107 and Lord Guest at 115.

[3]Finance Act 1968, s.21(3).

[4]*In re Keene* [1922] 2 Ch. 475.

[5]e.g. F. Dessemontent, *Le Savoir-faire industriel* (Geneva, 1974) p.270.

[6][1967] 2 A.C. 46 at 127-8.

such circumstances that it would be a breach of confidence to disclose it to another then courts of equity will restrain the recipient from communicating it to another. In such cases such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references; knowledge of secret processes, "know-how", confidential information as to the prospects of a company or of someone's intention or the expected results of some horse race based on stable or other confidential information. But in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship."

Other branches of the law

2.18 Other branches of the law, such as the law on trusts, patents, copyright, companies and defamation may provide remedies for certain types of use or disclosure of information.[1] None of them, however, is concerned with confidential information as such and none can be regarded as providing an adequate remedy for breach of confidence.

PART III ASSESSMENT OF PRESENT LAW

Criticisms of present law

3.1 A number of criticisms may be made of the present law. The first is the uncertainty of its extent. Unless there is an express or implied contractual term regarding confidentiality, it is far from clear to what extent, if at all, Scots law protects confidential information from unauthorised use or disclosure. Outside the sphere of contractual obligations the law, particularly the law of delict, is in an unsatisfactory state, and it is far from clear to what extent it is susceptible of further development. No doubt it ought to be possible to fashion out of the existing rules of Scots law an appropriate response to some of the problems which may arise, but this would occur only if there were a substantial flow of cases for decision. This is not happening and is unlikely to happen in a small jurisdiction. Outside the area of contract, the extent to which the law is prepared to recognise obligations of confidence should be settled by legislation.

3.2 A second criticism is that the present law provides inadequate civil remedies for persons directly affected by use or disclosure of confidential information. The common law remedies of damages or interdict may not always be appropriate. In some cases an accounting for profits may be a more appropriate remedy.

3.3 A third criticism is that there needs to be an adequate balance between legitimate private interests in preserving confidentiality and the legitimate public interest in securing the free flow of information. It is arguable that this is too important a balance to be left to the common law, and that it is unfair to the judges to assume a burden which is properly the responsibility of Parliament. As we demonstrate below, the English courts have been reluctant to recognise a public interest in the breach of an obligation of confidence, except where the

[1] See the memorandum, Part II.

information relates to an "iniquity" such as a criminal offence or a matter affecting the security of the State; and have also been reluctant to permit disclosure otherwise than to a public official such as a police officer. There is no reason to suppose that a substantially different attitude would be adopted by the Scottish courts. It is arguable that there should be legislation which more explicitly draws attention to the existence of a public interest in securing the disclosure of information in certain circumstances, and indeed legitimises this concept.

3.4 A fourth criticism concerns the special circumstances in which information is obtained by illegal means or by means which may be regarded as improper. As we have already indicated[1], our concern is with the unauthorised use or disclosure of information, rather than with providing sanctions against the particular method of obtaining it. But, in view of the lack of development of our law outwith the area of contract, it is doubtful whether the civil law affords adequate, or in some cases any, protection to persons from whom information is obtained in this way.

3.5 A fifth criticism concerns disclosure in the course of judicial proceedings. Persons may be obliged to disclose confidential information, in circumstances which may be commercially damaging to them, in the course of civil proceedings. It may be said that, if legislation on breach of confidence is contemplated, the opportunity should be taken to examine the problems which may arise during proceedings and to regulate the extent to which confidential information can subsequently be disclosed. One defect of the present law appears to be that a person wishing to seek the protection of the courts in order to maintain confidentiality may, by the very act of litigation, endanger the confidential nature of the information.

Advantages and disadvantages of legislation

3.6 The criticisms of the law outlined above suggest that there is a need for legislative intervention. There is also, however, a need for great care in devising legislative solutions in this area. The problem is inherent in the subject matter. We are not here concerned with the creation of relatively straightforward statutory duties, where there is only one discernible class of persons who require to be protected by the law. There is, instead, an inherent conflict between two different kinds of interest, each of which has some legitimate claim for recognition. We have no doubt that the law should protect trade secrets and certain other types of confidential information. Equally we have no doubt that, in our society, members of the public should have reasonable access to information unless there is a very good reason for depriving them of such access. There are also formidable conceptual problems to be solved. When, for example, should information be regarded as confidential, in the sense that a person to whom or to whose interests that information relates should be owed an obligation of confidence? There is no absolute standard which can be applied in every case. Can the same criteria be applied to all recipients of information? We hardly think so: in many cases a person who directly obtains information, who stands in a confidential relationship to another person and who is aware of the likely effect on that person of disclosure, should be less

[1]Para. 1.9.

favourably regarded by the law than, say, a third party such as a newspaper which subsequently comes into possession of the same information and wishes to publish it in the public interest. Above all there is a danger that a statutory law on confidentiality may be perceived as attaching too much weight to preserving confidentiality. A law which swings too much in that direction would become a useful weapon in the hands of those, both individuals and organisations, who wish to conceal their affairs from public scrutiny. Such a development would not be in the public interest.

3.7 There seem to us to be three broad possibilities. The first is to leave it entirely to the courts, by developing the principles of the common law, to find solutions to problems in this area as and when they arise. The second is that legislation should seek to supplement the common law, by providing a framework on which the courts can build and by indicating the general direction in which the law should develop. The third possibility, the solution preferred by the Law Commission for England and Wales, is to replace the common law (other than contract) by a statutory code.

3.8 We do not favour the last approach. Our conclusion stems less from any disagreement on policy between ourselves and the Law Commission than from the fact that we are considering the problems against a substantially different common law background. The Law Commission identified many problem areas in the present English law on breach of confidence, most of them due to the piecemeal nature of judicial development of this branch of the law on a somewhat obscure legal basis.[1] In Scotland there has been virtually no judicial development of a separate common law doctrine of breach of confidence. It is therefore unnecessary to deal with anomalies or imbalances of the type which may have arisen in England and Wales. It is also unnecessary to disapply the general law of delict. It is so undeveloped in regard to confidentiality that it is far from clear whether much of substance would be removed. We note that it has been the usual practice, when legislation is enacted in the area of delict, to superimpose statutory duties upon the common law, and we consider that this practice should be followed in relation to confidentiality.[2]

3.9 On the first round of consultation all those who submitted comments, without exception, agreed with the first provisional proposal that any rights and obligations which exist under the present law of contract and delict should not be abolished. There was very little opposition to a similar proposition, contained in the subsequent consultation paper, that legislation should seek, not to replace the present law, but rather to supplement it with such statutory provisions as may be necessary or desirable to deal with cases where it is unsatisfactory, unclear or undeveloped.[3]

3.10 The practical choice, therefore, lies between the first two possibilities mentioned above — not to legislate at all, or to seek to supplement the

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[1]Law Com. No. 110, para. 6.1.

[2]A notable example would be the numerous enactments over the years affecting conditions of employment and safety at work. Many reparation claims in modern times arising out of accidents at work are based both on alleged breaches of statutory duty and on principles of the common law. This has not created practical difficulties for the courts.

[3]Proposition 5.

common law. We have reached no concluded view on which of these courses is the more desirable. To some extent the choice depends on political judgments on matters of great sensitivity and public importance. What is, for example, the correct balance between the interests in confidentiality and the interests in freedom of information? Would legislation, however carefully framed, tip the balance too much one way or the other? These are not questions which it would be appropriate for us to attempt to answer.

3.11 If it is decided that this is an area where there should be legislation for Scotland, we are strongly of the opinion that intervention by the legislature should be confined to the creation of an appropriate framework which will enable the law to be developed by the courts. The legislation should provide principles flexible enough to accommodate changes in public attitudes and to take account of scientific and technical developments. We believe that excessively detailed legislation is much more likely to have a stultifying effect on the development of the law and may rapidly become obsolete. We have, accordingly, endeavoured to evolve a possible statutory scheme which would meet these requirements, and this is discussed in Part IV. In the meantime we **recommend:**

1. If it is decided that there should be legislation on breach of confidence applying to Scotland, such legislation should not replace the present law, but should supplement it in accordance with the recommendations contained in Part IV of this Report.

PART IV A POSSIBLE STATUTORY REFORMULATION

4.1 In this Part of the Report we consider, as did the Law Commission, the appropriate elements of any statutory reformulation of the law on breach of confidence. At the outset we would stress one significant difference between the respective approaches of the two Commissions, which is consequent upon the recommendation which we made at the end of the previous Part. In our view, if it is eventually decided that there should be legislation of some kind applying to Scotland, such legislation should not replace the present law but should rather supplement it along the lines which we shall now discuss.

4.2 We are not only concerned with the possible creation of civil obligations where these may not exist at present or, if they exist at all, would be held to do so on the application of general principles of the law of delict or quasi-delict. We think it desirable to ensure that, so far as possible, the same results apply whether an obligation arises from contract or otherwise. There are circumstances, for instance, in which it may not be clear whether an obligation is or is not strictly contractual, the main example being in the area of employment. An undertaking by an employee to maintain confidentiality might arise by operation of law from the relationship between himself and his employer, in terms of our recommendations set out below, and would thus give rise to a statutory obligation of confidence; alternatively, the undertaking might be regarded as an implied term in his contract of employment. On the question of title to sue, we have concluded that it would be impossible to justify

distinctions simply because, at some point in the chain of communication, there is a contractual obligation of confidence. We consider, too, that in principle a defence of public interest should be available even if the discloser has acted in breach of a clear contractual obligation of confidence.[1] More generally, we have also concluded that the range of remedies for breach of any obligation of confidence should be the same, whether or not the obligation is contractual. Consequently the draft clauses contained in Appendix A, designed to implement the recommendations in this Part of the Report, apply with few modifications to contractual as well as to purely statutory obligations.

4.3 In this Part we discuss first the circumstances in which an obligation of confidence should arise. We consider the nature of the obligation, and in particular the circumstances in which use or disclosure should be permitted on the grounds that the private interest in maintaining confidentiality is of less importance. We discuss the question to whom the obligation should be owed. We then consider what special provisions are appropriate where information has been obtained illegally or by means which may be regarded as improper. We next examine certain special problems connected with judicial proceedings, such as the effect of disclosure of confidential information in open court, the power of the court to close doors, and the protection of information contained in documents or other property inspected or recovered for the purposes of proceedings. Finally we discuss the appropriate defences and remedies which should be available in proceedings for breach of confidence.

The obligation of confidence

When an obligation of confidence should arise

4.4 In considering the circumstances in which an obligation of confidence should arise, a convenient starting-point is an observation by Megarry J. in *Coco* v. *A. N. Clark (Engineers) Ltd*:[2]

> "It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence."

The judge was not, of course, attempting to draft, for legislative purposes, a comprehensive summary of the present law: and his summary does not take into account the position of the recipient of unsolicited information.[3] For example, a firm may receive information marked "confidential" from a person with whom it has had no previous connection. Moreover, the firm may already be aware of the information — it may have been working in the same area of research as the sender. The mere receipt of information must not therefore suffice to create an obligation of confidence, and any legislative solution must be framed in such a way as not to produce that result. The Law Commission proposed a modification to the *Coco* test to meet this point, recommending that:

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[1]This does not, of course, mean that the courts would often react favourably to a deliberate breach of contract — see paras. 4.71-3 below.

[2][1969] R.P.C. 41, 48.

[3]See Law Com. No. 110, para. 5.3.

"An obligation of confidence should come into existence where the recipient of the information has expressly given an undertaking to the giver of the information to keep confidential that information, or a description of information within which it falls, or where such an undertaking is, in the absence of any indication to the contrary on the part of the recipient, to be inferred from the relationship between the giver and the recipient or from the latter's conduct. Furthermore, an obligation of confidence should arise whether the undertaking was given before, after or at the time when the information was acquired."[1]

4.5 We are in broad agreement with the policy which the Law Commission sought to achieve, but we have encountered some difficulty with the notion of an "inferred undertaking". In the consultation paper we pointed out that the Scottish courts are reluctant to imply or to infer the existence of undertakings where no undertaking has in fact been given.[2] When, for example, information is given to a bank or finance house with a view to the obtaining of credit it may be difficult, in the absence of the use of words in the application form indicating that the information will be treated as confidential, to infer any undertaking of confidence from the relationship between the applicant and the bank or finance house. Moreover, the person receiving the information may not have the authority to furnish such an undertaking. Where information is supplied under a specific statutory duty, such an undertaking may well conflict with the express or implied terms of the statute. The statute may well oblige the recipient to use information for certain specified purposes, and consequently it would be difficult or impossible to infer any undertaking not to do so.

4.6 In the consultation paper we referred to the range and variety of information which may come into the hands of government, local authorities and other statutory bodies. This information may concern both individuals and organisations. In relation to individuals, information is collected by the Registrar General, including census information; information is disclosed to social security offices, in tax returns, in medical records and in records of the personal particulars of applicants for employment. In relation to industrial, commercial, agricultural and fishing enterprises a vast amount of information is collected relating to their imports and exports, financial and trading position, plans and policies.[3] The Franks Report[4] commented:

"Some is given in response to express statutory requirements, such as the requirements to fill in census forms and to make tax returns. Some is given by persons and firms making applications or claiming benefits of various kinds. Some is given, particularly by firms and undertakings, in the course of consultations of the kind mentioned in the previous paragraph. Some is provided by third parties making reports of various kinds, e.g. police or medical reports. Often factual information of this kind is inextricably mixed up with assessments and opinions, favourable and unfavourable."

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[1]Para. 6.14 and Recommendation (2).

[2]Cf. *Craig* v. *Collie* (1828) 6 S. 1147; *Mushets Ltd.* v. *Mackenzie Bros.* (1899) 1 F. 756.

[3]See generally the Report of the Departmental Committee on Section 2 of the Official Secrets Act 1911, Cmnd. 5104 (1972) (the Franks Report); and the Report of the Committee on Data Protection, Cmnd. 7341 (1978) (the Lindop Report).

[4]Para. 195.

4.7 In the consultation paper we described some of the restraints which already exist to prevent the further dissemination of information so acquired. It is an offence under section 2 of the Official Secrets Act 1911 for anyone who has obtained information by virtue of his position as a person who holds office under the Crown to communicate such information to any person other than a person to whom he is authorised to communicate it or to a person to whom it is in the interest of the State to communicate it. The Franks Report stressed the importance of the criminal law in this field, but also referred to the availability of civil remedies. They said:

> "A citizen or firm suffering damage as a result of an unauthorised disclosure of confidential information entrusted to the Government should certainly be entitled to pursue any civil remedies the law may provide, if he has the desire and the means to do so. We thus welcome the [Younger] Committee's proposal that the Law Commissions should review the law on breach of confidence."[1]

4.8 In some areas the officials of government departments or agencies and quasi-governmental agencies are specifically prohibited from further disclosing information received by them. The Taxes Management Act 1970,[2] for example, requires Inland Revenue officials to make declarations that information received in the execution of their duties will not be disclosed except for the purposes of those duties or in other cases required by law. Again, the Civil Aviation Act 1971[3] empowers the Civil Aviation Authority to require the disclosure of information which may be commercially sensitive, and the following section provides that if the Authority or a member or employee of the Authority discloses such information without the authority of the discloser or of the Secretary of State, he shall be liable to a fine or to imprisonment. These sections are a clear recognition that the information required to be disclosed should be treated as confidential in the sense of being available for use only for such purposes as may be authorised by statute law or by the discloser but, as in the Official Secrets Acts, there is no express provision for civil law claims to damages at the instance of persons harmed by the disclosure of confidential information.

4.9 Similar problems arise in the context of information supplied to local authorities. Though we understand that local government officials may be obliged under their rules and conditions of service not to communicate the contents of any document to the public unless required by law or unless specifically authorised, the remedies of a person whose interests are affected by any unwarranted disclosure are not clear: the recourse of the individual affected will often be limited to a complaint to his councillor or to the local commissioner for administration.

4.10 The Law Commission referred to representations made to them by the Confederation of British Industry about the uncertainty which exists as to the confidentiality of information supplied to government and other public authorities and about the practical remedies available to their members if

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[1] Para. 199.
[2] S. 6 and Sched. 1.
[3] S. 35.

confidential information so supplied came into the hands of trade competitors. They considered that it would be

> "helpful in removing the uncertainty which attaches to information obtained in such circumstances to provide that the fact that the information has been so obtained should not of itself rule out an inference that the information was accepted in confidence, whether or not the relevant statute affords any remedy, such as a criminal sanction, against unauthorised disclosure."[1]

4.11 Similar problems arise where a person discloses information in order to acquire a benefit of some kind. The Younger Committee considered this particular problem in some detail, especially in the context of bank references and disclosures by credit rating agencies. In relation to the banks the Committee regarded the question as being primarily one of the extent of the implied authority granted by customers to disclose data relating to their clients' accounts. They observed[2]:

> "We doubt whether there is any serious or widespread abuse of the bank reference system, but we do not believe that the practice is as well-known and accepted among customers, particularly individuals, as the banks assert. Nor are we convinced that it would be undesirable for a customer to know what enquiries had been made about him and what replies had been given. On the contrary, we think the present situation is undesirable. We recommend that the banks should make clear to all customers, existing or prospective, the existence and manner of operation of their reference system, and give them the opportunity either to grant a standing authority for the provision of references or to require the bank to seek their consent on every occasion."

4.12 In response to our original memorandum the banks submitted to us that the Younger Committee's recommendation is impracticable, principally on the ground of the cost and delay which would be entailed in obtaining consent on each occasion. In the consultation paper[3] we explained our reluctance to recommend a positive requirement of consent or notice as a condition of the transfer of confidential information. It would entail the introduction of expensive procedures which may often be unnecessary in practice. The law should rather attempt to indicate in general terms the circumstances in which a recipient of information (such as a bank) is taken to hold it subject to an obligation of confidence and, in consequence, to make it clearer when the transfer of information is unauthorised. It would then be for the recipient of the information to decide whether to take steps to obtain the authority of the discloser of the information or to take the risk (as in effect banks and other recipients of information often appear to do at present) of disclosing the information without express authority. We also made clear our reluctance to make recommendations relating solely to banking practice, because the same practical problem arises in other cases where information is disclosed to potential credit granters.

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[1]Para. 6.48.
[2]Cmnd. 5012 (1972), para. 307.
[3]Paras. 31-4.

4.13 With these problems in mind we set out, in the consultation paper, two provisional propositions designed to identify the circumstances in which an obligation of confidence, in the sense of providing a civil remedy rather than a criminal sanction, might come into being. The first placed emphasis on the recipient's acceptance that the information was supplied in confidence. The second provided that a statutory obligation would arise in certain types of case, irrespective of acceptance. These cases were: (*a*) where the information was obtained under a statutory duty; (*b*) where the recipient or a person acting on his behalf required the disclosure of the information as a condition of any licence, permission or other advantage; or (*c*) where the recipient or a person acting on his behalf specifically requested the disclosure of the information. As regards the three cases covered by the second proposition, we no longer believe that it is necessary for legislation to provide specifically for them. The first two cases are obvious instances where a properly drafted general statutory formula, of the kind we discuss below, would enable a court to hold in appropriate circumstances that a statutory obligation had come into being. There is perhaps a danger in drawing attention, even in statutory guidelines, to particular situations, namely that the court may infer too readily that classes of recipient who are specifically mentioned are to be placed under an obligation of confidence, and *vice versa*. We are not, in any event, disposed to recommend any immunity from liability for particular classes of recipient, such as Government departments and public and local authorities.

4.14 As regards information disclosed on request, we now regard such a criterion as too vague and uncertain for inclusion in legislation. It may be extremely difficult to establish whether or not a person offered to disclose information or was asked to disclose it. We believe that a special rule of this kind would create problems of interpretation and would give rise to practical difficulties, especially for the press. It may be a matter of pure chance, say during a telephone conversation with a journalist, whether a piece of information is volunteered or requested. Whether, and in what circumstances, a person in the position of a journalist should incur a statutory obligation of confidence is a matter to which we return below: but in the present context, we do not think that the presence or absence of a mere request to supply information should be the test.

4.15 Against this background we now consider what criteria for determining whether an obligation of confidence has arisen might appropriately appear in legislation. We do not believe it is possible or desirable to indicate in precise terms how the courts should approach the task of balancing individual interests in preserving the confidentiality of certain information with the public interest in freedom of access to information and the wide dissemination of information. Any attempt to achieve this would result in legislation which was not only excessively complex but was also too inflexible to cover every case and to take account of changes in public attitudes. We have therefore concluded that the central criterion should be based on the familiar and well-tested principle of the reasonable man: in context, that an obligation should arise if a reasonable person in the position of the recipient would, in all the circumstances of the case, have regarded himself as bound to treat the information as confidential. This form of wording is designed to reflect the fact that different standards may be expected of different classes of recipient. Thus higher standards of

confidentiality would generally be expected in certain relationships, for example between a doctor and his patient or between a minister of religion and his parishioners, than in others. This is not to say that the test ceases to be an objective one: all we wish to achieve is that different considerations apply to different relationships and classes of recipients.

4.16 To provide guidance in the application of this central test the legislation should, we suggest, enjoin the court to have regard to all the circumstances of the case, including a number of specified factors. We believe there are three such factors which could usefully be incorporated in legislation, and which were referred to in our consultation paper. The first of these is the nature of the information: it will always be relevant to consider whether particular information is truly "confidential" in any relevant sense of that term. The second factor is the relationship between the recipient and the person from whom the information was obtained. The third factor is the manner and circumstances in which it was obtained.

The nature of the obligation

4.17 The general nature of the obligation which we have proposed is, of course, to maintain confidentiality. More expressly, it may be described as an obligation not to use or disclose the information. For obvious reasons, however, it cannot be so widely expressed. An absolute ban on all types of use or disclosure may not be appropriate. A person to whom the information relates may have authorised use for a particular purpose only, or disclosure to one person but not to others. Similarly, legislation should make clear that any specific rules of law or statutory provisions, which may themselves permit or require the use or disclosure of certain types of information, prevail over any general legislative provisions on breach of confidence. Finally, legislation should not impede the fulfilment of any public duty or function, especially in relation to the security of the State or the prevention, investigation or prosecution of crime.

To whom the obligation should be owed

4.18 In the consultation paper we discussed, in several different contexts, the question who should be entitled to sue for breach of an obligation of confidence. In each case we identified the supplier of the information. In the specific context of information improperly obtained (for example by theft, coercion or fraud)[1] we suggested that any person to whom or to whose affairs the information related should also be entitled to sue (if it might reasonably be inferred that he would have disclosed the information only on the basis of confidentiality). We also enquired, more generally, whether a person (A) to whom an obligation of confidence is owed by another person (B) should be entitled to sue a third party (C) to whom (B) has disclosed information, in the circumstances where (C) used or disclosed the information when he knew or might reasonably have inferred that (B) was subject to an obligation of confidence to (A). In other words, should (C) owe an obligation of confidence to (A) even though the information was supplied to (C) by (B)?

[1]See generally paras. 4.34-41 below.

4.19 It seems to us that the objective of reform in this area would not be achieved if the obligation of confidence were owed only to the immediate supplier of information. That person may have no interest to sue for breach of confidence. He or she may be supplying information disclosed in confidence by someone else and that other person may have the real interest in having the obligation of confidence protected. Confidential information about a school pupil may, for example, be disclosed in confidence, for a legitimate purpose, by a headmaster. An obligation of confidence ought, in our view, to be owed in such circumstances to the pupil, who is the person directly affected.[1] There would be little point, in our estimation, of recommending any statutory reform in this branch of the law if, in many cases, the person actually sustaining loss or damage were prevented from suing, or were to be restricted to the amount of the loss sustained by a person lower down the "chain" of information.[2]

4.20 We consider, therefore, that wherever an obligation of confidence arises solely from any statutory provisions any person to whom or to whose interests the information relates should have a title to sue. Moreover, in order to achieve a satisfactory legislative solution the same title to sue has to be conferred where, at some point in the chain of communication, someone has made a contractual stipulation of confidence. It would be anomalous if the person to whom certain information relates (A) were to be denied a title to sue merely because, after several transmissions of the information, (E) had so stipulated in a question with (F). It would be equally anomalous if (A), having made a contractual stipulation of confidence with (B), found himself in a weaker position *quoad* (E) or (F) than he would have been if he had made no contractual stipulation at all. (B) may not be able to meet a claim, but (E) or (F) may have profited from the information and be better able to compensate (A). Moreover we do not believe, on further reflection, that we could justify conferring a title to sue on (A) only where the information is "stolen" or otherwise obtained by improper means — this would have been the effect of our earlier proposals. The degree of culpability on the part of the defender may be greater, but that is only a subsidiary factor. What matters is that the loss sustained by the pursuer may be just the same.

Who should incur the obligation

4.21 We now explain how our conclusions on the nature of a statutory obligation of confidence and on title to sue would affect third parties and consider, more generally, the extent to which third parties should be liable. In context, "third parties" is a somewhat elastic and imprecise term. Where, for example, a head teacher submits an application for university entrance on behalf of a pupil and divulges confidential information relating to that pupil, the university authorities will be a "third party" in a question with the pupil himself. Where a person reveals information to a newspaper about another person, the newspaper is a "third party" in a question with the person to whom the information relates. Where the employee of a firm reveals a trade secret to another company, that company is a third party in a question with the firm which "owns" the trade secret.

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[1] In addition, it may be, to an obligation of confidence owed to the headmaster.

[2] This would arise, for example, if the only way in which (A) (in the example given above) could sue (C) was by virtue of an assignation in his favour granted by (B). A further objection is that (B) might not always be willing to assign his claim to (A).

4.22 The Law Commission recommended that:

> "A person who acquires information already impressed with an obligation of confidence, however created, should become subject to that obligation as soon as he has both acquired the information and knows or ought to know that the information is so impressed."[1]

In substance we agree. We would prefer, however, to regard this question as part of the general question of when a statutory obligation of confidence arises. The fact that the supplier was under an obligation of confidence to another person may well be relevant to the question of the liability of a third party. We would hesitate, however, to elevate this factor to the status of a hard and fast rule applying in every case; accordingly in our scheme it would be more appropriately specified as one of the factors to be taken into account in determining whether a statutory obligation of confidence has arisen.

4.23 Our broad approach to the question of title to sue means that our scheme requires no special treatment of third parties. It becomes possible to apply a single set of rules to anyone who uses or discloses information, wherever he stands in the "chain" of information. We emphasise that this does not mean a third party would necessarily incur liability just because a person further up the "chain" did so. The starting point, in each case, would be whether a reasonable person in the position of that particular recipient would have regarded himself as bound to treat the information as confidential. Matters such as the nature of the information would be relevant in each case. A third party, however, might not necessarily know of any stipulation of confidence, nor perhaps that the relationship between the first recipient and the person to whom the information relates suggests that the information should not have been subsequently disseminated. We consider that this approach will provide a degree of certainty to certain classes of persons, at least in relation to certain types of information. No-one could legitimately expect to be protected by the law if he knowingly revealed a "trade secret" which caused serious commercial loss to the person entitled to exploit it. He would recognise, from the very nature of the information, that it was not the kind of matter which a reasonable person would divulge, and that its divulgence would be likely to injure another person. However, the same degree of certainty would not attach, at any rate to the same extent, to aspects of personal privacy — matters on which the attitudes of the press and others may be expected to diverge sharply. Nonetheless it would undoubtedly be the case that, on many occasions, a third party would not be at risk unless he knew, or ought to have known, the circumstances in which the information was earlier divulged.

4.24 The position of a third party who is unaware of circumstances giving rise to an obligation of confidence is a matter of concern not only to commercial organisations, which may have purchased the information at considerable cost, but also to the press. Representatives of the press, television and radio made clear to the Law Commission that, in their view, the overriding principle should be one of freedom of information, and they resisted the idea of imposing obligations of confidence even in circumstances where the information had been unlawfully obtained. They pointed out that it is possible for a news agency

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[1]Para. 6.55 and Recommendation (11).

such as the Press Association to receive information, unaware of its confidentiality, and to distribute it generally to all subscribing newspapers. They urged that, if obligations of confidence were imposed on the press in these circumstances, the defence that the information was innocently obtained for value should be admitted. Denial of a defence of innocent publication would, they argue, render them all liable for damages.

4.25 The Law Commission's solution to this problem is to impose an obligation of confidence, not merely upon a person who at the time of receiving the information was aware, or who ought to have become aware, of circumstances giving rise to an obligation of confidence, but even on a person who subsequently becomes aware of the existence of such an obligation in relation to information held by him. In the latter case a difficulty arises because the "innocent" acquirer may have paid for know-how and may have set up a production line before it is brought to his attention that the know-how was disclosed to him in breach of an obligation of confidence. Should he then be vulnerable to an action of interdict or to an action of damages for the utilisation of such tainted information? The position of the person to whom the obligation of confidence was owed may also be a difficult one. He too, may have incurred expenditure in reliance on the secrecy of the information he possesses. It is clear from paragraphs 5.21 and 5.22 of the Law Commission's Report that they found these problems particularly intractable, and the difficulty of dealing equitably with both parties was one of the reasons which led them to propose that in such situations the court might make an "adjustment order" for the purpose of doing justice between the parties. The court would be enabled:

> "(*a*) to make a monetary award to the plaintiff in lieu of an injunction on such basis of assessment as is appropriate in all the circumstances, one of which may be the nature of the information involved. Such an award would take the form either of a lump sum or of a royalty in respect of the defendant's future use of information on such terms and for such period as the court deems appropriate;
>
> (*b*) to order the defendant to make such a fair and equitable contribution to the expenses of the plaintiff preparatory to exploiting the information as are likely to be wasted if the defendant is to be allowed to exploit it;
>
> (*c*) to determine the extent (if at all) to which each of the parties will respectively be free to use the information (as, for example, to grant licences to use it to third parties);
>
> (*d*) where the defendant is to be restrained by injunction from exploiting the information and he has incurred expenditure preparatory to exploiting the information before he knew or ought to have known that it was subject to an obligation of confidence, to require the plaintiff to make such contribution to those expenses as may be fair and equitable."[1]

4.26 Such an equitable solution, involving the apportionment of gains and losses between the parties, has some attractions, but we are not satisfied that it is the best solution in the circumstances. There is much to be said for

[1]Para. 6.110 and Recommendation (29)(ii)(*b*).

determining liability solely at the time when the information was acquired: would — in terms of the test which we have proposed — a reasonable person in the position of the acquirer have regarded himself as bound to treat the information as confidential? If this test cannot be satisfied — for example because the acquirer had no knowledge of any obligation owed by his supplier — then, it may be argued, the matter should be determined according to the good faith of the acquirer and he should not be liable. We stated above,[1] as a reason for imposing liability on third parties, that the original discloser may not be worth suing but the receiver of the information may have profited from it and may be better able to compensate the person sustaining the loss. That, however, is not by itself a valid reason for imposing liability on a recipient who has acted in good faith. A further reason for not applying the Law Commission's approach in Scotland is that the problem will arise infrequently, and its resolution would be left to depend on *ad hoc* decisions of the courts. In these circumstances the law would develop slowly and would be likely to remain uncertain for a considerable period.

4.27 In the consultation paper we canvassed views on various solutions to this problem, including the possibility of imposing liability on the recipient from the time when he knew or could reasonably have inferred that the supplier was under an obligation of confidence. We further suggested a defence that, after the time when the recipient became aware or might reasonably be inferred to have become aware of the existence of the obligation of confidence, he did not further disseminate the information and did not use it more extensively than he had used it prior to that time. The difficulty with this approach, however, is that it affords inadequate protection to the acquirer who, during the period when he has acted in good faith, has incurred expenditure with a view to commercial exploitation of the information.

4.28 We do not ourselves believe that it is possible to devise a perfect solution to this question. A feature of this area of the law is that there are frequent instances where there is an incompatible conflict between two more or less legitimate interests, and ultimately one interest or another must prevail. We regard the objections to the "equitable" solution as formidable. We cannot see any justification for imposing liability on a person who has acted in good faith. This is not an area where the activity concerned would seem to justify some species of "strict" liability, that is liability irrespective of fault. The areas best suited to this kind of legislative treatment are those where a risk can be adequately guarded against by insurance. We have, of course, already suggested that the legislation should refer to the relationship between the supplier and the recipient. Consideration of the circumstances of the case will, in many cases, help the court to determine to what extent the recipient has acted in good faith. If, for example, the supplier is an employee of a trade competitor, the recipient would at the very least be expected to make reasonable enquiries in order to ascertain the extent, if any, of the supplier's authority to divulge the information.[2]

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[1]Para. 4.20.

[2]We also propose below a defence that, prior to its use or disclosure by the defender, the information was already known to him or any person acting on his behalf in circumstances not giving rise to any obligation of confidence to the pursuer. See paras. 4.75-6 and 4.87 (Recommendation 25(*c*)).

Particular relationships

4.29 Before summarising our conclusions on the circumstances in which obligations of confidence should arise, it is appropriate to consider whether any attempt should be made to prescribe specific rules for certain specific types of relationship. In the consultative memorandum we enquired whether it might be desirable:

> "to provide by legislation guidelines on the circumstances in which a restriction would be implied on the disclosure or use of information by a person to whom it was communicated, for example in the following relationships: employer/employee; doctor/patient; clergyman/parishioner; lawyer/client; student/teacher."[1]

In an earlier provisional proposal[2], however, we had remarked:

> "In the creation of new rights and obligations, it is preferable to resort to general principles of law wherever practicable, rather than to detailed rules".

This proposal was generally supported.

4.30 Though several commentators, in response to these proposals, suggested that rules implying obligations of confidence in respect of particular professions should be created, these suggestions tended to come from persons stressing the uniqueness of certain relationships, such as those between a doctor and his patient or a minister of religion and his parishioners. Other bodies were opposed to such guidelines, either on the ground that they might tend to be treated as exhaustive of the field or on the broader ground that any unauthorised disclosure should *prima facie* be actionable. The Faculty of Advocates stated that in their view

> "there is a real risk that such guidelines would either be too vague to be effective or else so restrictive as to lead to a loss of flexibility and create more serious difficulties than exist at present."

Moreover certain commentators helpfully pointed out that within given relationships, notably that of employer and employee, it might be reasonable to imply an obligation of confidence in relation to some only of the information supplied.

4.31 In the consultative memorandum we expressed the provisional view that

> "the individual circumstances in which such obligations are likely to be required are so varied that no good purpose is likely to be served by providing by statute pro forma terms in particular cases."[3]

Further consultation and subsequent re-examination of the problem has reinforced us in this view. The range of relationships in which implied obligations of confidence may arise is not limited to the traditional cases of client and solicitor or employer and employee, but possibly extends, even in the field of commercial relationships, to the relations between a director and

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[1]Provisional Proposal 6.
[2]Provisional Proposal 2.
[3]Para. 86.

his company, between partners *inter se*, between principal and agent, and between other fiduciaries. But such obligations may also be implied in relationships which are not of a commercial character, such as relations between a clergyman and his parishioner, teacher and student, and (it seems likely) husband and wife. In this last context the Duchess of Argyll obtained an injunction restraining her former husband and a newspaper from disclosing publicly marital confidences entrusted to the Duke by the Duchess during their marriage.[1] It was held that since marriage was of its very essence a relationship of a confidential nature it gave rise to an obligation of confidence and that this obligation was not destroyed by the subsequent dissolution of the marriage. But the court recognised that there were practical difficulties in deciding what communications between husband and wife should be protected and on this point Ungoed-Thomas J. said[2]:

> "If this were a well-developed jurisdiction doubtless there would be guides and tests to aid in exercising it. But if there are communications which should be protected and which the policy of the law recognises should be protected . . ., then the court is not to be deterred merely because it is not already provided with fully developed principles, guides, tests, definitions and the full armament for judicial decision. It is sufficient that the court recognises that the communications are confidential, and their publication within the mischief which the law as its policy seeks to avoid, without further defining the scope and limits of the jurisdiction: and I have no hesitation in this case in concluding that publication of some of the passages complained of is in breach of marital confidence."

4.32 We have therefore concluded that it would not be practicable to provide legislative guidelines for every aspect of any relationship in which the court may reasonably hold that an obligation of confidentiality exists. In our view, there should be no attempt to provide, in legislation, special rules regarding confidentiality for particular relationships.

4.33 Accordingly our **recommendations** on the circumstances in which an obligation of confidence should arise, if the matter is to be regulated by statute, are as follows:

2. A person should be under an obligation of confidence if he has obtained information in the circumstances referred to in Recommendation 3. (Paragraphs 4.4 to 4.16; 4.21 to 4.28; clause 1(1).)
3. Those circumstances are:
   (*a*) that he agreed or undertook to treat the information as confidential; or
   (*b*) that a reasonable person in his position would, in all the circumstances of the case (including the factors mentioned in Recommendation 4), have regarded himself as bound to treat the information as confidential.
   (Paragraphs 4.4 to 4.16; clause 1(2)(*a*) and (*c*).)

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[1] See *Margaret, Duchess of Argyll* v. *Duke of Argyll* [1967] 1 Ch. 302.
[2] At 330.

4. Those factors are:
   (*a*) the nature of the information;
   (*b*) the relationship between the recipient and the person from whom he obtained the information;
   (*c*) the manner and circumstances in which the information was obtained.
   (Paragraph 4.16; clause 1(3)(*a*) to (*c*).)

5. An obligation of confidence, in any legislation following on this Report, should mean an obligation not to use or disclose the information except in the circumstances mentioned in Recommendation 6.
   (Paragraph 4.17; clause 1(4).)

6. Those circumstances are that use or disclosure is:
   (*a*) authorised expressly or impliedly by or on behalf of the person to whom or to whose interests the information relates;
   (*b*) authorised or required by any rule of law or enactment; or
   (*c*) required for the fulfilment of any public duty or function.
   (Paragraph 4.17; clause 1(4).)

7. A person who is under an obligation of confidence should owe that obligation not merely to the supplier of the information, but also to any person to whom or to whose interests the information relates.
   (Paragraphs 4.18 to 4.20; clause 1(1).)

8. There should be no attempt to provide, in legislation, special rules regarding confidentiality for particular relationships.
   (Paragraphs 4.29 to 4.32).

Information unlawfully obtained

4.34 Our terms of reference enjoin us to consider not only breach of confidence (as that expression is generally understood), but also the special case of the disclosure or use of information unlawfully obtained. These matters were referred to separately in the Younger Report — hence the separate paragraphs of our terms of reference — but they were clearly regarded as two aspects of much the same problem. The Younger Committee — apart from proposing the introduction of new criminal offences for the unlawful use of surveillance devices — stated that

> "the damaging disclosure or other damaging use of information acquired by means of any unlawful act, with knowledge of how it was acquired, is an objectionable practice against which the law should afford protection. We recommend therefore that it should be a civil wrong, actionable at the suit of any person who has suffered damage thereby, to disclose or otherwise use information which the discloser knows, or in all the circumstances ought to have known, was obtained by illegal means. It would be necessary to provide defences to cover situations where the disclosure of the information was in the public interest or was made in privileged circumstances. We envisage that the kinds of remedy available for this civil wrong would be similar to those appropriate to an action for breach of confidence."[1]

[1]Para. 632.

4.35 The Law Commission examined this proposal and recommended that a person should owe an obligation of confidence in respect of information acquired in the following circumstances:

"(i) by unauthorised taking, handling or interfering with anything containing the information;

(ii) by unauthorised taking, handling or interfering with anything in which the matter containing the information is for the time being kept;

(iii) by unauthorised use of or interference with a computer or similar device in which data is stored;

(iv) by violence, menace or deception;

(v) while he is in a place where he has no authority to be;

(vi) by a device made or adapted solely or primarily for the purpose of surreptious surveillance where the user would not without the use of the device have obtained the information;

(vii) by any other device (excluding ordinary spectacles and hearing aids) where he would not without using it have obtained the information, provided that the person from whom the information is obtained was not or ought not reasonably to have been aware of the use of the device and ought not reasonably to have taken precautions to prevent the information being so acquired."[1]

4.36 In the consultation paper we said we were sympathetic to the objects of the Law Commission in making this recommendation, but would prefer, if possible, to achieve the same result in a simpler way. Our provisional approach was to specify certain obvious examples of improper or unlawful behaviour, such as theft, coercion and fraud; and to rely otherwise on the notion of "taking steps", in order to obtain information, without the appropriate authority. We received a number of criticisms of the precise formula which we tentatively put forward.

4.37 For the purpose of imposing civil liability we do not support an approach which depends on prescribing a long list of improper methods of obtaining information. We are strongly opposed to the provision of a list which is exclusive, in the sense that any method not contained in the list will not give rise to this particular form of civil liability. Not only may the list omit some methods already available, but it will inevitably fail to include methods not yet invented. In short, the list might require to be constantly updated. We regard this as a most unsatisfactory way of legislating.

4.38 We have accordingly concluded that a more satisfactory way of resolving this problem is to refer simply to the acquisition of information by illegal means or by means which a reasonable person would have regarded as improper. We have further concluded that this method of acquisition should be regarded, not as a separate form of civil liability, but should be made an integral part of any statutory formulation of the obligation of confidence. Accordingly the legislative provisions on breach of confidence might refer specifically to these means of obtaining information. Where a person has himself obtained any

[1]Law Com. No. 110, paras. 6.28-38 and Recommendation (7).

information by illegal means or by means which a reasonable person would have regarded as improper, he should automatically be placed under an obligation of confidence not to use or disclose the information. The obligation should not, in this case, depend on a test such as the nature of the information: it should extend to any information so obtained, however trivial it might seem to an outsider. Where information has been obtained in this way, and the question is whether a third party who has subsequently received the information should be placed under an obligation, we consider that the same test should apply as we have recommended should apply to any other obligation of confidence — namely that an obligation should arise if a reasonable person would, in all the circumstances of the case, have regarded himself as bound to treat the information as confidential. To take account of this particular method of obtaining information, we suggest a broadening of one of the factors mentioned above (Recommendation 4(c)), viz. the manner and circumstances in which the information was obtained, so as to refer to the manner and circumstances in which the information was obtained by any person and in particular whether it had at any time been obtained by any person other than the recipient by illegal means or by means which a reasonable person would have regarded as improper.

4.39 In arriving at these conclusions we have sought to ensure that the same consequences apply in the case of illegal or improper obtaining of information as apply in any other case of breach of confidence. Thus the obligation should be described as an obligation not to use or disclose the information except insofar as use or disclosure is (*a*) authorised by or on behalf of the person to whom or to whose interests the information relates; (*b*) authorised or required by any rule of law or enactment; or (*c*) required for the fulfilment of any public duty or function. In the consultation paper we made no reference to (*a*) above, although in context the very nature of the method of obtaining the information makes it unlikely that use or disclosure was authorised. We note further that our terms of reference do not require us to propose sanctions against the mere obtaining of information, but only to consider the question of compensating a person who has suffered loss or damage as a result of subsequent use or disclosure. The former aspect is primarily a matter for the criminal law, and possibly also for administrative control, neither of which concerns us in this report.

4.40 We have referred to the above solution as "more satisfactory" than a solution based on a list of specified methods of obtaining information. We do not claim that it is free from all difficulties or dangers. The reference to "means which a reasonable person would have regarded as improper" is inherently vague and would in practice give a great deal of discretion to the courts to decide after the event whether certain types of borderline conduct gave rise to liability, perhaps for substantial damages. Nevertheless if there is to be an obligation of confidence arising from the improper obtaining of information (and that, like other questions in this sensitive area, must be a matter of political judgment) we can seen no reasonable alternative to a test based on some more or less vague notion of impropriety.

4.41 We therefore **recommend**:

9. A person should be under an obligation of confidence if he himself acquired information by illegal means or by means which a reasonable person would have regarded as improper.
(Paragraphs 4.34 to 4.40; clause 1(2)(*b*).)

10. A person should be under an obligation of confidence if a reasonable person in his position would, in all the circumstances of the case, including the factor mentioned in Recommendation 11, have regarded himself as bound to treat the information as confidential.
(Paragraphs 4.34 to 4.40; clause 1(2)(*c*).)

11. That factor is that the information had at any time been obtained by another person by illegal means or by means which a reasonable person would have regarded as improper.
(Paragraphs 4.34 to 4.40; clause 1(3)(*c*).)

Judicial proceedings

4.42 Under this heading we consider questions of confidentiality which may arise in the course of judicial proceedings. We are not here concerned with claims to a privilege to refuse to disclose information to the court or to a party to the litigation. We are concerned with the legitimate interest which certain litigants may have, that information disclosed to the court or to another party for the purpose of the proceedings should not be disseminated to a wider public, including perhaps business competitors. Many litigants — including not only individuals and organisations, but also the State — may wish to withhold the disclosure of certain facts or evidence from the general public. Exceptionally, the law may condone this withholding of information because it attaches greater importance to other ends than the disclosure of the whole truth in open court in accordance with the important principle that justice should be dispensed openly and publicly. This principle is in the general interest of society as a whole, inasmuch as it ensures public confidence in the judiciary and in the administration of justice.

Disclosure in open court

4.43 We take as our starting point that it is not practicable to impose restrictions on the further use or disclosure of information revealed in open court.[1] This was also the view of the Law Commission. They identified, as an important illustration of information coming into the public domain, its emergence in the course of a public hearing in court.[2] The passing of information into the public domain destroys its confidentiality. Thereafter neither the original recipient — subject to what is said below — nor anyone else into whose possession the information comes can reasonably be regarded as being under an obligation of confidence. If, therefore, there is a case for maintaining the confidentiality of certain information, it is necessary to devise some machinery for preventing its disclosure in open court.

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[1]But see para. 4.56 below.

[2]Para. 6.71. For a discussion of public domain or public knowledge, see paras. 4.77-80 below.

Power of court to close doors

4.44 The circumstances in which proceedings may at present be held behind closed doors are not clearly defined. Two old statutes confer some measure of discretion upon the Court of Session,[1] although these statutes have not in fact been construed as conferring a general discretion on the Court. In practice, the Court of Session has exercised the power with restraint and in limited circumstances, such as in proceedings for nullity on the ground of impotence. The basis for the practice of closing doors in the sheriff court is obscure, apart from certain cases where Parliament has given the sheriff specific power. There is, for example, statutory provision for holding adoption proceedings in private.[2] There may well be reasons other than confidentiality which will persuade a court to exclude the public from the whole or part of certain proceedings — for example where evidence is to be given by a very young child, whose natural nervousness may be increased by the presence of large numbers of members of the public, or where evidence of the complainer is to be given in cases of rape or other sexual assaults. In these cases it is customary to exclude the general public, but not representatives of the press.[3]

4.45 In the consultation paper we suggested it should be made clear, in general terms, that the civil courts (including the sheriff courts) have the power, in exceptional circumstances, to close doors, and that rules of court should specify appropriate cases for the exercise of this power.[4] Fears were expressed, however, that this would lead to an unwarranted extension of the circumstances in which the general public is excluded from proceedings, and that it would be difficult to achieve uniformity of approach. Any express provision might create the impression that the need to maintain confidentiality is to take precedence over the general public interest in securing that justice is dispensed in public.[5] One influential commentator objected, further, that it would be wrong to regulate a matter of such importance through the medium of rules of court. We accept these criticisms and no longer consider that a solution to this problem should be sought by the enactment of a provision couched in such wide terms.

4.46 This was not, however, our only proposal. We made the suggestion, specifically in relation to confidential information, that the court should have the power to close doors for the purpose of maintaining the confidentiality of information wherever this seemed reasonable and necessary to protect the interests not only of the litigants but of any other person who might be prejudiced by the disclosure of the information. We believe that a provision

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[1]The Acts of 1686, cap. 18 and of 1693, cap. 26. The latter is now referred to as the Court of Session Act 1693.

[2]S.I. 1959/763, para 11. Proceedings under the Social Work (Scotland) Act 1968 for the assumption of parental rights by a local authority are regularly conducted in private. There appears to be no statutory basis for this practice, though presumably it can be justified on an analogy with adoption proceedings.

[3]Cf. the Judicial Proceedings (Regulation of Reports) Act 1926, which restricts the information which the press may publish about divorce cases.

[4]Proposition 15.

[5]Some support for these fears may be found in the interpretation by some English courts of section 11 of the Contempt of Court Act 1981, which permits the court to prohibit the publication of a name (or other matter) where the court has allowed the name, etc., to be withheld from the public in proceedings before the court.

limited to these terms would meet most of the criticisms which we received on consultation; even so, we consider that any such provision should be narrowed still further. The real justification for a power to close doors arises where the information has some commercial value. The real need, in our view, is to ensure that a person is not discouraged from seeking redress against a trade competitor in the ordinary courts, and similarly that a trade competitor is prevented from using the medium of legal proceedings in order to bring secret commercial information into the public domain. Accordingly we have concluded that the court should have power to close doors in civil proceedings where it is satisfied that:

(*a*) information which is not in the public domain may be disclosed by any person in the course of the proceedings;

(*b*) any person to whom or to whose interests the information relates would not, if acting reasonably, disclose the information unless such disclosure were subject to an obligation of confidence; and

(*c*) disclosure of the information in open court seems likely to result in substantial prejudice to the patrimonial interest of any person.

4.47 The next question is the range of persons entitled to apply to the court to close doors. In the consultation paper we envisaged that this right might be available, not just to the parties to the proceedings, but to anyone who might be prejudiced by the disclosure of the information. This proposal also attracted some criticism, mainly because it would create practical difficulties for the parties to the litigation: in particular it could lead to delays being caused by persons who were subsequenly found not to have a genuine interest in the outcome of the proceedings. An alternative procedure, suggested to us on consultation, would be to enable the court to grant an order of confidentiality. This would have the effect of imposing statutory obligations of confidence on all persons hearing the evidence given in court. We think, however, that a solution along these lines would be unworkable. It would have the effect of enlarging considerably the potential category of obligants. It would seriously prejudice third parties, who might not be aware of the order. We have no doubt, as we have already observed, that it would not be practicable to impose obligations of confidence, in relation to information revealed in the course of proceedings in open court, upon any member of the public attending those proceedings.[1]

4.48 We believe that fears of delays in proceedings may have been overstated. In the normal case a third party wishing to apply to the court will be a witness, who will be unwilling to reveal certain information in the course of cross-examination in open court. We can see no valid reason for denying such a person the opportunity to seek the court's protection. Accordingly we consider that the most satisfactory solution is to empower the court to close doors either of its own accord or on the application of any person having an interest.

Effect of closing doors

4.49 A necessary corollary to this power is that an obligation of confidence should be owed by those attending the proceedings, or any part of them, held

[1] See para. 4.43.

behind closed doors. The obligation should be in the same terms as we have described above — not to use or disclose the information, except in the circumstances mentioned in Recommendation 6. The obligation should extend to all information disclosed behind closed doors — subject to what is said in the next paragraph — and should not depend on a test such as the nature of the information. The obligation should be owed to essentially the same category of persons as in any other kind of obligation of confidence — in context, to the person who discloses the information and to any other person to whom or to whose interests the information relates. Only those attending the proceedings held behind closed doors should automatically be placed under an obligation of confidence. Where information has been disclosed behind closed doors, and the question is whether a third party who has subsequently received the information should be placed under an obligation, we consider that the same test should apply as we have recommended should apply to any other obligation of confidence — namely that an obligation will arise if a reasonable person would, in all the circumstances of the case, have regarded himself as bound to treat the information as confidential. To take account of this particular method of obtaining information, we suggest an addition to clause 1(3) of the draft Bill contained in Appendix A. One of the factors to be specifically drawn to the court's attention, in addition to the nature of the information, and the relationship between the parties, etc., should be whether the information was originally disclosed in the course of proceedings held behind closed doors by virtue of an order of the court.[1]

4.50 Where the court has made an order to close doors, it will sometimes happen that nothing of a confidential nature is, in the event, disclosed during the proceedings. It is accordingly necessary to give the court power to authorise, at any time, the use or disclosure of any information disclosed behind closed doors, subject to such conditions, if any, as it thinks fit.

Documents, etc, relevant to judicial proceedings

4.51 The other main difficulty in connection with judicial proceedings concerns the confidentiality of documents, etc, recovered for the purposes of civil proceedings (whether or not lodged in process) and of steps in process, especially the open and closed records. The English courts have developed the rule that

> " . . . documents disclosed on discovery are not to be made use of except for the purposes of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, nor for bringing a libel action, or for any other alien purpose."[2]

In the consultation paper we expressly approved of the English rule and suggested that it should extend to any document voluntarily provided without a court order for the limited purposes of litigation and to any document already in his possession which a litigant reasonably has to lodge in process for the purposes of the litigation. We proposed that anyone receiving or becoming

[1] See clause (1)(3)(*d*), draft Bill, Appendix A.

[2] *Riddick* v. *Thames Board Mills Ltd.* [1977] Q.B. 881 per Lord Denning M.R. at 896. Cf. *Distillers Co. (Biochemicals) Ltd.* v. *Times Newspapers Ltd.* [1975] 1 Q.B. 613 at 621; *Home Office v. Harman* [1983] 1 A.C. 280.

aware of the contents of any such document should incur an obligation not to use or disclose the information it contained except for the purposes of the litigation.[1] This would not apply to any part of the contents disclosed orally in open court.[2]

4.52 Much of the comment this proposal elicited related to the record, particularly the closed record. There is little doubt that the open record is a private document to which the public does not have access. It is the means by which the parties adjust the pleadings before a proof takes place. Before that stage the case may be settled — without the court's direct intervention — and accordingly there seems little room for any argument that the public interest demands disclosure of the contents. The same, strictly speaking, is true of the closed record. There is a widely held view that, once the record is closed, the public may have access to it, but the cases in which the matter has been reviewed give little support to this opinion and reflect rather the principle that the right to disclose material in the closed record only extends to those items of process which have been adduced in evidence.[3] As a matter of long-standing concession, however, law reporters have been afforded access to the closed record. Very strong representations were made to us by the legal press that this privilege should continue. Without access to the closed record it would in many cases be extremely difficult, if not impossible, for a reporter to follow the proceedings. At the very least, it was said, the press should have access to the closed record, even if they are not permitted to quote directly from it. We are impressed by these arguments and we are not now disposed to make any recommendation affecting written pleadings, as distinct from documents or productions lodged in process. Existing practice appears to be satisfactory, and accordingly there is little need for statutory regulation. Our recommendation will therefore be confined to information obtained from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972.

4.53 For the sake of consistency with our earlier recommendations, we consider that this obligation of confidence should be owed to:

(*a*) the person by whom the document or other production was lodged, or any person on whose behalf that person was acting;

(*b*) the person in whose possession the document or other thing was when it was inspected or recovered, or any person on whose behalf that person was acting;

(*c*) any person to whom or to whose interests the information relates.

The obligation should be owed by any party to any civil proceedings: a party, in context, should include:

(*a*) the *dominus litis* in such proceedings;

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[1]Proposition 17.

[2]Proposition 18.

[3]*Riddell* v. *Clydesdale Horse Society* (1885) 12 R. 976 per Lord Mure at 983; *Macleod* v. *Justices of Peace of Lewis* (1892) 20 R. 218.

(*b*) any person on whose application the court made the order under section 1 of the 1972 Act;

(*c*) any person acting on behalf of such party.

The obligation should be in the same terms as we have described above — not to use or disclose the information, except in the circumstances mentioned in Recommendation 6. The obligation should extend to all information obtained from these sources, and should not depend on a test such as the nature of the information. Where a third party subsequently receives information, we consider that the same test should apply as we have recommended should apply to any other obligation of confidence — namely that an obligation will arise if a reasonable person in the position of the recipient would, in all the circumstances of the case, have regarded himself as bound to treat the information as confidential. To take account of this particular method of obtaining information, we suggest a further addition to clause 1(3) of the draft Bill contained in Appendix A. One of the factors specifically drawn to the court's attention, in addition to the nature of the information, and the relationship between the parties, etc, should be whether the information was originally obtained from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972.

4.54 In the earlier consultative memorandum we drew attention to an existing Court of Session practice which is designed to provide a measure of confidentiality for certain information in judicial proceedings. This takes the form of a statement describing the confidential information which is then lodged in process but not printed in the pleadings. There was widespread support for the continuation of this practice from those who commented on the earlier memorandum, and the importance of the practice was stressed by the Faculty of Advocates. In the present context we need only note that such a statement is a document lodged in process and in terms of our recommendation would accordingly attract the same incidents of confidentiality as any other document so lodged.

4.55 We should stress that we are not, in this Report, directly concerned with a re-examination of the rules which enable a party to litigation to recover documents in the possession of another person: in particular, we are not concerned with the creation of any exception to these rules. They *inter alia* enable a party to recover documents from a person who is not himself a party to the proceedings. A very common example is where it is sought to recover medical records from a hospital board for the purposes of personal injuries litigation. The procedure, which often may be regarded as involving interference with the reasonable rights of third parties, can only be justified on the view that justice cannot be done unless all the available evidence is available to the court. The interference with these rights is preserved, so far as possible, by a rule that the documents must not be used for any purpose not connected with the proceedings, and use for any other purpose constitutes a contempt of court. Thus, where a person comes into possession of documents which have been handed over for the purposes of litigation, and uses or discloses their contents for an entirely different purpose, he is not permitted to

invoke a doctrine such as public interest as an answer to a charge of contempt of court.

4.56 Neither are we concerned in this Report, as we have indicated in Part I, with reviewing the law on contempt of court, but it is relevant in this context to refer to the particular circumstances which arose in *Home Office* v. *Harman.*[1] This case did not relate to liability for breach of confidence but to contempt of court. It did, however, raise incidentally a number of difficult questions which we have examined in the course of our own work. The defendant, a solicitor acting for a plaintiff in an action against the Home Office, was held liable for contempt in showing documents, already read out in open court, to a journalist who wrote a newspaper article based on them. The House of Lords, by a majority, held that she was liable for contempt because she had obtained most of these documents on discovery and had given a specific assurance to the Treasury Solicitor, acting on behalf of the Home Office, that they would not be used other than for the purpose of the action. We have already expressed the view that any part of the contents of any document which has been disclosed orally in open court should no longer be subject to an obligation of confidence. Accordingly it seems to us that the crucial distinction in such cases, for the purposes of the law on breach of confidence, is to be drawn between those parts of a document which have been so disclosed and those which have not. If the whole of a document has been read out there can be no question of its continuing confidentiality in a question with a third party such as a journalist. He is free to publish any or all of the contents if he so wishes. It would be different, however, if only part of the document had been read out and the journalist subsequently came into possession of all of it. We have no specific proposal to make on this point, nor do we suggest any legislative intervention. We merely note the criticism levelled by Lord Keith at the practice of affording the press access to copies of documents to which confidentiality may still apply.[2]

4.57 Accordingly our **recommendations** on confidentiality in relation to judicial proceedings are as follows:

12. No statutory obligation of confidence should arise where information is disclosed in open court.
(Paragraph 4.43; clause 3(3).)

13. Without prejudice to any other powers it may have, any court or tribunal in any civil proceedings should have power to make an order that the proceedings, or any part of them, be held behind closed doors.
(Paragraphs 4.44 to 4.46; clause 2(1).)

14. The court or tribunal may make an order under Recommendation 13 where it is satisfied that:
    (*a*) information which is not in the public domain may be disclosed by any person in the course of the proceedings;
    (*b*) any person to whom or to whose interests the information relates would not, if acting reasonably, disclose the information unless such disclosure were subject to an obligation of confidence; and

[1] [1983] 1 A.C. 280.
[2] *Ib.*, 309.

(*c*) disclosure of the information in open court seems likely to result in substantial prejudice to the patrimonial interest of any person.
(Paragraph 4.46; clause 2(1).)

15. The court or tribunal may make an order under Recommendation 13 of its own accord or on the application of any person having an interest.
(Paragraphs 4.47 to 4.48; clause 2(1).)

16. Where an order has been made under Recommendation 13, any person present during the proceedings should be under an obligation of confidence, in respect of information disclosed behind closed doors, to the discloser of the information and to any other person to whom or to whose interests the information relates.
(Paragraph 4.49; clause 2(2).)

17. A person, other than a person referred to in Recommendation 16, should be under an obligation of confidence, in respect of information disclosed behind closed doors, to the persons referred to in Recommendation 16, if a reasonable person in his position would, in all the circumstances of the case (including the factors mentioned in Recommendations 4 and 18) have regarded himself as bound to treat the information as confidential.
(Paragraph 4.49; clause 1(2)(*c*).)

18. That factor is that the information was originally disclosed in the course of proceedings held behind closed doors by virtue of an order made under Recommendation 13.
(Paragraph 4.49; clause 1(3)(*d*).)

19. The court may at any time authorise the use or disclosure of any information disclosed behind closed doors, and may do so subject to such conditions, if any, as it thinks fit.
(Paragraph 4.50; clause 2(3).)

20. Any party to any civil proceedings who has obtained information from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972, should be under an obligation of confidence.
(Paragraphs 4.51 to 4.52; clause 3(1).)

21. The obligation referred to in Recommendation 20 should be owed to:
    (*a*) the person by whom the document or other production was lodged, or any person on whose behalf that person was acting;
    (*b*) the person in whose possession the document or other thing was when it was inspected or recovered, or any person on whose behalf that person was acting;
    (*c*) any person to whom or to whose interests the information relates.
    (Paragraph 4.53; clause 3(2).)

22. In Recommendation 20 "party" includes:
    (*a*) the *dominus litis* in such proceedings;
    (*b*) any person on whose application the court made the order under section 1 of the 1972 Act;

(*c*) any person acting on behalf of such party.
(Paragraph 4.53; clause 3(4).)

23. A person, other than a person referred to in Recommendation 20, should be under an obligation of confidence, in respect of the information referred to in Recommendation 20, to the persons referred to in Recommendation 21, if a reasonable person in his position would, in all the circumstances of the case (including the factors mentioned in Recommendations 4 and 24) have regarded himself as bound to treat the information as confidential.
(Paragraph 4.53; clause 1(2)(*c*).)

24. That factor is that the information was originally obtained from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972, and has not been disclosed in open court.
(Paragraph 4.53; clause 1(3)(*e*).)

Defences

4.58 In the consultation paper we proposed that a number of specific defences should be available in proceedings for breach of confidence, in addition to any other general defences which might be available in an action based on delict — an obvious example of the latter being that the defender did not use or disclose the information as averred by the pursuer.

The public interest

4.59 In England the common law has developed the doctrine that the law does not protect obligations of confidence in cases where the enforcement of the obligation would prevent the disclosure of misconduct. The precise ambit of this doctrine is not wholly clear and there has been some controversy as to whether it extends beyond the disclosure of a crime or civil wrong.[1] It clearly includes "matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public".[2] As a defence it "operates to override the rights of the individual (including copyright) which would otherwise prevail and which the law is also concerned to protect".[3] In referring to a suggestion of Bankes L. J. in *Weld-Blundell* v. *Stephens*[4] that the defence was restricted to information relating to the proposed or contemplated commission of a crime or civil wrong, Lord Denning M.R. said

> "I do not think that it is so limited. [The defence] extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others. . . The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always

[1]The starting point of the modern law is to be found in the remark of Wood V.-C. in *Gartside* v. *Outram* (1856) 26 L.J. Ch. 113, 114 that "there is no confidence as to the disclosure of iniquity".
[2]*Beloff* v. *Pressdram Ltd.* [1973] 1 All E.R. 241 per Ungoed-Thomas J. at 260.
[3]*Ib.*
[4][1919] 1 K.B. 520, 527.

— and this is essential — that the disclosure is justified in the public interest."[1]

In discussing what is meant by public interest, Lord Wilberforce has commented:

"But there is a wide difference between what is interesting to the public and what it is in the public interest to make known."[2]

In his judgment in *Initial Services Limited* v. *Putterill* Lord Denning M.R. added that:

"The disclosure must . . . be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."[3]

4.60 There are thus two aspects to the notion of public interest. The first is the scope of the doctrine. The second is the range of persons to whom disclosure may be made. The second is a point of acute importance to newspapers. Both of these aspects were discussed by Lord Wilberforce in *British Steel Corporation* v. *Granada Television.* He observed:

"There is an important exception to the limitations which may exist upon the right of the media to reveal information otherwise restricted. That is based on what is commonly known as the 'iniquity rule'. It extends in fact beyond 'iniquity' to misconduct generally . . . It is recognised that, in cases where misconduct exists, publication may legitimately be made even if disclosure involves a breach of confidence such as would normally justify a prohibition against disclosure. It must be emphasised that we are not in this field in the present case; giving the widest extension to the expression 'iniquity' nothing within it is alleged in the present case. The most that it is said the papers reveal is mismanagement and government intervention. Granada has never contended that it had a right to publish in order to reveal 'iniquity'."[4]

4.61 On the other hand Lord Salmon took a much wider view both of the scope of public interest and of the circumstances in which the disclosure of confidential information by the press might be justified in the public interest. He remarked:

"No doubt crime, fraud and misconduct should be laid bare in the public interest; and these, of course, did not occur in B.S.C. There was however much else, even more important in all the circumstances, which called aloud to be revealed in the public interest."[5]

He laid particular emphasis on the fact that the affairs of a nationalised undertaking were involved in the particular case, where the losses would fall on

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[1] *Initial Services Ltd.* v. *Putterill* [1968] 1 Q.B. 396, 405.
[2] *British Steel Corporation* v. *Granada Television Ltd.* [1981] A.C. 1096, 1168.
[3] [1968] 1 Q.B. 396, 405-6.
[4] [1981] A.C. 1096 at 1169.
[5] *Ib.*, 1191.

the public, who in his view would not have the same safeguards as would be available to the shareholders of a private corporation. Having referred to the immense losses suffered by British Steel and, in spite of the introduction of new machinery, to their low productivity per man he said that Granada had rightly taken the view that

> "if any of these [documents provided by British Steel's employees] exposed the faults and mistakes which were causing the immense losses made by B.S.C., it would be Granada's public duty to disclose the contents of those papers to the public."[1]

4.62 More recently two different divisions of the Court of Appeal have had to consider this problem, within the space of a few days, against the background of substantially different facts. In each case a newspaper wished to publish information and the object of the proceedings was to prevent it from doing so. A significant difference between these cases was that, in the first — *Francome* v. *Mirror Group Newspapers Ltd.*[2] — the information had been obtained by unlawful telephone-tapping (not at the behest of the newspaper concerned). The editor of the newspaper, in an affidavit, referred to the public interest in the disclosure of the information, which related to conduct alleged to be antisocial and possibly also involved criminal offences. The Master of the Rolls commented that the media were "peculiarly vulnerable to the error of confusing the public interest with their own interest", and continued:

> "Usually these interests march hand in hand, but not always. In the instant case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication could only serve the interests of the 'Daily Mirror'."[3]

4.63 In the second case, however — *Lion Laboratories Limited* v. *Evans*[4] — the Court of Appeal was prepared to detect a public interest in the proposed disclosure of information by a newspaper. That information referred to the reliability of an "Intoximeter", a machine widely used in England and Wales to ascertain whether a person had been driving a motor vehicle with an alcoholic concentration above the limit prescribed by law. As one of the judges put the question in argument: suppose the plaintiffs had informed the police that their Intoximeter was not working accurately or was not safe to use, and the police had replied that they were nonetheless going to continue using it as breath-test evidence. Could there be no defence of public interest if the defendant sought to publish that confidential information, simply because the plaintiffs themselves had done nothing wrong but the police had? There would be the same public interest in publication whoever was guilty of misconduct, and the right to breach confidence would not be lost, although the public interest remained the same.[5]

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[1] *Ib.*, 1185-6.

[2] [1984] 1 W.L.R. 892 (March 16, 1984).

[3] *Ib.*, 898.

[4] [1984] 3 W.L.R. 539 (March 26, 1984)

[5] There are certain similarities in approach to be found in the dissenting judgment of Lord Denning M.R. in *Schering Chemicals Ltd.* v. *Falkman Ltd.* [1981] 2 W.L.R. 848 (a case in which a television company wished to use information relating to a pregnancy testing drug), especially (at 865): "the *public* interest in the drug Primodos and its effects far outweighs the *private* interest of the makers in preventing discussion of it."

4.64 It would be fair to say, by way of summary, that the English courts have been reluctant to concede that there is a public interest in breaching confidence — except where the information relates to crime or national security or to some form of misconduct — and, with very rare exceptions, have been reluctant to permit disclosure otherwise than to a public official such as a police officer.[1] A right to disclose on the part of the press is scarcely recognised.

4.65 There are no reported Scottish cases where the concept of public interest has been discussed in the context of breach of confidence. Judicial observations in other contexts are not necessarily applicable in this field. For example, in *Higgins* v. *Burton* Lord Avonside observed

> ". . . while the matter did not require full argument before me and is not necessary to the decision of this case I would tend strongly to be of the opinion that there is no such thing as public interest in the sense in which that phrase is used in our Court unless the interest be a national one and put forward either by a Minister of the Crown or by the Lord Advocate. If the scope of such a claim was widened, I can see no end to the repercussions which might arise."[2]

In this case, however, the alleged public interest was in *withholding* information relevant to judicial proceedings. The observations have to be read in that context.

4.66 The Law Commission, founding to some extent on certain observations made in a series of cases in the Court of Appeal,[3] propose to make it a general requirement of their statutory remedy for breach of confidence that the public interest in preserving the confidentiality of the information should outweigh the public interest in its disclosure or use. They propose also that if the defendant satisfies the court that there was a public interest in the disclosure or use of the information in question, it should then be for the plaintiff to establish that this interest is outweighed by the public interest in the protection of the confidentiality of the information.[4] Their recommendations on the matter are as follows:

(i) Information should only enjoy the protection of the action for breach of confidence if, after balancing the respective public interests in confidentiality on the one hand and in disclosure or use of the information on the other, the information is found to merit such protection.

(ii) In assessing the public interest in the protection of the confidentiality of information the court should take into account all the circumstances, including the manner in which the information was acquired.

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[1]Notable exceptions are *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, where an interlocutory injunction was unsuccessfully sought to prevent publication of a book describing certain courses given by the "Church of Scientology" (especially per Lord Denning M.R. at 96); and *Lion Laboratories Ltd.* v. *Evans,* discussed in para. 4.63 above.

[2]1968 S.L.T. (Notes) 52.

[3]E.g. by Lord Widgery C.J. in *Attorney-General* v. *Jonathan Cape Ltd.* [1976] Q.B. 752, 770 (and see also Law Com. No. 110 at para. 4.42); and by Lord Denning M.R. in *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760, 764 where he refers to a balance being taken between "the public interest in maintaining the confidence" and "the public interest in knowing the truth".

[4]Law Com. No. 110, paras. 6.77-84 and Recommendation (24).

(iii) In assessing the public interest in the disclosure or use of the information the court should take into account all the circumstances, including the extent and character of such disclosure or use. A public interest may arise in the disclosure or use of confidential information whether or not the information relates to iniquity or other forms of misconduct.

(iv) In assessing the public interest in the protection of confidentiality as against the public interest in the disclosure or use of information the court should take into account the time that has elapsed since the information originally became subject to an obligation of confidence.

(v) It should be for the defendant to satisfy the court that there was a public interest involved in the relevant disclosure or use of the information in question. If the defendant discharges this burden, it should be for the plaintiff to establish that this interest is outweighed by the public interest in the protection of the confidentiality of the information.

(vi) The above-mentioned approach in relation to the public interest should apply not only to past but also to apprehended breaches of confidence and, in respect of the latter, to claims not only for a final injunction but also, so far as the provisional character of such proceedings allows, for an interlocutory injunction.

The Law Commission also propose[1] that contractual obligations not to use or disclose information, whether or not that information is in the public domain, should be subject to similar rules relating to public interest.

4.67 We have no doubt that the law should be prepared to recognise that use or disclosure of confidential information in the public interest may sometimes be permissible and justifiable. Unless this is clearly recognised, the law on breach of confidence could become a shield for those engaged in criminal or other antisocial activities. At the very least — and this, we think, could scarcely be disputed — it is in the public interest that the authorities responsible for the investigation of serious crime should be entrusted with information which enables them to discharge their functions, even if technically the disclosure of the information is in breach of confidence.[2] However, the public interest defence should not, in our view, be confined to what may be regarded as "iniquity" or "misconduct", nor should there be pre-determined constraints on the range of persons to or by whom information may, in suitable circumstances, be disclosed, despite the existence of an obligation of confidence. The validity of both of these propositions is, in our view, amply demonstrated by the circumstances of the Intoximeter case. This is not to say that disclosure is appropriate in every case. All we are saying here is that a defender must not be precluded from arguing that such disclosure whether to a public official or otherwise is justifiable in the particular circumstances of the case.

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[1]Paras. 6.130-3 and Recommendation (32)(iii).

[2]The effect of Recommendation 6 is that certain authorised uses and disclosures would not amount to a breach of an obligation of confidence. In these cases, therefore, there is no need to found on a defence of public interest.

4.68 The question now arises how this approach can be put into effect in legislation. We have had some difficulty in accepting the distinction which the Law Commission drew between the public interest in the use or disclosure of information, and the public interest in protecting confidentiality. The essence of our difficulty is that we regard the latter less as a matter of public interest than as a private interest, the interest of the person who asks the court to uphold the existence of an obligation.[1] We think, too, that it would be undesirable to deal with the matter by making express reference to two competing burdens of proof. It is somewhat artificial to require a person to establish that the public interest involved in protecting confidentiality outweighs that involved in disclosure. In civil procedure generally, it may be said that each party is required to prove his own averments. Seldom, however, will the court find it necessary to state expressly that particular averments have or have not been proved by either party: rather the issue will be resolved by an assessment of the evidence as a whole. Where public interest is in issue we would expect the pursuer to make averments to the effect that, having regard to the facts of the case, a statutory obligation of confidence has arisen; and the defender to make counter-averments that, notwithstanding that certain provisions of the statute have been satisfied, nonetheless use or disclosure was justified in the public interest. The court will, in our view, be able to take account of all the averments and the evidence without being directed to consider any special onus of proof.

4.69 In the consultation paper we made two suggestions. One was that a public interest may be involved in the use or disclosure of confidential information, notwithstanding that the information does not relate to any crime, fraud or other misconduct.[2] We do not believe it is necessary to state this Proposition expressly in legislation, in view of recent judicial developments in England. The other suggestion was that it would be desirable to refer not merely to the fact of use or disclosure, but also to the manner of disclosure.[3] On this second point our reasoning was as follows. In some circumstances disclosure might be justified only to the prosecuting authorities or to the police, but not to the world at large. A person who had obtained from documents which he had no right to examine, or by the use of surveillance devices, confidential information indicating the possible commission of an offence, should not necessarily be entitled to disclose the information to the world at large. On reconsidering this matter we are now of the view that it would be undesirable to draw undue attention to this aspect of the matter. In certain cases the courts might be influenced more by the manner of disclosure than by the content of the information. They might, indeed, regard a specific reference to the manner of disclosure as a direction to adopt a restrictive approach to the concept of public interest. In short, there is a risk that the courts will become too involved in matters of controversy, and that the really important matter will be overshadowed by consideration of matters of subsidiary importance. Accordingly we no longer adhere to our provisional proposal. We think nonetheless that the formula used in clause 4(*a*) of the draft Bill in Appendix A

[1] Cf. *Glasgow Corporation* v. *Central Land Board* 1956 S.C. (H.L.) 1, where Viscount Simonds (at 7) contrasted the public interest with the interest of the individual; and Lord Keith of Avonholm (at 25) contrasted public interest with private right.

[2] Proposition 21(*b*).

[3] Proposition 21(*a*).

would enable the court to take account, in suitable cases, of the manner of disclosure.

4.70 The Law Commission also suggested, as one of the relevant factors, the time which has elapsed since the information originally became subject to an obligation of confidence. They referred in particular to *Attorney General* v. *Jonathan Cape Ltd.*[1] a case concerning the proposed publication, in 1976, of the first volume of the diary kept by the late Richard Crossman covering the years 1964 to 1966. Lord Widgery C.J. attached considerable importance to the lapse of time, emphasising that he did not regard publication in this instance as likely to "inhibit free discussion in the Cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago."[2] We agree that, in appropriate circumstances, the court should and indeed would pay due regard to this factor, but we do not consider it necessary to make special mention of it in legislation. The concept of public interest in our view would be better left unfettered by statutory guidelines.

4.71 It remains to consider whether our recommendations on public interest should be applied where the obligation arises from contract. Both Commissions recommend, in rather different terms, that use or disclosure in the public interest should be permitted in circumstances where a statutory obligation of confidence might otherwise arise. The Law Commission were anxious not to create a distinction in this respect between contractual and statutory obligations. In a case such as *British Steel Corporation* v. *Granada Television Ltd.*[3] the question whether an employee could disclose confidential information would be governed by the "iniquity" rule, while the question whether a television company which received such information could publish it would be governed by the broader approach in their proposals. They instanced, too, an agreement not to use or disclose information already in the public domain, and were critical of a result whereby the "iniquity" test might apply to information already public, while the broader public interest rule might apply to information which was confidential.

4.72 It is, no doubt, possible to take the view that a specific statutory defence of public interest should apply only to statutory obligations. On this view a sterner attitude should be adopted towards a person who broke his contract (and, indeed, towards a person who induced a breach of contract) than towards a person whose obligation arose solely from the terms of the statute. Indeed, where a party is bound to secrecy by his contract the matter should be left to depend upon the general principles governing the law of contract. Certain types of agreement will be void or voidable under the general rules of contract. If, for example, the agreement related to evidence of criminal activity, it would be void on the ground of illegality. Similarly an agreement could be attacked if an undertaking had been obtained by error, fraud or coercion. On this view there is nothing special about the nature of the agreements which requires any of these principles to be disapplied. Where two parties have agreed, at arms

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[1] [1976] Q.B. 752.
[2] *Ib.*, 771.
[3] [1981] A.C. 1096.

length, of their own free will, to do something which the law does not preclude them from doing, legislation should not provide one of the parties with an excuse for breaking his promise. In short, the two situations are not directly comparable.

4.73 In spite of these arguments we have come with considerable hesitation to agree with the Law Commission's conclusion. As we said above[1] we think that the same results should obtain, whether an obligation is contractual or statutory, unless there is a clear case for distinguishing between them. There is a risk that anomalies of the kind described by the Law Commission will arise unless the defence of use or disclosure in the public interest is generally available to any action of breach of confidence. There will be nothing to prevent the courts from rejecting the defence whenever the circumstances so warrant. At the time of entering into an agreement a person undertaking to maintain confidentiality may be unaware of the precise nature of the information or of the consequences to the public interest of not disclosing it. We also think it desirable to preclude arguments over the correct classification of the obligation.[2] It is preferable, in our view, that the appropriateness of a defence be judged against the background of the whole circumstances of the case and not, at least in part, on whether a pursuer can establish that there was an express or implied contractual term of confidentiality.

Authority to use or disclose

4.74 A right to confidentiality may be waived expressly or by implication from the conduct of the person to whom it is owed. The principle of implied waiver is of importance in the context of applications for credit or the leasing of consumer goods, where it might be argued that the mere supplying of the name of the applicant's bank may be construed as an implied waiver of the right to confidentiality in relation to the particular transaction. A similar argument may also be presented in other contexts, such as the granting of references for the purposes of employment. In our view, however, it would be quite impracticable to state the cases in which a waiver of a right to confidentiality may appropriately be implied. We consider a more general defence should be available, to the effect that the defender has reasonable grounds to believe that the use or disclosure of the information was authorised by or on behalf of the person to whom or to whose interests it relates or would have been so authorised had that person been consulted.

Prior knowledge

4.75 The Law Commission have recommended that it should be a defence to establish:

(*a*) that, at the time of the defendant's acquisition of the information which gave rise to the obligation of confidence in question, he was already in possession of the information, or

(*b*) that he subsequently came into possession of it by independent means,

and, in addition, that at the time he disclosed or used the information the defendant did not, in connection with his previous or (as the case may be)

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[1]Para. 4.2.

[2]See para. 4.2.

subsequent awareness of the information, owe any other obligation of confidence of which that disclosure or use constituted a breach.[1] In the consultation paper we proposed that similar defences should be available in Scots law. Our proposal made clear that neither of these defences should be available if the obligation arose under contract.[2] A person should be free to contract, if he so wishes, that he will not use or disclose information which is already known to him. In terms of our earlier conclusion[3] a defence of public interest would be available to a party who breached such a contractual stipulation.

4.76 In making their recommendations the Law Commission were anxious to ensure that a person (A) should not be allowed to invoke a defence of prior knowledge in a question with another person (B) where his knowledge derived from a separate obligation of confidence owed to a third party (C). We do not consider that, within the framework of our own scheme, this kind of problem arises. It is sufficient merely to make clear that the defence is confined to circumstances in which the defender's prior knowledge does not give rise to a statutory obligation of confidence owed to the pursuer — who, in context, is most likely to be the person to whom the information relates, or the "owner" of commercial information. Our conclusion arises as a direct consequence of the recommendation which we have made on title to sue. Accordingly we think it sufficient to limit each defence to the case where the defender does not owe an obligation of confidence to the pursuer.

Public knowledge

4.77 There is little doubt that the Scottish courts would hold that, otherwise than by express contract, no obligation of confidence may arise in relation to information which is already a matter of public knowledge. It is not always an easy matter to decide when something may be held to be a matter of public knowledge. Information may not be regarded as a matter of public knowledge when it is available from public records or public sources, but only by the expenditure of significant effort. The fact that a restricted class of persons, such as employees, students or the passengers in an aeroplane become aware of the facts may or may not be regarded as making the facts a matter of public knowledge.[4] It seems likely, indeed, that the question of public knowledge is a question of degree, depending on the facts of the particular case.[5] It is probably competent (subject to the law of restraint of trade) for the contracting parties to impose an obligation of confidence in relation to information which is already a matter of public knowledge.[6] In such cases a person seeking to uphold the obligation might be met with the plea that he has no interest to enforce the

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[1]See Law Com. No. 110, paras. 6.102-3.

[2]Proposition 22.

[3]Para. 4.73.

[4]Contrast *Caird* v. *Sime* (1887) 14 R. (H.L.) 37 and *Saltman Engineering Co. Ltd.* v. *Campbell Engineering Co. Ltd.* (1948) 65 R.P.C. 203, per Lord Greene M.R. at 215, with *Woodward* v. *Hutchins* [1977] 1 W.L.R. 760.

[5]*Franchi* v. *Franchi* [1967] R.P.C. 149 at 152-3.

[6]See *Levin* v. *Farmers Supply Association of Scotland* 1973 S.L.T. (Notes) 43 per Lord Kincraig at 44, col. 2.

obligation. Like the Law Commission[1] we consider that there is no reason for precluding the parties to a contract from making stipulations relating to the further disclosure of information which may already be a matter of public knowledge. Any statutory provision, therefore, relating to public knowledge would require to exclude such contractual stipulations.

4.78 English law achieves a broadly similar result by declining to attach confidentiality to information which is in the "public domain". The Law Commission, however, commented critically[2] on a decision by the majority of the Court of Appeal in *Schering Chemicals Ltd.* v. *Falkman Ltd.*[3] It was held in that case that the use or disclosure of information obtained by the defendant should be restrained by an injunction on the ground that, because the information was already available from another public source (and was accordingly in the public domain) no public interest justified its publication. The Law Commission found this approach unacceptable because, taken to its logical conclusion, it would mean that information once acquired in confidence could not be used by the acquirer even though the information was public at the time of acquisition or later became so. Anyone in the world could use it except the particular acquirer in question. They concluded that such a restriction on the use of information generally available to the public should only be provided, if at all, by the law of contract. They also rejected the application of different tests depending on whether the information was of commercial value or related to a private individual.[4]

4.79 In the consultation paper we proposed, in view of the lack of authority on this point in Scots law, that legislation should specify a defence that information was a matter of public knowledge, and that the expression "public knowledge" should not itself be further defined.[5] On reconsidering this matter we considered whether the defence might better be expressed in some other way, for instance that the information was generally available to the public. There is a statutory precedent for this kind of approach, to be found in section 130 of the Patents Act 1977. For the purposes of that Act the term "published" means

> "made available to the public (whether in the United Kingdom or elsewhere) and a document shall be taken to be published under any provision of this Act if it can be inspected as of right at any place in the United Kingdom by members of the public, whether on payment of a fee or not."

We concluded, however, that any choice of phrase was inherently uncertain and, indeed, that it was best to leave it to the court to determine, on the facts of the particular case, whether or not information had become public knowledge. We would not, in any event, favour the incorporation of a territorial restriction such as is contained in section 130 of the Patents Act 1977. As the onus of proof is on the defender, the more recondite the source of the information, the harder it will be to satisfy the court that the information is public knowledge.

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[1]Law Com. No. 110, para. 6.129.
[2]*Ib.*, para. 6.67.
[3][1981] 2 W.L.R. 848.
[4]Para. 6.69.
[5]Proposition 19.

4.80 The Law Commission were also anxious to clarify the position where the extraction of information would require a significant expenditure of labour, skill or money.[1] Their draft Bill expressly stipulates that —

> "information which is capable of being extracted from any matter in the public domain (whether a document, product, process or anything else) is not in the public domain on that ground alone if such extraction would require a significant expenditure of labour, skill or money".[2]

We ourselves regard this problem as no different in character or degree from any other question likely to arise in considering whether particular information is public knowledge; and we would accordingly be reluctant to recommend any express reference to this factor in legislation applying to Scotland. We consider, moreover, that any specification of this factor might yield undesirable results. At the very least it would create unnecessary uncertainty. Suppose, for example, that a person spends two days in searching a public register, incurring — as he will generally do — fees which may not necessarily be nominal. He has therefore expended money. Moreover, if he is an employed person, the time spent may invite argument as to whether his time should be valued by direct reference to his usual earnings. Ultimately everything will depend on what the court regards as "significant", which in context is not an expression which offers much assistance to the court. Obviously, in the absence of such an express reference, arguments about such questions cannot altogether be eliminated; but we are of the view that an express reference will simply invite argument where otherwise none might arise. Where relevant, this matter is certain to be taken into account by the court. Moreover, in many cases of this type, it will no doubt be open to the defender to argue that a reasonable person in his position would not have regarded himself as bound to treat the information as confidential, and hence that no obligation of confidence had arisen.

Privilege

4.81 The Law Commission concluded that it should be a defence that the disclosure of the information took place in circumstances which, for the purposes of defamation, would confer absolute privilege, but that it would be neither appropriate nor necessary to introduce a defence of qualified privilege.[3] In the consultation paper we expressed agreement with the Law Commission's conclusion. Absolute privilege is justified in the law of defamation on the ground that there are certain proceedings, including proceedings in Parliament and judicial proceedings, where the interest of society in freedom to disclose information must necessarily override the interests of individuals in its non-disclosure. The considerations are not materially different in the context of confidential information. Qualified privilege, on the other hand, is conceded where the statement was made by a person "in the discharge of some public or private duty, whether legal or moral, or in the the conduct of his own affairs, in matters where his interest is concerned".[4] It is clear, therefore, that the defence of qualified privilege is so

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[1]Para. 6.69.

[2]Clause 2(2).

[3]Law Com. No. 110, paras. 6.93-6 and Recommendation (27).

[4]The language is that of Parke B. in *Toogood* v. *Spyring* 1 C.M.&R. 181, 193 cited as the *locus classicus* in this field by Lord Dundas in *A.B.* v. *X.Y.* 1917 S.C. 15, 19.

wide as to undermine the basis of obligations of confidence. The person in breach will only too readily have a "legitimate cause" — to use the language of Lord Young[1] — to disclose information in the conduct of his own affairs. There was no opposition to this approach on consultation, and we have therefore concluded that it should be a defence that the information was disclosed in circumstances in which the defender would have enjoyed absolute privilege if the information had been defamatory; but that no defence of qualified privilege should be available.

Other defences

4.82 *Legal duty to disclose.* In certain cases the disclosure of information subject to an obligation of confidence may be expressly required or authorised by the law. The fact that information is confidential is not by itself a reason for a person's failure to disclose it when required by the court in the course of judicial proceedings. This general duty is reinforced in the course of proceedings for sequestration by sections 86 and 87 of the Bankruptcy (Scotland) Act 1913. The principal effect, it is thought, of these provisions is to withdraw the privileges otherwise extended to communications between husband and wife and between solicitor and client.[2] Other cases of statutory authority chiefly relate to disclosures as between Government departments.[3] Under our earlier recommendations, a use or disclosure which is authorised or required by any rule of law or enactment would not amount to a breach of any obligation of confidence. Accordingly, as a reference to authorised use or disclosure is built into the definition of an obligation of confidence, it is not necessary to specify any special defence.

4.83 *Information obtained in the course of employment.* In Scots law it is an implied condition of a contract of employment that the employee should not divulge the trade secrets and other confidential information of which he acquires knowledge in the course of his employment.[4] It is also competent in a contract of service to make express provision to prevent the unauthorised disclosure by the employee of trade secrets and confidential information to which he is likely to have access in the course of his employment.[5] It is, however, a general rule of public policy in Scots law that any prohibition in a contract of employment which directly restricts the employee's capacity to earn a living should not be wider than is necessary in the circumstances for the protection of the employer's interests.[6]

4.84 In their application to particular facts there may clearly be a conflict between the principle of confidentiality and the prohibition of unjustified

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[1] *Shaw* v. *Morgan* (1888) 15 R. 865, 870.

[2] We examined these privileges in our report on Bankruptcy and Related Aspects of Insolvency and Liquidation (Scot. Law Com. No. 68, 1982) para. 14.33. We recommended the retention of the existing law save that, to clarify the present law, the proviso to section 3 of the Evidence (Scotland) Act 1853 should be disapplied in bankruptcy and related proceedings.

[3] E.g. s.164 of the Social Security Act 1975 permits the transfer of confidential information from the Inland Revenue to the Department of Health and Social Security.

[4] *Liverpool Victoria Legal Friendly Society* v. *Houston* (1900) 3 F. 42 per Lord Pearson (Ordinary) at 47; cf. *Scottish Farmers' Dairy Co. (Glasgow) Ltd.* v. *McGhee* 1933 S.C. 148.

[5] *Bluebell Apparel Ltd.* v. *Dickinson* 1980 S.L.T. 157, 161.

[6] *Scottish Farmers' Dairy Co.* v. *McGhee, supra.*

restrictions on employment. The English courts, therefore, have qualified the principle of confidentiality by drawing a distinction between cases involving the use by an employee of trade secrets properly so-called and cases where the employee by reason of his employment has become better equipped to fulfil his duties.[1] As Lord Shaw of Dunfermline explained,[2] in the latter case

> ". . . the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden."

4.85 The Law Commission, in discussing this rule, have argued that the same principle appropriately applies to cases where information amounting to no more than an enhancement of personal knowledge, skill or experience is gained by persons other than employees, including independent contractors and partners. They propose that it should be expressly provided that a person who has acquired information in the course of his work which merely represents such an enhancement should be under no obligation of confidence in respect of that information.[3]

4.86 There is an absence of Scottish authority on this point outside the context of contract. The question which therefore concerns us is solely whether there should be a specific defence to a claim that a non-contractual obligation of confidence has arisen. We provisionally concluded that there should not. In the consultation paper we were critical of words such as "no more than an enhancement of personal knowledge, skill or experience", since they might apply to confidential information of considerable commercial value. The expression might deal adequately with the acquisition of skills by a craftsman, but seems too broad in its application to professional persons, such as scientists or engineers. This is not to say, however, that we regard the words as inapposite in an English context, because in that system the words will be readily understood against the background of the English common law authorities: our difficulty is rather whether this concept would be readily intelligible to the Scottish courts. After reconsidering this point we adhere to our earlier conclusion, and do not propose that legislation should refer in any way to information obtained in the course of employment. The present law on restraint of trade will in any event apply — namely that any prohibition in a contract of employment which directly restricts the employee's capacity to earn a living should not be wider than is necessary in the circumstances for the protection of the employer's interests.

4.87 We therefore **recommend**:

25. In any civil proceedings in which a breach of an obligation of confidence is alleged, it should be a defence to that allegation, without prejudice to any other defence available:
    (*a*) that the use or disclosure of the information was in the public interest;
    (Paragraphs 4.59 to 4.73)

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[1] *Mason* v. *Provident Clothing and Supply Co. Ltd.* [1913] A.C. 724, 741; *Herbert Morris Ltd.* v. *Saxelby* [1916] 1 A.C. 688; *Worsley & Co. Ltd.* v. *Cooper* [1939] 1 All E.R. 290, 306-310.

[2] *Mason* v. *Provident Clothing and Supply Co. Ltd.* 741.

[3] Law Com. No. 110, para. 6.75 and Recommendation (23).

(*b*) that the defender had reasonable grounds to believe that the use or disclosure of the information was authorised by or on behalf of the person to whom or to whose interests the information relates or would have been so authorised had that person been consulted;
(Paragraph 4.74)

(*c*) in the absence of any agreement or undertaking not to use or disclose the information, that, prior to its use or disclosure by the defender, the information was already known to him or any person acting on his behalf in circumstances not giving rise to any obligation of confidence to the pursuer;
(Paragraphs 4.75 to 4.76)

(*d*) in the absence of any agreement or undertaking not to use or disclose the information, that the information was at the time of its use or, as the case may be, its disclosure, public knowledge;
(Paragraphs 4.77 to 4.80)

or (*e*) that the information was used or disclosed in circumstances in which the defender would have enjoyed absolute privilege if the information had been defamatory.
(Paragraph 4.81)
(Clause 4).

Remedies

4.88 Finally in this Part of the Report we consider the remedies which are generally available for breach of duty and breach of contract; and consider whether any additional remedies should be provided in relation to confidential information.

Interdict

4.89 Interdict in Scots law is a remedy to which a person is generally entitled as of right: it is only at the discretion of the court where interim interdict is sought. In the words of Lord President Inglis

> ". . . for the Court to abstain from enforcing a right because that enforcement would cause great inconvenience or pecuniary loss to somebody else is a doctrine which is quite unknown to the law of Scotland."[1]

In England, on the other hand, the granting of an injunction is a discretionary remedy. In their Report the Law Commission maintain an approach which is consistent with the general principles of English law.[2]

4.90 We have given careful consideration to whether there is a case for making any exception in this regard to the general approach of Scots law. One problem which the courts have had to deal with is whether a person can be interdicted from using information after it has become a matter of public knowledge. In *Levin* v. *Farmers Supply Association of Scotland*[3] interim interdict was granted, but it is not clear from the report whether interdict in such cases could be granted for an unlimited duration, in which case it would be punitive in its effect. It would be open to the defender to seek recall of the interdict at any time, and it is unlikely that the court would pronounce an

[1] *Bank of Scotland* v. *Stewart* (1891) 18 R. 957 at 971-2.
[2] Law Com. No. 110, paras. 6.108-9 and Recommendation (29).
[3] 1973 S.L.T. (Notes) 43.

interdict which would operate beyond the point when any advantage which the defender had gained from his breach of contract had disappeared. In these circumstances there seems no reason for making any exception to the general law, and in the consultation paper we did not recommend any such exception. There was no opposition to the view which we expressed on consultation. We therefore **recommend**:

26. No special qualifications or extensions of the powers of the court in actions for interdict should apply to obligations of confidence. (Paragraphs 4.89 to 4.90; clause 5(1).)

Damages

4.91 *Compensatory damages.* A claim for damages is, of course, a general remedy for breaches of contract or duty of various kinds. Where the breach is of a non-contractual obligation of confidence under our proposals, it should give rise to claims for damages on principles similar to those applicable to breaches of statutory duty.

4.92 *Damages for injury to the feelings.* The right to claim damages for injury to the feelings upon breach of contract is less well-established. Although Lord Fraser in his *Master and Servant*[1] had suggested that the dismissal by a master of his servant in circumstances which injured his reputation might warrant damages for such injury, this view was repudiated by Lord Shaw of Dunfermline in *Addis* v. *Gramophone Co. Ltd.*[2] We note, however, that in the analogous area of copyright, the courts may take account of the injury to the feelings of the person whose copyright was infringed. In *Williams* v. *Settle*[3] the Court of Appeal approved an award of £1,000 on the express basis that the infringement was in total disregard of the feelings of the plaintiff as well as of his legal rights. In England, moreover, a recent chain of authority points to the conclusion that where the contract by its nature is such that its breach by one party would be likely to occasion mental suffering to the other, the latter may be awarded damages therefor.[4]

4.93 It may be that, in cases of breach of contract, the Scottish courts would now adopt an approach similar to the more recent approach of the English courts, but there is at present only sheriff court authority for the proposition.[5] We therefore suggested in the earlier consultative memorandum that it should be made clear by statute that damages for breach of contract involving the use or disclosure of information should include, where appropriate, reparation for injury to feelings.[6] There was almost unanimous support for a proposition of this kind upon consultation, both on the memorandum and on the later consultation paper. We do not, in any event, consider it would be practicable or desirable to draw a distinction in this matter depending on whether an obligation was contractual or non-contractual. It would lead to strange

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[1] 2nd edn., p. 135.

[2] [1909] A.C. 488, 503.

[3] [1960] 1 W.L.R. 1072.

[4] See *Davis & Co. (Wines) Ltd.* v. *Afa-Minerva (E.M.I.) Ltd.* [1974] 2 Lloyd's Rep. 27; *Jarvis* v. *Swans Tours Ltd.* [1973] Q.B. 233; *Cox* v. *Philips Industries Ltd.* [1976] 3 All E.R. 161.

[5] *Diesen* v. *Samson* 1971 S.L.T. (Sh.Ct.) 49.

[6] Provisional Proposal 3.

anomalies. A person who particularly desired privacy would be in a weaker position if he stipulated confidentiality than if he did not.

4.94 *Exemplary damages.* Finally we consider the question of exemplary damages. "Additional" damages are available in copyright cases under section 17(3) of the Copyright Act 1956; and in its Consultative Document on the Reform of the Law relating to Copyright, Designs and Performers' Protection[1] the Government, while agreeing that damages based on the value of the infringing copies without regard to the cost of producing them should no longer be available under section 18(1) of the Act, accepted the view of the Whitford Committee[2] that the right to exemplary damages under section 17(3) should be retained.

4.95 The award of exemplary damages is very much out of keeping with the general principles underlying the Scottish remedies in contract and in delict.[3] In the consultation paper we discussed whether there was a case for making a further exception to our law, and instanced in particular the case where confidential information has been "stolen" or obtained without authority. There was no dissent to our provisional proposal that no such exception should be made, and accordingly we make no recommendation which would enable the court to make an award of exemplary damages.

Accounting for profits

4.96 Under the statutory provisions relating both to patents and to copyright the court has the power to order the defender to account for any profits he has made.[4] In many cases of breach of an obligation of confidence the defender may have knowingly exploited confidential information to his own advantage as well as to another's loss. We therefore have to consider whether the remedy of an accounting for profits should be available. It seems important, for example, to seek to deter a person from deliberately breaching confidentiality because he calculates that the profits he would acquire from the breach would exceed any liability he is likely to incur in damages.

4.97 In England, however, it seems that the remedy is rarely used, mainly because of the difficulty in ascertaining how much profit is attributable to the breach. As long ago as 1892 Lindley L.J. observed:

> ". . . the difficulty of finding out how much profit is attributable to any one source is extremely great — so great that accounts in that form very seldom result in anything satisfactory to anybody. The litigation is enormous, the expense is great, and the time consumed is out of all proportion to the advantage ultimately attained . . . as a matter of business [a Patentee] would generally be inclined to take an inquiry as to damages, rather than launch upon an inquiry as to profits".[5]

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[1]Cmnd. 8302 (1981), ch. 14, para. 3.

[2]Cmnd. 6732 (1977).

[3]See *Broome* v. *Cassell & Co. Ltd.* [1972] A.C. 1027 per Lord Kilbrandon at 1133 and Lord Reid at 1086.

[4]Copyright Act 1956, s.17; Patents Act 1977, s.61(1)(*d*).

[5]*Siddell* v. *Vickers* (1892) 9 R.P.C. 152, 163.

The Law Commission, commenting on this dictum,[1] said that for these reasons an account of profits is rarely granted in actions for infringement of a patent, and they envisage that it would seldom be resorted to in actions for breach of confidence. They nevertheless pointed out that there would be cases in which the calculation of profits would be relatively straightforward and where it would be the remedy "best fitted to do justice between the parties". Their own recommendation was that an accounting of profits should be available at the discretion of the court.[2] Our own view is not dissimilar, although, in the interests of consistency with the principles of our own law, we would be reluctant to entrust the matter solely to the discretion of the court. Accordingly we think that the entitlement to an accounting of profits should be confined to the case where the defender has knowingly and deliberately breached the obligation, and the onus of proof of the defender's conduct should rest squarely on the pursuer. A provisional proposal to this effect in the consultation paper was unanimously supported.

4.98 Our **recommendations** on damages and accounting for profits are therefore as follows:

27. Any legislation following on this Report should specifically entitle the pursuer to seek damages, including reparation for injury to his feelings, and either:
    (*a*) damages for patrimonial loss, or
    (*b*) an accounting for any profits derived by the defender as a result of the breach, if the pursuer satisfies the court that the defender knowingly and deliberately breached the obligation.
    (Paragraphs 4.91 to 4.97; clause 5(1).)

Orders for delivery or destruction

4.99 Finally, we consider the possibility that the pursuer should be able to apply to the court for an order for delivery or destruction of documents, etc. In the earlier consultative memorandum we suggested that the court might be empowered to order the defender to destroy all articles or documents which had come into his possession by reason of or in consequence of the infringement.[3] This suggestion was made in a limited context, but nonetheless we are of the view that such a remedy may be a useful one in certain circumstances. It should be supplemented by a power to order the delivery to the pursuer of any materials containing the confidential information. A similar recommendation was made by the Law Commission[4] and we note that the Patents Act 1977 specifically provides that a claim may be made

> "(b) for an order for [the defender] to deliver up or destroy any patented product in relation to which the patent is infringed or any article in which that product is inextricably comprised."[5]

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[1]Para. 4.86.
[2]Para. 6.114, Recommendation (29).
[3]Provisional Proposal 12.
[4]Para. 6.114(ii)(*c*).
[5]s.61(1)(*b*).

We therefore **recommend**:

28. In any proceedings relating to an obligation of confidence, the court may order the delivery up or destruction of any document or thing. (Clause 5(2).)

PART V SUMMARY OF RECOMMENDATIONS

Form of legislation

1. If it is decided that there should be legislation on breach of confidence applying to Scotland, such legislation should not replace the present law, but should supplement it in accordance with the following Recommendations. (Paragraph 3.11.)

The obligation of confidence

2. A person should be under an obligation of confidence if he has obtained information in the circumstances referred to in Recommendation 3. (Paragraphs 4.4 to 4.16; 4.21 to 4.28; 4.33; clause 1(1).)

3. Those circumstances are:
   (*a*) that he agreed or undertook to treat the information as confidential; or
   (*b*) that a reasonable person in his position would, in all the circumstances of the case (including the factors mentioned in Recommendation 4), have regarded himself as bound to treat the information as confidential.
   (Paragraphs 4.4 to 4.16; 4.33; clause 1(2)(*a*) and (*c*).)

4. Those factors are:
   (*a*) the nature of the information;
   (*b*) the relationship between the recipient and the person from whom he obtained the information;
   (*c*) the manner and circumstances in which the information was obtained.
   (Paragraphs 4.16 and 4.33; clause 1(3)(*a*) to (*c*).)

5. An obligation of confidence, in any legislation following on this Report, should mean an obligation not to use or disclose the information except in the circumstances mentioned in Recommendation 6. (Paragraphs 4.17 and 4.33; clause 1(4).)

6. Those circumstances are that use or disclosure is:
   (*a*) authorised expressly or impliedly by or on behalf of the person to whom or to whose interests the information relates;
   (*b*) authorised or required by any rule of law or enactment; or
   (*c*) required for the fulfilment of any public duty or function.
   (Paragraphs 4.17 and 4.33; clause 1(4).)

7. A person who is under an obligation of confidence should owe that obligation not merely to the supplier of the information, but also to any person to whom or to whose interests the information relates. (Paragraphs 4.18 to 4.20; 4.33; clause 1(1).)

8. There should be no attempt to provide, in legislation, special rules regarding confidentiality for particular relationships.
(Paragraphs 4.29 to 4.33).

Information unlawfully obtained

9. A person should be under an obligation of confidence if he himself acquired information by illegal means or by means which a reasonable person would have regarded as improper.
(Paragraphs 4.34 to 4.41; clause 1(2)(*b*).)

10. A person should be under an obligation of confidence if a reasonable person in his position would, in all the circumstances of the case, including the factor mentioned in Recommendation 11, have regarded himself as bound to treat the information as confidential.
(Paragraphs 4.34 to 4.41; clause 1(2)(*c*).)

11. That factor is that the information had at any time been obtained by another person by illegal means or by means which a reasonable person would have regarded as improper.
(Paragraphs 4.34 to 4.41; clause 1(3)(*c*).)

Judicial proceedings

12. No statutory obligation of confidence should arise where information is disclosed in open court.
(Paragraphs 4.43 and 4.57; clause 3(3).)

13. Without prejudice to any other powers it may have, any court or tribunal in any civil proceedings should have power to make an order that the proceedings, or any part of them, be held behind closed doors.
(Paragraphs 4.44 to 4.46; 4.57; clause 2(1).)

14. The court or tribunal may make an order under Recommendation 13 where it is satisfied that:

(*a*) information which is not the public domain may be disclosed by any person in the course of the proceedings;

(*b*) any person to whom or to whose interests the information relates would not, if acting reasonably, disclose the information unless such disclosure were subject to an obligation of confidence; and

(*c*) disclosure of the information in open court seems likely to result in substantial prejudice to the patrimonial interest of any person.
(Paragraphs 4.46 and 4.57; clause 2(1).)

15. The court or tribunal may make an order under Recommendation 13 of its own accord or on the application of any person having an interest.
(Paragraphs 4.47 to 4.48; 4.57; clause 2(1).)

16. Where an order has been made under Recommendation 13, any person present during the proceedings should be under an obligation of confidence, in

respect of information disclosed behind closed doors, to the discloser of the information and to any other person to whom or to whose interests the information relates.
(Paragraphs 4.49 and 4.57; clause 2(2).)

17. A person, other than a person referred to in Recommendation 16, should be under an obligation of confidence, in respect of information disclosed behind closed doors, to the persons referred to in Recommendation 16, if a reasonable person in his position would, in all the circumstances of the case (including the factors mentioned in Recommendations 4 and 18) have regarded himself as bound to treat the information as confidential.
(Paragraphs 4.49 and 4.57; clause 1(2)(*c*).)

18. That factor is that the information was originally disclosed in the course of proceedings held behind closed doors by virtue of an order made under Recommendation 13.
(Paragraphs 4.49 and 4.57; clause 1(3)(*d*).)

19. The court may at any time authorise the use or disclosure of any information disclosed behind closed doors, and may do so subject to such conditions, if any, as it thinks fit.
(Paragraphs 4.50 and 4.57; clause 2(3).)

20. Any party to any civil proceedings who has obtained information from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972, should be under an obligation of confidence.
(Paragraphs 4.51 to 4.52; 4.57; clause 3(1).)

21. The obligation referred to in Recommendation 20 should be owed to:
   (*a*) the person by whom the document or other production was lodged, or any person on whose behalf that person was acting;
   (*b*) the person in whose possession the document or other thing was when it was inspected or recovered, or any person on whose behalf that person was acting;
   (*c*) any person to whom or to whose interests the information relates.
   (Paragraphs 4.53 and 4.57; clause 3(2).)

22. In Recommendation 20 "party" includes:
   (*a*) the *dominus litis* in such proceedings;
   (*b*) any person on whose application the court made the order under section 1 of the 1972 Act;
   (*c*) any person acting on behalf of such party.
   (Paragraphs 4.53 and 4.57; clause 3(4).)

23. A person, other than a person referred to in Recommendation 20, should be under an obligation of confidence, in respect of the information referred to in Recommendation 20, to the persons referred to in Recommendation 21, if a reasonable person in his position would, in all the circumstances of the case

(including the factors mentioned in Recommendations 4 and 24) have regarded himself as bound to treat the information as confidential.
(Paragraphs 4.53 and 4.57; clause 1(2)(*c*).)

24. That factor is that the information was originally obtained from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972, and has not been disclosed in open court.
(Paragraphs 4.53 and 4.57; clause 1(3)(*e*).)

Defences

25. In any civil proceedings in which a breach of an obligation of confidence is alleged, it should be a defence to that allegation, without prejudice to any other defence available:

(*a*) that the use or disclosure of the information was in the public interest;
(Paragraphs 4.59 to 4.73)

(*b*) that the defender had reasonable grounds to believe that the use or disclosure of the information was authorised by or on behalf of the person to whom or to whose interests the information relates or would have been so authorised had that person been consulted;
(Paragraph 4.74)

(*c*) in the absence of any agreement or undertaking not to use or disclose the information, that, prior to its use or disclosure by the defender, the information was already known to him or any person acting on his behalf in circumstances not giving rise to any obligation of confidence to the pursuer;
(Paragraphs 4.75 to 4.76)

(*d*) in the absence of any agreement or undertaking not to use or disclose the information, that the information was at the time of its use or, as the case may be, its disclosure, public knowledge;
(Paragraphs 4.77 to 4.80)

or (*e*) that the information was used or disclosed in circumstances in which the defender would have enjoyed absolute privilege if the information had been defamatory.
(Paragraph 4.81)
(Paragraph 4.87; clause 4).

Remedies

26. No special qualifications or extensions of the powers of the court in actions for interdict should apply to obligations of confidence.
(Paragraphs 4.89 to 4.90; clause 5(1).)

27. Any legislation following on this Report should specifically entitle the pursuer to seek damages, including reparation for injury to his feelings, and either:

(*a*) damages for patrimonial loss, or

(*b*) an accounting for any profits derived by the defender as a result of the breach, if the pursuer satisfies the court that the defender knowingly and deliberately breached the obligation.
(Paragraphs 4.91 to 4.98; clause 5(1).)

28. In any proceedings relating to an obligation of confidence, the court may order the delivery up or destruction of any document or thing.
(Paragraph 4.99; clause 5(2).)

APPENDIX A

Breach of Confidence (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Obligation of confidence.
2. Hearing in private.
3. Information from documents, etc.
4. Defences.
5. Remedies.
6. Interpretation.
7. Savings.
8. Citation, commencement and extent.

DRAFT

OF A

BILL

TO

Impose obligations of confidence on persons obtaining information in certain circumstances in Scotland, and to make further provision in the law of Scotland in relation to the use or disclosure of information, and for purposes connected therewith.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Obligation of confidence.

1.—(1)Where a person ("the recipient") has obtained information in the circumstances referred to in subsection (2) below, he shall be under an obligation of confidence to the person from whom he obtained the information and to any person to whom or to whose interests the information relates.

(2) The circumstances referred to in this subsection are—

(*a*) that the recipient agreed or undertook to treat the information as confidential; or

(*b*) that the recipient has himself acquired the information by illegal means or by means which a reasonable person would have regarded as improper; or

(*c*) that a reasonable person in the position of the recipient would, in all the circumstances of the case (including the factors mentioned in subsection (3) below), have regarded himself as bound to treat the information as confidential.

(3) The factors mentioned in this subsection are—

(*a*) the nature of the information;

(*b*) the relationship between the recipient and the person from whom the information was obtained;

(*c*) the manner and circumstances in which the information was obtained by any person and in particular whether it had at any time been obtained by any person other than the recipient by illegal means or by means which a reasonable person would have regarded as improper;

(*d*) whether the information was originally disclosed in the course of civil proceedings held behind closed doors by virtue of an order under section 2(1) below;

(*e*) whether the information was originally obtained from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972, and has not been disclosed in open court.

(4) In this Act, "obligation of confidence" means an obligation not to use or disclose the information except insofar as such use or disclosure is —

(*a*) authorised expressly or impliedly by or on behalf of the person to whom or to whose interests the information relates;

(*b*) authorised or required by any rule of law or enactment; or

(*c*) required for the fulfilment of any public duty or function.

EXPLANATORY NOTES

Clause 1

This clause implements Recommendations 2 to 11, 17, 18, 23 and 24 of the Report.

Subsection (1) implements Recommendations 2 and 7 (for Recommendation 7, see especially paragraphs 4.18-20).

Subsection (2) implements Recommendations 3, 9 and 10 (for Recommendations 9 and 10, see especially paragraph 4.38).

Subsection (3) implements Recommendations 4, 11, 17, 18, 23 and 24 (for Recommendations 17 and 18, see especially paragraph 4.49; for Recommendations 23 and 24, see especially paragraph 4.53).

Subsection (4) implements Recommendations 5 and 6.

Hearing in private.

2.—(1) Without prejudice to any other powers it may have, the court in any civil proceedings shall have power, of its own accord or on the application of any person having an interest, to make an order that the proceedings, or any part of them, be held behind closed doors where the court is satisfied—

(*a*) that information which is not in the public domain may be disclosed by any person in the course of the proceedings;

(*b*) that any person to whom or to whose interests the information relates would not, if acting reasonably, disclose the information unless such disclosure were subject to an obligation of confidence; and

(*c*) that disclosure of the information in open court seems likely to result in substantial prejudice to the patrimonial interest of any person.

(2) Where an order has been made under subsection (1) above, any person present during the proceedings shall, subject to subsection (3) below, in respect of information disclosed behind closed doors be under an obligation of confidence to the person who made such disclosure and to any person to whom or to whose interests the information relates.

(3) The court may at any time authorise the use or disclosure of any information to which subsection (2) above refers and may do so subject to such conditions, if any, as it thinks fit.

Clause 2

This clause implements Recommendations 13 to 16 and 19 of the Report (see generally paragraphs 4.42-50).

Subsection (1) implements Recommendations 13 to 15.

Subsection (2) implements Recommendation 16.

Subsection (3) implements Recommendation 19.

Information from documents, etc.

3.—(1) Subject to subsection (3) below, any party to any civil proceedings who has obtained information from a document or production (other than written pleadings) lodged in process, or from a document or other thing inspected or recovered under a commission and diligence or under an order under section 1 of the Administration of Justice (Scotland) Act 1972, shall be under an obligation of confidence to the persons to whom subsection (2) below refers.

1972 c. 59.

(2) The persons to whom this subsection refers are —

(*a*) the person by whom the document or other production was lodged, or any person on whose behalf that person was acting;

(*b*) the person in whose possession the document or other thing was when it was inspected or recovered as aforesaid, or any person on whose behalf that person was acting;

(*c*) any person to whom or to whose interests the information relates.

(3) Nothing in subsection (1) above shall apply to information disclosed in open court.

(4) In this section —

"civil proceedings" includes civil proceedings which are likely to be brought;

"party", in relation to civil proceedings, includes —

(*a*) the *dominus litis* in such proceedings;

(*b*) any person on whose application the court made the order under section 1 of the said Act of 1972;

(*c*) any person acting on behalf of such party.

EXPLANATORY NOTES

Clause 3

This clause implements Recommendations 12, 20, 21 and 22 of the Report (see generally paragraphs 4.51-5).

Subsection (1) implements Recommendation 20.

Subsection (2) implements Recommendation 21.

Subsection (3) implements Recommendation 12. In context, the expression "information" is not restricted to oral evidence.

Subsection (4) implements Recommendation 22.

Defences.

4.—(1) Without prejudice to any other defence available, in any civil proceedings in which a breach of an obligation of confidence is alleged, it shall be a defence to that allegation —

(*a*) that the use or disclosure of the information was in the public interest;

(*b*) that the defender had reasonable grounds to believe that the use or disclosure of the information was authorised by or on behalf of the person to whom or to whose interests the information relates or would have been so authorised had that person been consulted;

(*c*) in the absence of any agreement or undertaking not to use or disclose the information, that, prior to its use or disclosure by the defender, the information was already known to him or any person acting on his behalf in circumstances not giving rise to any obligation of confidence to the pursuer;

(*d*) in the absence of any agreement or undertaking not to use or disclose the information, that the information was at the time of its use or, as the case may be, its disclosure public knowledge; or

(*e*) that the information was used or disclosed in circumstances in which the defender would have enjoyed absolute privilege if the information had been defamatory.

(2) In this section, "pursuer" means the person to whom an obligation of confidence is owed; and "defender" means the person alleged to be in breach of the obligation of confidence.

Remedies.

5.—(1) Without prejudice to his right to apply for interdict, a person to whom an obligation of confidence is owed ("the pursuer") shall be entitled to claim from the person in breach of the obligation ("the defender") damages, including reparation for injury to his feelings and either —

(*a*) damages for patrimonial loss, or

(*b*) an accounting for any profits derived by the defender as a result of the breach if the pursuer satisfies the court that the defender knowingly and deliberately breached the obligation.

(2) In any proceedings relating to an obligation of confidence, the court may order the delivery up or destruction of any document or thing.

Clause 4

This clause implements Recommendation 25 (see generally paragraphs 4.58-86).

Clause 5

This clause implements Recommendations 26 to 28 (see generally paragraphs 4.88-99).

Subsection (1) implements Recommendations 26 and 27.

Subsection (2) implements Recommendation 28.

Interpretation.

6. In this Act, unless the context otherwise requires, the following expressions shall have the following meanings respectively assigned to them:—

"civil proceedings" includes civil proceedings before a tribunal;

"the court" means the Court of Session or the sheriff or a tribunal, as the case may require;

"information" means information in whatever form which constitutes the subject-matter of the obligation of confidence;

"obligation of confidence" has the meaning assigned to it in section 1(4) above.

Savings.

7.—(1) Nothing in this Act shall affect the law relating to contempt of court or the power of the court to order the disclosure of information for the purposes of proceedings.

(2) Notwithstanding any other provision in this Act, nothing in this Act shall have the effect of imposing on any person an obligation of confidence in respect of information obtained by him before the commencement of this Act.

(3) The provisions of this Act shall be supplemental to, and not in derogation of, any rule of law or enactment in force immediately before the commencement of this Act except insofar as inconsistent therewith.

Citation, commencement and extent.

8.—(1) This Act may be cited as the Breach of Confidence (Scotland) Act 1984.

(2) This Act shall come into force at the end of the period of three months beginning with the date on which it is passed.

(3) This Act shall extend to Scotland only.

Clause 7

Subsection (1): see especially paragraphs 1.10 and 4.56.

Subsection (3) implements Recommendation 1.

APPENDIX B

List of those who submitted written comments on Consultative Memorandum No. 40

Association of Chief Police Officers (Scotland)
Association of University Teachers (Scotland)
Building Societies Association
The Rev. Dr. A. V. Campbell
Church of Scotland, General Administration Committee
Committee of Scottish Clearing Bankers
Convention of Scottish Local Authorities
Faculty of Advocates
Faculty of Law, University of Aberdeen
Faculty of Law, University of Glasgow
John G. Grant
H.E. Cardinal Gordon J. Gray
Law Society of Scotland
Registrar General for Scotland
Scottish Home and Health Department
Scottish Law Agents Society

APPENDIX C

List of those who submitted written comments on consultation paper of June 1982

Association of Chief Police Officers (Scotland)
Chartered Institute of Patent Agents
Committee of Scottish Clearing Bankers
Committee of Senators of the College of Justice
Convention of Scottish Local Authorities
Sheriff Principal J. A. Dick
Faculty of Law, University of Aberdeen
John G. Grant
Guild of British Newspaper Editors
President, Industrial Tribunals (Scotland)
Junior Chamber Scotland
Law Society of Scotland
National Union of Journalists
Press Council
Registrar General for Scotland
George C. Saunders and others (law reporters)
Scottish Council for Civil Liberties
Scottish Law Agents Society
Scottish Newspaper Proprietors' Association
Sheriffs' Association
Society of Writers to H.M. Signet
Trade Marks, Patents and Designs Federation
George A. Watt

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