SCOTTISH LAW COMMISSION

BREACH OF CONFIDENCE

CONSULTATION PAPER

This paper, which has been prepared for restricted circulation, is published for comment and criticism and does not represent the final views of the Scottish Law Commission.

Comments should be sent, by 31st July 1982, to:

Mr. H.R.M. Macdonald
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

(Telephone: 031-668 2131)

BREACH OF CONFIDENCE

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BREACH OF CONFIDENCE

PART I: INTRODUCTION

1. On 6th 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."

On 14th 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 on 15th October 1974,[1] and a report containing their final recommendations was published in October 1981.[2]

2. We received many helpful comments in response to our Consultative Memorandum. Those comments, however, and further analysis of the problems have left us in considerable doubt whether our earlier approach was a satisfactory one. We consider it desirable, therefore, to explain our reasons for this doubt and for our provisional conclusion that a different approach would be desirable. We have not consulted on several of the elements/

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

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

elements of this approach and the purpose of this paper is to invite comments upon our provisional conclusions.

PART II: SCOPE OF THE REPORT

(a) Privacy

3. Our terms of reference differed from those of the Law Commission for England and Wales in that the former are preceded by the words "With a view to the protection of privacy". Like the Law Commission, however, we are concerned only with the law relating to breach of confidence and with the remedies for the disclosure or use of information unlawfully obtained and not with privacy as such. This is apparent from the passage in the Younger Committee's report[1] which recommended the reference to the two Law Commissions of the law relating to breach of confidence. In paragraph 630 of their report that Committee remarked -

> "Important restrictions on a person's freedom to disclose information in his possession are imposed by the law relating to breach of confidence. This branch of the law is discussed in greater detail in Appendix I. That survey of the present law has led us to two conclusions: first, that the action for breach of confidence affords, or at least is potentially capable of affording, much greater protection of privacy than is generally realised; secondly, 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. We therefore recommend that the law relating to breach of confidence be referred to the Law Commissions with a view to its clarification and statement in legislative form."

4. We consider, therefore, that our remit does not extend to rights of privacy, other than those aspects of privacy which may properly be protected by the law of breach of confidence. However, even if our terms of reference did not preclude us from considering/

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[1] Report of the Committee on Privacy, Cmnd.5012 (1972).

considering wider aspects of the law of privacy, we would hesitate 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] Moreover, in answer to a question by Mr Ivan Lawrence M.P. on whether the Home Secretary intended to introduce any proposals to provide additional protection for the privacy of the individual, Mr Raison, Minister of State at the Home Office, replied on 16th January 1981 -

> "... the Government are considering the subject of data protection with a view to making an early statement. My right hon. Friend has no plans for legislation on other aspects of privacy."[6]

5. We appreciate that several of our consultees expressed the wish that we should examine matters of privacy. A general review of the law of privacy, however, could not be achieved with the resources at our disposal within any reasonable period of time. Our conclusion, therefore, is that our forthcoming report should be confined to those aspects of the law of privacy which can be protected within the ambit of the law relating to breach of confidence and to the disclosure or use of information unlawfully obtained (Proposition 1).

6. It would be a consequence of the acceptance of this proposition that our report would include no recommendations on the/

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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] H.C. Deb., Vol.996/7, col.672 (16th January 1981).

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).

(b) Data protection

7. 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.[1] We concluded that the separate examination of issues of data protection by the Lindop Committee in their report on data protection;[2] by Government in the White Papers, "Computers and Privacy"[3] and "Computers: Safeguards for Privacy";[4] and by Government in the recent White Paper "Data Protection: The Government's Proposals for Legislation",[5] made it inappropriate for us to enter 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 -

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[1] See Report of the Committee on Data Protection (the Lindop Report), Cmnd.7341 (1978) para.34.11.

[2] Cmnd.7341 (1978).

[3] Cmnd.6353 (1975).

[4] Cmnd.6354 (1975).

[5] Cmnd.8539 (1982).

> "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."[1]

We conclude, 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 protection, our report should not enter the field of data protection as such (Proposition 2).

8. It would follow from the acceptance of this proposition that our report would contain 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."

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. We accept the force of this criticism and provisionally conclude that our report should not recommend the introduction of special rules to deal with cases where confidential information is communicated for the purpose of being stored in a computer (Proposition 3). For reasons, however, which we explain in more detail later in this paper, we/

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[1] Cmnd.7341 (1978), para.32.14.

we are inviting views on the question whether, when a person is required or requested to disclose information for one purpose, the information - unless certain defences are established - should be used for that purpose only.[1] If that question were answered affirmatively, it would be of some assistance in maintaining the confidentiality of information transmitted to data banks.

(c) Criminal law

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. 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. Irrespective of these comments, however, our earlier decision not to examine issues of privacy carries with it the corollary that we are no longer concerned with the obtaining of information, but merely with the divulging of it or its unauthorised use. We think it unnecessary, therefore, to make proposals for the extension of the criminal law in the present context. We are fortified in this view by the consideration that, in the field of commercial information at least, remedies of civil law may well be as effective a deterrent to the divulging of information as the penalties which the criminal law might reasonably impose. In a statement in the House of Commons Mr. Alexander W. Lyon M.P. remarked -

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[1] See generally Part III, and especially Propositions 10 and 14.
[2] Provisional Proposals 17 and 18.
[3] Paras.5.60-5.65.

> "I do not think that a criminal penalty will ever be a real inducement to stop industrial spying. What will deter industry spies and their customers is the knowledge that if the information which they obtain is beneficial to their employer, that will immediately cost the employer a great deal of money in damages in a civil suit."[1]

Our report, therefore, should contain no recommendations for the creation of criminal offences in the context of breach of confidence (Proposition 4).

(d) Preservation of existing law

10. Those who submitted comments on the Consultative Memorandum without exception agreed with its Provisional Proposal 1 that "any rights and obligations which exist under the present law of contract and delict should not be abolished". We adhere to this proposal. We note that the Law Commission for England and Wales, while proposing to leave subsisting the existing law of contract relating to obligations of confidence, recommend the replacement of non-contractual obligations of confidence by a new tort of breach of confidence. Our proposal would, in effect, lead to a similar result, since the existing Scots law relating to non-contractual obligations of confidence is quite undeveloped.[2] Our provisional conclusion, therefore, is that the legislation to follow upon our report should not seek 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 (Proposition 5).

(e)/

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[1] H.C. Deb., Vol.775, cols.827/8 (13th December 1968).

[2] See Consultative Memorandum No.40, para.79.

(e) No specification of particular relationships in which obligations of confidence arise

11. Those who commented on the Consultative Memorandum also supported Provisional Proposal 2 that -

> "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."

Despite Provisional Proposal 2, we suggested in Provisional Proposal 6 that 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."

12. Though several commentators 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."

Certain commentators helpfully pointed out, moreover, 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.

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13. 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."[1]

Further 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 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.[2] 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[3] -

> "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/

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[1] Para.86.

[2] See Argyll v. Argyll [1967] 1 Ch.302.

[3] At p.330.

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."

14. We have provisionally concluded, therefore, 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; and that such legislative guidelines should not be introduced (Proposition 6).

PART III: CIRCUMSTANCES IN WHICH OBLIGATIONS OF CONFIDENCE SHOULD ARISE

(a) Express or implied agreement

15. Most of the Scottish cases on breach of confidence as such[1] are based on express or implied contractual obligations.[2] The courts have been prepared to imply a contractual obligation of confidence where there is an existing contractual relationship between the parties - for example, a doctor and the person employing him,[3] or an employee and his employer.[4] Outside these/

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[1] We are not here concerned with cases where a remedy can be provided in a breach of confidence case because of some incidental feature of the case - e.g. that it involves an invasion of property rights, or a breach of copyright, or defamation, or a wrongful invasion of other rights, or unjustified enrichment. See paras.44-68 of the Consultative Memorandum.

[2] See paras.7-18 of the Consultative Memorandum.

[3] A.B. v. C.D. (1851) 14 D. 177.

[4] Liverpool Victoria Friendly Society v. Houston (1900) 3 F. 42.

these cases, an obligation of confidence is less easily established. The few cases where a remedy for breach of confidence appears to have been allowed in the absence of a contractual obligation are arguably based on property or common law copyright, although some of the dicta in them could perhaps be read in a wider sense.[1] Indeed, the suggestion is made in the recent case of Roxburgh v. Seven Seas Engineering Ltd. and another[2] that the pursuer must aver both "an agreement to treat the material as confidential and a relationship giving rise to the duty". Lord Robertson said -

> "In my opinion the petition is irrelevant. 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."

16. It seems to us that, if this proposition is an accurate one, the law is in an unsatisfactory state. Where information is passed from one person to another in circumstances in which a reasonable person might readily conclude that the information was both furnished and received on a confidential basis, it is not necessarily possible for the court to infer any agreement between the parties to keep the information as confidential. We therefore conclude that obligations of confidence should continue to be created by express or implied agreement, but should not arise exclusively where there is an express or implied agreement to treat information as confidential (Proposition 7).

(b)/

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[1] See Brown's Trs. v. Hay (1898) 25 R. 1112; Neuman v. Kennedy 1905, 12 S.L.T. 763; and the other cases discussed in paras.19-24 of the Consultative Memorandum.

[2] 1980 S.L.T. (Notes) 49.

(b) Inferred undertakings

17. The central recommendation of the Law Commission for England and Wales is in these terms -

> "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."

The emphasis in this formula is upon the existence of an undertaking, express or inferred,[1] on the part of the recipient of the information to keep the information confidential. This emphasis arose from the desire of the Law Commission to avoid the imputation of obligations of confidence to unwilling participants as, for example, where information is sent unsolicited by one person to another with whom the sender has no previous connection.[2] We share this desire and, so far as the recommendation extends, we are in broad agreement with the policy which the Law Commission are seeking to achieve. We have some difficulty, however, with the manner in which it is expressed. The Scottish courts are understandably reluctant to imply or to infer the existence of undertakings where no evidence is available that an undertaking has been given.[3] When, for example, information is given to a bank or finance house with a view to the obtaining of/

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[1] Recommendation (2). The Law Commission explain that they "prefer to speak of an acceptance or undertaking which is expressly given or is to be 'inferred', rather than 'implied', in order to avoid any suggestion that acceptance might have to be implied by law, as in relation to contracts, rather than inferred from the circumstances of the particular case" (footnote 557, p.103).

[2] See Law Com. No.110, para.6.9.

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

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. We have provisionally concluded, therefore, that a rule to the effect that a statutory obligation of confidence should arise only where there is an express undertaking to keep the information confidential, or where an undertaking to that effect may be inferred from the relationship between the giver and the recipient or from the latter's conduct, would be likely to be too narrow (Proposition 8).

(c) Our main proposal

18. We consider that it would be preferable to adopt as the primary rule - leaving aside the question for the present whether it should be supplemented by other rules - a provision stating that an obligation of confidence will arise if the reasonable inference from the nature of the information, the relationship between the parties and the circumstances in which the information was furnished and accepted is that it was furnished and accepted on the basis that it would be treated as confidential. Like the formula adopted by the Law Commission, this formula is designed to make it clear that an obligation of confidence may not be imposed upon a person against his will: hence the emphasis upon the recipient's acceptance of the information on a confidential basis. This is a point of considerable practical importance. The evidence presented to the Law Commission and legal discussions in the United States and France[1] suggest that there is a real risk of industrial firms/

[1]Cf. A. Bertin, Le secret en matière d'inventions (Paris, 1965), p.4 - "Les firmes sérieuses refusant en général, et pas en principe, de s'intéresser aux inventions qui leur sont proposées avant, d'avoir fait l'objet d'une demande de brevet. Ceci pour éviter toute contestation ultérieure sur la paternité de l'invention."

firms having pressed upon them on a confidential basis information which they already possess or which they may otherwise readily obtain. To avoid the risk of actions for breach of confidence those firms may adopt elaborate precautions to prevent any obligation of confidence arising contrary to their intention -

> "Some firms require the person submitting the information to sign a form recognising that no obligation of confidence exists in respect of the information, the person submitting the information being limited to such rights (if any) as he may have in respect of any patent or registered design protection for which he may have applied. Other firms are content to ensure that the person submitting unsolicited information appreciates that the recipients will remain free to exploit the ideas involved if they have already been or are in the future independently discovered by the recipients, or if they are in the public domain."[1]

19. Similar problems exist outside the field of industrial secrets. Journalists may be given "in confidence" information of which they or their newspapers are already aware. They may also, it is understood, receive documents marked "Confidential" from local authorities and other organisations without having any opportunity before their receipt of declining to accept them on a confidential basis. For these reasons it seems to us that - except perhaps in special cases which we examine later - a person should not come under an obligation of confidence unless he expressly accepted such an obligation, or unless the reasonable inference is that he accepted the information on the basis that it would be treated as confidential.

20. Our provisional conclusion, therefore, is that a statutory obligation of confidence should arise if it is a reasonable inference from the nature of the information, the relationship of the parties, and the circumstances in which the information was/

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[1] Law Com. No.110, para.5.3.

was furnished and accepted, that it was furnished and accepted on the basis that it would be treated as confidential. This statutory obligation of confidence should be owed to the person disclosing the information; but it is also for consideration whether, when the recipient of the information knew or might reasonably have inferred that the discloser of the information was himself subject to an obligation of confidence to a third party in relation to that information, the obligation first mentioned should also be owed to that third party (Proposition 9). This rider is mentioned, since the discloser himself may have no practical interest in enforcing the obligation of confidence. We envisage, too, that this obligation should be expressed as an obligation not to disclose or use the information for purposes other than "authorised purposes". We discuss this question below in relation to all the statutory obligations of confidence which we propose should be created.[1] We also discuss below the provision of appropriate defences.[2]

(d) Possible extensions to our main proposal

21. In our view the enactment of a provision on the lines of Proposition 9 would go far to meet the more glaring deficiencies in the present law, but it is for consideration whether such a provision by itself would be adequate. Its central feature is that the reasonable bystander should be able to infer that the information was both furnished and accepted on the basis that it would be treated as confidential. Emphasis upon the acceptance of the information on the basis that it will be treated as confidential springs partly from the need to protect the recipient where unsolicited information is thrust upon him. This need, however, does not arise in certain situations/

[1] Para.50.

[2] Part V, paras.61-83.

situations, notably where the information has been disclosed at the behest of the recipient himself. The problem then is simply one of balancing the respective interests and expectations of the giver of the information and its recipient.

22. The Franks Report and the Report of the Committee on Data Protection point 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 the former, we need merely refer to information collected by the Registrar General, including census information; information disclosed to social security offices; information 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. The Franks Commitee[1] went on to explain that -

> "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]Departmental Committee on Section 2 of the Official Secrets Act 1911, Cmnd.5104 (1972), para.195.

23. We propose, therefore, to examine possible extensions to Proposition 9 in three main perspectives: where the information has been disclosed under a statutory duty; where it has been disclosed as a condition of the granting of a licence, permission or other advantage; and where it has been disclosed in response to a request made by its recipient.

(i) Information disclosed under a statutory duty

24. Where information is disclosed to officials of central or local government under statutory powers, an express undertaking of confidence is unlikely to be given; and it may not necessarily be a reasonable inference from the nature of the information, the relationship between the parties and the circumstances in which it was both furnished and accepted that, whatever the basis on which it was furnished, it was accepted on the basis that it would be treated as confidential. Yet, when an individual discloses personal data to an official for a particular purpose or a company discloses commercially sensitive information to Government, he or it may reasonably expect that the information should be used or disclosed only for the purposes for which it was disclosed. The personal data should not be disclosed to the curious or the commercial data to a competitor.

25. The Government, indeed, in its recent proposals for legislation on data protection accept that among the general principles to be applied are that information shall ...

(ii) "be held for a specified and legitimate purpose or purposes";

(iii) "... not be used or disclosed in a way incompatible with those purposes".[1]

It is not wholly clear whether these proposals, like the Council of Europe Convention on which they are based, apply to data other than/

[1] Cmnd.8539 (1982), para.6.

than "personal data", in the sense of information relating to an identified or identifiable individual. With regard, however, to personal data which is subject to data processing it is clear that the Government accept that obligations of confidence should attach to it. For the reason given above[1] we see no reason why - if these principles are to be accepted - similar principles should not apply to information which is supplied in pursuance of a statutory duty but which is not subject to data processing.

26. The Law Commission for England and Wales examined[2] this problem and referred to representations of 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 confidential information supplied to such authorities comes into the hands of trade competitors. The Law Commission considered that this uncertainty would be sufficiently removed if it were provided 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". They rejected the view that an obligation of confidence should attach to information supplied to public authorities under statutory powers on the ground that this would "involve major inroads into the idea of free and open government. If all information given to public authorities was subject to an obligation of confidence, it would necessarily inhibit the ability of the general public to be informed about the processes of government".[3] As we have indicated, however, we believe that an inference that information was <u>accepted</u> in/

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[1]Para.7.

[2]Law Com. No.110, para.6.48.

[3]Para.6.49.

in confidence can seldom be drawn when information is supplied under a statutory duty, for example, to a government department. Nor do we appreciate why the ability of the general public to be informed about the processes of government would be affected positively or negatively by the rules imposing an obligation of confidence in relation to information disclosed under a statutory duty. We do not envisage any alteration of the rules relating to absolute privilege.[1] The information, moreover, will usually be personally referable information and government operates, as a rule, on the basis of collated information which is not personally referable. Furthermore, we propose below that public interest should be a defence to disclosure.[2]

27. It is, of course, 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 his duty to communicate it. The Departmental Committee set up under the Chairmanship of Lord Franks to consider this section in its report[3] 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."[4]

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[1] See paras.79-82.

[2] See paras.69-74.

[3] Cmnd.5104 (1972).

[4] Para.199.

28. 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, 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, section 35 of the Civil Aviation Act 1971 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 or it is liable to a fine of £400 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.

29. 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.

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30. Whether any special rule is needed to protect the confidentiality of information which is disclosed in pursuance of a statutory duty is a question which we have found difficult and on which we would particularly welcome views. There are at least two points of view. One is that the existing protections - including the Official Secrets Acts, the special statutory rules such as those in the Taxes Management Act, the obligations undertaken by various public employees in their contracts of employment, the possibility of disciplinary proceedings against officials who disclose confidential information and the possibility of political pressure - are sufficient, when supplemented by the general obligation of confidence which we recommend in Proposition 9 above. On this view, while there should be no special exception from the general law on obligations of confidence for Government departments and officials who require information to be disclosed to them under a statutory duty, there is no need to impose additional civil obligations upon them. Another view is that, when someone furnishes information to a person who has statutory powers to obtain it, the furnisher of the information is entitled to expect that the information will be used only for the purposes for which it is disclosed and, moreover, should have a civil remedy of damages if the information is disclosed or used for any other purpose, even when it could not reasonably be inferred that the information was accepted by its recipient on the basis that it would be treated as confidential.

(ii) Information disclosed as a condition of the granting of a licence, permission or other advantage

31. It is clear that similar problems arise when information is disclosed otherwise than in terms of a statutory duty. The Younger Committee considered the matter in some detail, especially in the context of bank references and disclosures by credit/

credit rating agencies. In relation to the banks the Committee regarded the problem as being primarily one of the extent of the implied authority granted by customers to disclose data relating to their clients' accounts. They observed[1] -

> "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."

The banks have submitted to us that this recommendation is impracticable, principally on the ground of the cost and delay which would be entailed in obtaining consent on each occasion.

32. We are reluctant to recommend a positive requirement of consent or notice as a condition of the transfer of confidential information. It would require the introduction of expensive procedures which may often be unnecessary in practice. It seems to us that the law should rather make clearer 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.

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[1] Cmnd.5012 (1972), p.90, para.307.

33. We would not in any case be disposed to make recommendations relating solely to banking practice. The same practical problem arises in other situations where information is disclosed to potential credit granters. The Lindop Committee examined this question and came to the conclusion that their proposed Data Protection Authority should be entitled to make regulations inter alia providing that where a consumer supplies "information about himself for the purposes of a particular transaction (whether in the consumer credit field or outside it) his consent should usually be obtained before that information is disclosed to any other organisation (e.g. to a credit reference agency)".[1] The Committee also envisaged the provision of the civil remedy of damages for breach of some at least of the regulations made by the proposed Data Protection Authority, in particular the regulations to ensure confidentiality. A similar result would appear to follow from the Government's proposals for legislation to implement the Council of Europe Convention relating to the automatic processing of personal data. The White Paper refers to the civil sanctions which are to be available to data subjects and statutes -

> "The main purpose of the civil remedies will be to ensure that data subjects who have suffered damage because of a breach of the requirements governing data use can secure compensation, although injunctions will be available to restrain breaches of a statutory requirement where damage is anticipated but has not yet been suffered."[2]

34. We have again found it far from easy to reach a concluded view on this question. The general rules which we have proposed in Proposition 9 should go some way to clarify the law, and it could be said that a person who requires the disclosure of information/

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[1] Cmnd.7341 (1978), para.13.37.

[2] Cmnd.8539 (1982), para.20.

information as a condition of the granting of a licence, permission or other advantage should be placed under no higher obligation than any other recipient of information to treat it as confidential. An obligation of confidence, on this view, should be imposed upon bankers, finance houses, and others only if a reasonable person might infer that they accepted the information on a confidential basis. Others, however, might go further and say that, if the recipient of the information actually required its disclosure as a condition of another person obtaining a benefit from him, the fact that he cannot be inferred to have accepted the information on the basis that it should be treated as confidential is irrelevant if a reasonable person would have assumed that it was furnished on a confidential basis. Altnough in theory the person furnishing the information is free to decline to do so and to renounce the chance of receiving the licence, credit or other advantage, this may in practice prove to be an unrealistic option.

(iii) Information disclosed on request

35. If it is thought that there should be a special obligation of confidence on those who have required information to be disclosed in the exercise of a statutory duty or as a condition of the conferring of some benefit, it may also be asked whether the fact that someone has specifically requested the disclosure of information should be sufficient to impose an obligation of confidence on him, even where he cannot be inferred to have accepted the information on a confidential basis. Again two views are possible. On the one hand it can be said that if someone has specifically asked for information to be disclosed he should take it on such terms as, in the view of the reasonable bystander, it was given. On this view, the information should be used or disclosed only for such purposes as, it might reasonably be assumed, were authorised by law or by or on behalf of the person to whom the obligation is owed. Not to impose such an obligation, it might be argued, is to defeat the expectations of the/

the person furnishing the information. It might be argued, on the other hand, that there is nothing morally reprehensible about a request for information, and no reason for imposing an obligation of confidence upon the person who makes such a request unless he has either specifically accepted such an obligation or a reasonable bystander would have inferred, in the circumstances of the case, that he accepted the information on the basis that it would be treated as confidential. To impose an obligation otherwise than in these circumstances may be to defeat the expectations of the recipient of the information. A problem of proof also arises: it may not be a simple matter to determine retrospectively whether or not a request was indeed made.

36. We tentatively propose, therefore, that a statutory obligation of confidence should arise, where it may reasonably be inferred from the nature of the information, the relationship of the parties and the circumstances of its disclosure that it was furnished on the assumption that it would be treated as confidential (irrespective of whether it was so accepted by the recipient), in the following circumstances -

(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.

This statutory obligation of confidence should be owed to the person disclosing the information; but it is also for consideration whether, when the recipient of the information knew or might reasonably have inferred that the discloser of the/

the information was himself subject to an obligation of confidence to a third party in relation to that information, the obligation first mentioned should also be owed to that third party (Proposition 10). We envisage that this obligation also should be expressed as an obligation not to disclose or use the information for purposes other than "authorised purposes".[1] We also discuss below the provision of appropriate defences.[2]

37. In our view there are two other situations where obligations of confidence should be imposed irrespective of any undertaking by the recipient to treat the information as being confidential. The first is where a person has obtained confidential information by theft, fraud or coercion or where he obtained the information from a source which he had no authority to use; and the second relates to third parties who have received information already subject to an obligation of confidence.

(e) Information obtained by improper means

38. Our provisional decision not to make proposals for the introduction of criminal offences in this sphere[3] does not absolve us from dealing with the civil law aspects of the obtaining of information by improper means. 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/

[1] See para.50 below..

[2] Part V, paras.61-83.

[3] See para.9 above.

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]

39. The Law Commission examined this proposal and have 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 surreptitious 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."[2]

40. Although in general we sympathise with the objects of the Law Commission in making this recommendation we take the view that those objects may in substance be achieved in a simpler way. The common factor in these cases is the fact that the recipient/

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[1] Para.632.

[2] Law Com. No.110, paras.6.28-6.38 and Recommendation (7).

recipient of the information or someone on his behalf has taken steps to obtain the information from data which he had no authority to examine or to use. In our view, it should suffice for the law to provide that an obligation of confidence should arise when the recipient of the information obtained it (a) by theft, coercion or fraud; or (b) by taking steps for that purpose from a source which he knew or ought to have known he required the authority of another person to use in circumstances where he lacked that authority or lacked it in relation to the information which he sought to obtain. This obligation should arise whatever the nature of the source of information or method by which the information was obtained from that source. This obligation should be owed to -

(i) the person from whom that information was obtained;

(ii) any third person to whom that person is under an obligation of confidence in relation to the information; and

(iii) any third person to whom or to whose affairs the information relates if from the nature of the information it might reasonably be inferred that it was or would have been disclosed by that person only on the assumption that it would be treated as confidential by its recipient

(Proposition 11).

In paragraph (b) of this proposition the phrase "taking steps" is intended to connote some positive action. It is intended to cover the case where a person did not know of the existence of the particular information until he had examined the source - in other words, a dishonest intent at the time of obtaining authority would not be a prerequisite of an obligation. The question of the use or disclosure of the information for "authorised/

"authorised purposes" is also relevant here, but to a more restricted extent.[1] We also discuss below the provision of appropriate defences.[2]

(f) Information received which is already subject to an obligation of confidence

41. In the Consultative Memorandum we suggested that there was a case -

> "for making it clear by statute that a contractual obligation is enforceable against a third party who knows, or ought reasonably to know, that information has been received by him in breach of contract and that to use it would constitute a breach of that contract".[3]

We indicated that in our view this proposition might well represent the existing law based upon the delict of interference with contractual relationships, but we explained that the extent of its application in the field of breach of confidence had not been expressly decided.[4] Though we did not otherwise justify this proposal, it attracted the assent of those who submitted comments. However, the Law Faculties of Aberdeen and of Glasgow questioned whether the third party's obligation should be framed in contractual terms. We share this doubt but, in addition, find it difficult to appreciate why a third party should come under such an obligation of confidence only where the initial obligation was of a contractual character. We have come to the conclusion that the idea behind this proposition, if acceptable at all, must be applied with respect to all obligations of confidence.

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[1] See para.50 below.

[2] Part V, paras.61-83.

[3] Provisional Proposal 4.

[4] Para.84.

42. Should a proposition on these terms be accepted? The Law Commission have 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]

This recommendation reflects the present case law in England and Wales, but there is an element of doubt as to whether the rule applies to a person who purchases confidential information for value without notice of the obligation of confidence.[2] In Scotland, a person who induces a breach of a contractual obligation of confidence may be liable for damages,[3] but the extent of this liability and its application to breach of confidence cases is not clear. It would not appear to cover all those cases which would be covered by the recommendations of the Law Commission.

43. The imposition of an obligation of confidence in these circumstances might well be resisted by representatives of the press, television and radio. They made it clear to the Law Commission that, in their view, the over-riding principle should be one of freedom of information, and they resisted the imposition of obligations of confidence even in situations where the information has been unlawfully obtained. They pointed out that it is possible for a news agency 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/

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[1] Law Com. No.110, para.6.55 and Recommendation (11).

[2] Ib., para.4.12.

[3] See the Consultative Memorandum, paras.7-12, 28 and 84.

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 argued, render them all liable for damages.

44. Like the Law Commission we find this question a particularly difficult one. It will be noted, however, that the Law Commission propose 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 upon a person who subsequently becomes aware of the existence of such an obligation in relation to information held by him. In the former situation - where knowledge of the obligation is contemporaneous with receipt of the information - the imposition of an obligation of confidence upon the third party recipient can be justified on the pragmatic ground that, without the extension of obligations of confidence to a third party, the person to whom the original obligation of confidence was owed would in many cases have no effective remedy. In cases of the wrongful disclosure of valuable "know-how", the original discloser of the information may not be worth suing but the receiver of the "know-how" (who may be profiting by its use) may well be able to compensate the person to whom the obligation was owed.

45. We provisionally conclude, therefore, that where a person receives information and at the time of its receipt knew or ought to have inferred, from its nature or other circumstances of which he was aware, that the person supplying the information was under an obligation of confidence to a third person, the recipient should be under an obligation of confidence to that third person (Proposition 12).

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46. It is, we concede, taking a bolder step to argue that the same principle should apply to a recipient of information who at the time of its receipt is unaware of the existence of any obligation of confidence in relation to information received but who subsequently becomes aware of the existence of such an obligation. The "innocent" acquirer of information may have set up a production line on the basis of know-how which he may have paid for 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? But 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)/

(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]

47. There are also arguments against such a solution. The problem is likely to arise only in a limited number of cases, yet the rules proposed are complicated. In essence they leave the resolution of a difficult problem to ad hoc decisions on the part of the courts. In view of the paucity of cases in this field coming before the Scottish courts, the law would be likely to remain uncertain for a long time.

48. An alternative approach - which might not achieve an ideal result in every case - would be to confer a measure of protection on an innocent acquirer of information for value. This might take the form of a defence that, after the time he became aware or ought to have become aware of the existence of an obligation of confidence in relation to the information, he did not further disseminate the information and did not use the information more extensively than he had used it prior to that time.

49. We therefore invite views on the following possible solutions where a person receives information and at the time of its receipt neither knew nor could reasonably have inferred that the person supplying the information was under an obligation of confidence to a third person -

(a) The court should have power to make an order, corresponding to the "adjustment order" proposed by the Law Commission.

(b)/

[1] Para.6.110.

(b) The recipient should come under an obligation of confidence from the time when he knew or could reasonably have inferred that the person supplying the information was subject to such an obligation. It should be a defence, however, to any proceedings based on the alleged breach of this obligation 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.

We also invite suggestions for alternative ways of dealing with this problem (Proposition 13). We envisage that any statutory obligations imposed on third parties under this heading[1] should also be expressed as obligations not to disclose or use the information for purposes other than "authorised purposes".[2] We also discuss below the provision of appropriate defences.[3]

(g) Authorised purposes

50. In discussing the creation of possible statutory obligations of confidence in this Part of the paper we have taken for granted that the use or disclosure of information for certain authorised purposes should be permitted. We consider that these statutory obligations should be expressed as obligations not to disclose or use the information for purposes other than "authorised purposes". One of these purposes should obviously be the security of the State and the prevention, investigation or prosecution of crime.[4] This is/

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[1] i.e. in terms of Propositions 12 and 13.

[2] See para.50 below.

[3] Part V, paras.61-83.

[4] The recognition of such a purpose would give effect, in part at at least, to the exceptions contained in Article 9 of the Council of Europe Convention on Data Protection (The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data) which was opened for signature in January 1981 and was signed by the United Kingdom in May 1981.

is, indeed, the only authorised purpose which can be justified where the information was improperly obtained. In all other cases, however, it would seem that an obligation should not arise in circumstances where a reasonable person might assume that use or disclosure had been authorised by or on behalf of the person to whom the obligation was owed. We therefore propose that the statutory obligations of confidence should be expressed as obligations not to disclose or use the information for purposes other than "authorised purposes". These should be defined as being such purposes as were reasonably required to enable any person to fulfil an official function in regard to the security of the State or the prevention, investigation or prosecution of crime. In addition, except where a statutory obligation arises under Proposition 11, the definition should extend to such purposes as a reasonable person might assume were authorised by or on behalf of the person to whom the obligation was owed (Proposition 14).

PART IV: CONFIDENTIALITY AND JUDICIAL PROCEEDINGS

51. In the context of judicial proceedings there are conflicts of two main kinds between interests in maintaining the confidentiality of information and those of securing its disclosure. One of those conflicts arises because litigants - including not only individuals and organisations but the State itself - may wish to withhold the disclosure of certain facts or evidence even from the court itself. Exceptionally, the law may condone this withholding of information because it attaches greater importance to other ends than the disclosure of the whole truth, notably the preservation of the security of the State and of freedom of communications between certain classes of persons. These include communications between a client and his legal advisers and between a husband and his wife. These privileges (and possible variations of them) were examined in our Consultative Memorandum No.46 on the Law of Evidence, and our/

our recommendations thereon will be included in our report on this subject. For this reason, we do not propose to consider these privileges in our report on Breach of Confidence.

52. The other conflict is between the interest of society as a whole, in securing that justice should be "seen to be done" openly and publicly, and the interest of individuals in the course of civil litigation that confidential information disclosed to permit the establishment of the facts and adjudication upon the issues should not without good cause be further disseminated. In considering this conflict of interest, however, the court should be in a position to take account of the interests of persons who are not parties to the litigation and, for this reason, the court's powers should be expressed widely.

53. In our Consultative Memorandum we proposed that there should be a special procedure to prevent the proceedings themselves causing further disclosure of the information. This, we suggested, could be achieved by using statements lodged in process, but not printed in the pleadings, to describe the confidential information. This proposal was widely supported on consultation and its importance was stressed by the Faculty of Advocates. On re-examining the matter, however, we consider that a broader approach should be adopted.

54. Paradoxically, the legal protection of obligations of confidence may require or entail the disclosure in court of confidential information, yet the preservation of its confidentiality may be crucial to the parties. An obligation of confidence - apart from express contract - must clearly disappear when the information to which it relates is a matter of public knowledge, and we consider on this account that it would not be practicable/

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. Accordingly, preserving the confidentiality of information disclosed in the course of judicial proceedings would seem to require (first) that in appropriate cases the court has a power to order proceedings or part of the proceedings to be held behind closed doors and that confidences disclosed in the course of such proceedings should be preserved; and (second) that the law should contain adequate provisions to secure the confidentiality of steps in process, other documents lodged in process, and any documents recovered under judicial proceedings for the purposes of the litigation even if they are not lodged in process.

55. In relation to the first point it is clear that the reputation of the courts would suffer if justice were dispensed, other than in exceptional circumstances, behind closed doors. But it would be equally unsatisfactory if parties were denied access to the courts because of lack of facilities for preserving the confidentiality of information. The circumstances in which, under the present law, proceedings may be held behind closed doors are not clearly defined. Two old statutes have a bearing on the topic. The Act of 1686, cap.18[1] provides that in all processes before the "Lords of Session and all other Judges within this Kingdome, the witnesses who are made use of and adduced therein shall be examined in presence of the Parties or their advocats". The Act of 1693, c.26[2] provides that "all Bills Reports Debates Probations and others relating to processes shall be considered, reasoned advised and voted by the Lords of Session with open doors where parties procurators and all others are hereby allowed to be present, as they used to/

[1]Now called the Evidence Act 1686.

[2]Now called the Court of Session Act 1693.

to be formerly in time of Debates but with this restriction, that in some special cases the saids Lords shall be allowed to cause remove all persons except the parties and their procurators". In practice, the Court of Session has exercised this power to close doors with restraint and in limited circumstances only, such as in proceedings for nullity on the ground of impotence. Although we understand that in practice doors may occasionally be closed in the sheriff courts, the basis for this practice is obscure. Though the matter goes beyond the law of breach of confidence, we consider that it should be made clear in general terms that the courts (including the sheriff courts) have the power, exceptionally, to close doors, and that rules of court should be enacted specifying (without prejudice to the above generality) cases where prima facie this power might appropriately be exercised. In relation to confidential information the court should have the power to close doors for the purpose of maintaining the confidentiality of information wherever this seems 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. It should be made clear, moreover, that such a person should have a locus to intervene in the proceedings (Proposition 15).

56. In so far, however, as proceedings are held behind closed doors, we propose that any person attending them should have a duty -

(i) to any witness disclosing the information;

(ii) to any person on whose behalf the witness held the information; and

(iii) to any other person who, it might reasonably be expected, would suffer substantial prejudice to his patrimonial interests or (in the case of individuals) injury to the feelings by the disclosure or use of the information

not/

not to use or disclose the information otherwise than for the purposes of those proceedings (Proposition 16).

57. In relation to the second point in paragraph 54 above there is a strong case for saying that the law should preserve the confidentiality of documents which have been recovered under a commission and diligence, in so far at least as their contents have not been disclosed in open court. 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 a ground for comment in the newspapers, nor for bringing a libel action, or for any other alien purpose".[1] There is, to our knowledge, no clear rule to the same effect in Scots law. We consider that the English rule is a just one. When a person who has no interest in a litigation has been compelled by law to make documents available for the purposes of the litigation, it seems wrong/

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[1] Riddick v. Thames Board Mills Ltd. [1977] Q.B. 881, 896. Cf. Distillers Co. v. Times Newspapers [1975] 1 Q.B. 613 where Talbot J. remarked at p.621 -

> "Those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed. I also consider that this protection can be extended to prevent the use of the documents by any person into whose hands they come unless it be directly connected with the action in which they are produced. I am further of the opinion that it is a matter of importance to the public, and therefore of public interest, that documents disclosed on discovery should not be permitted to be put to improper use and that the court should give its protection in the right case.
>
> Save as to questions of copyright and the defence of fair dealing, I consider that the only competing right which the defendants can advance is that there is a public interest which is so high that it overrides the public interest which protects documents disclosed on discovery."

wrong that he should run the risk that the contents of such documents should be used for any extraneous purposes, including purposes for which he would not willingly have disclosed them.

58. The English common law rule, however, and, following it, the rule proposed by the Law Commission are restricted to information which is "compulsorily disclosed".[1] We are not satisfied that, in this respect, the English rule goes far enough. We do not see why a litigant who reasonably has to lodge a document for the purposes of the litigation or a person who willingly provides a document without a court order for the limited purposes of a litigation should not also be protected against its use for other purposes. Accordingly, we provisionally propose that any person receiving or becoming aware of the contents of any step in process, of any document lodged in process, or of any document recovered under commission and diligence but not lodged in process, should owe a duty to specified persons not to use or disclose the information therein contained except for the purpose of the litigation (Proposition 17). It is our intention that this recommendation should extend also to the closed record. Though there is a widely held view that, once the record is closed, the public may have access to it, 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.[2]

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[1] This is the general effect of the Law Commission's Recommendation (4): see Law Com. No.110, p.170.

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

59. This duty, however, requires qualification by reference to the defence of public knowledge. We consider that, in principle at least, anything said in open court must be regarded as being ipso facto a matter of public knowledge. It would be quite unrealistic to impose obligations of confidence upon members of the public who happen to be present in open court and, subject to any contractual obligations of confidence which may otherwise affect them, unrealistic to continue to impose the obligation of confidence arising by virtue of the preceding proposition upon persons connected with the litigation. We therefore suggest that, notwithstanding Proposition 17, and subject to any contractual obligation of confidence, there should be no obligation of confidence in relation to any part of the contents of any document which has been disclosed orally in open court (Proposition 18). This should be without prejudice to any duty which a person, for example a solicitor, may owe to the court not to use or disclose any information except for the purpose of the litigation.[1] This is an aspect of the law of contempt of court, with which we are not concerned in this paper.

60. It would be necessary, of course, to make it clear that any legislation enacted in pursuance of the preceding propositions is not intended to affect the power of the court to order the disclosure of information for the purposes of judicial proceedings, even where that information is subject to an obligation of confidence. Nor should it in any way restrict the operation of the law of contempt of court.

PART V: DEFENCES IN ACTIONS FOR BREACH OF CONFIDENCE

61. In the Consultative Memorandum we did not examine the defences available in actions of breach of confidence, though we/

[1] See Home Office v. Harman [1982] 2 W.L.R. 338.

we briefly referred to the defence of public interest.[1] Apart from public interest, however, there are certain defences special to actions of breach of confidence whose potential applicability in Scots law is not wholly clear.

(a) Public knowledge

62. 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. Indeed, the central question when Caird v. Sime[2] came before the House of Lords was less whether there was an obligation of confidence between the professor and his students - that was implied from their relationship - than whether delivery of the lectures to the students, a limited class of persons, was to be considered publication to the world at large. The House of Lords answered this question in the negative and declared that the professor was "entitled notwithstanding such delivery to restrain all other persons from publishing the said lectures without his consent". To some extent, however, this case seems to have concerned property rights. It is not an easy matter, as this case and several English cases illustrate, 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.[3] The fact/

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[1] Para.90.

[2] (1885) 13 R. 23 and (1887) 14 R. (H.L.) 37.

[3] See Coco v. A.N. Clark (Engineers) Ltd. [1969] R.P.C. 41, per Megarry J. at p.47; Ackroyds (London) Ltd. v. Islington Plastics Ltd. [1962] R.P.C. 97 per Havers J. at p.104.

fact that a restricted class of persons, such as employees, students, the passengers in an aeroplane, or persons attending a dance become aware of the facts may or may not be regarded as making the facts a matter of public knowledge.[1] It seems likely, indeed, that the question of public knowledge is a question of degree, depending on the facts of the particular case.[2] This in our view makes it especially inappropriate to attempt to imprison it in a statutory definition.

63. We may add that 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.[3] In such cases a person seeking to uphold the obligation might be met with the plea that he has no interest to enforce the obligation. Like the Law Commission[4] 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.

64. In view of the paucity of authority on this point in Scots law we consider that, without prejudice to any other defences available/

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

[2] Franchi v. Franchi [1967] R.P.C. 149, at pp.152-153.

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

[4] Law Com. No.110, para.6.129 and draft Bill, clause 19(3).

available in actions arising from a threatened or alleged breach of confidence, it might be useful to provide that, in the absence of contractual stipulations to the contrary, the fact that information was a matter of public knowledge should be a defence, but the expression "public knowledge" should not itself be further defined (Proposition 19).

(b) Enhancement of personal experience

65. It is in Scots law 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.[1] It is also competent in a contract of service or in an ancillary "security agreement" 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.[2] 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.[3]

66. In their application to particular facts there may clearly be a conflict between the principle of confidentiality and the prohibition of unjustified restrictions on employment. The English courts/

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[1] Liverpool Victoria Legal Friendly Society v. Houston (1900) 3 F. 42 per Lord Pearson (Ordinary) at p.47. Cf. Scottish Farmers Dairy Co. v. McGhee 1933 S.C. 148.

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

[3] Scottish Farmers Dairy Co. v. McGhee. It was held in Bluebell Apparel Ltd. v. Dickinson that a clause prohibiting the employee from entering the service of a competitor for two years after the end of his employment was not unreasonable in view of the risk of disclosure of secrets.

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 particular instances, be forbidden."

67. 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]

68. The absence of Scottish authority on this matter prompted us to consider whether a statutory rule to the same effect should be introduced. However, information which may be described as "no more than an enhancement of personal knowledge" may be confidential information of considerable commercial value. It would, in our view, be extremely difficult to formulate a statutory provision which is neither too wide nor too narrow. We consider that the matter is best left to the commonsense of any/

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

[2] Mason v. Provident Clothing & Supply Co., supra.

[3] Law Com. No.110, para.6.75 and draft Bill, clause 7.

any court required to determine whether or not information disclosed, or likely to be disclosed, may truly be regarded as being of a secret or confidential nature. We conclude, therefore, that it would be unnecessary and undesirable to make specific statutory provision for a defence of enhancement of personal knowledge, skill or experience (Proposition 20).

(c) Public interest

69. 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] The present position, however, was recently summed up by Ungoed-Thomas J. in Beloff v. Pressdram Ltd. and another[2] -

> "In Hubbard v. Vosper[3] Lord Denning M.R. treated material on scientology published in breach of confidence as susceptible to a defence of public interest on the ground that it was dangerous material, namely medical quackeries 'dangerous in untrained hands'.
>
> The defence of public interest clearly covers and, in the authorities does not extend beyond, disclosure, which as Lord Denning M.R. emphasised must be disclosure justified in the public interest, of 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/

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[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". A relatively narrow formulation of the doctrine was stated by Viscount Finlay in Weld-Blundell v. Stephens [1919] 1 K.B. 520; [1920] A.C. 956, but was later repudiated by Lord Denning in Initial Services Ltd. v. Putterill [1968] 1 Q.B. 396.

[2] [1973] 1 All E.R. 241, 260.

[3] [1972] 2 Q.B. 84; [1972] 1 All E.R. 1023.

> medically dangerous to the public; and doubtless other misdeeds of similar gravity. Public interest, as a defence in law, operates to override the rights of the individual (including copyright) which would otherwise prevail and which the law is also concerned to protect. Such public interest, as now recognised by the law, does not extend beyond misdeeds of a serious nature and importance to the country and thus, in my view, clearly recognisable as such."

The Scots law on this matter is relatively undeveloped. There are no clear statements of the law in the context of breach of confidence, but such observations as have been made suggest that a restrictive approach to this defence might be adopted.[1]

70. The Law Commission 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.[2] 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.

(iii)/

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[1] See Brown's Trs. v. Hay (1898) 25 R. 1112, especially at p.1118; and Higgins v. Burton 1968 S.L.T. (Notes) 52.

[2] Law Com. No.110, paras.6.77-6.84 and clause 11.

(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.

71. We have carefully considered these recommendations but regret that we feel able to follow them only in part. Having regard to the hesitation on the part of the Scottish courts to apply a defence of public interest, we agree that it would be useful to state specifically that public interest should be a general defence to an action based on breach of an obligation of confidence (including/

[1] Paras.6.130-6.133 and clause 19.

(including obligations of a contractual character) that the use or disclosure of the information was in the public interest. We also agree, and for the same reason, that it would be useful to provide that a public interest may be involved in the disclosure or use of information, notwithstanding that the information does not relate to any crime, fraud or other misconduct. We agree that it should be possible, exceptionally, to justify breach of an obligation of confidence by the disclosure of information relating to a matter which, though not struck at by the law, is gravely harmful to society.[1] Otherwise, however, we consider that it should be left to the courts to identify the cases where public interest is involved, and to do so without guidelines. Though one of the bodies submitting comments suggested that some attempt should be made to formulate guidelines, others argued that such guidelines would tend to be either too vague to be effective or so restrictive as to impede the development of the law.

72. Apart from these matters, we find it difficult to accept the proposals of the Law Commission. Once the defender has established a public interest in disclosure in the sense referred to above we consider that it would be inappropriate to allow the pursuer to argue that this public interest is counterbalanced by the public interest in upholding the confidentiality of the particular information in question. The interest in the preservation of any particular obligation of confidence - as opposed to obligations of confidence as a class - is essentially a private interest, the interest of the person who asks the court to give effect to the obligation.

73./

[1] See Hubbard v. Vosper [1972] 2 Q.B. 84.

73. In formulating our own conclusions in this domain we consider that it would be desirable to refer not merely to the fact of the disclosure of information but also to the manner of its disclosure. In some situations disclosure may be justified only to the prosecuting authorities or to the police, but not to the world at large.[1] A person who has obtained from documents which he had no right to examine, or by the surreptitious use of surveillance devices, confidential information indicating the possible commission by another of an offence should not necessarily be entitled to disclose the information to the world at large. The limits of such disclosure are not easy to fix in advance. It may be too narrow to suggest that the information should be disclosed only to the prosecuting authorities. It might be appropriate to disclose the information to other persons affected by the actings of the person who appears to have committed the offence. Lord Denning M.R. in Initial Services Ltd. v. Putterill[2] suggested -

> "The disclosure must, I should think, 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."

74. We provisionally conclude, therefore, that it should be provided that -

(a) in all actions based on the use or disclosure of confidential information (including actions founded on breach of contract) it should be a defence/

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[1] This proposition is precedented in the context of qualified privilege - see James v. Baird 1916 S.C. (H.L.) 158; Leitch v. Lyal 1903 11 S.L.T. 394; Adam v. Allan (1841) 3 D. 1058.

[2] [1968] 1 Q.B. 396 at pp.405/6.

defence to establish that such use or disclosure and the manner of such use or disclosure were justified in the public interest; and

(b) 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

(Proposition 21).

(d) Prior knowledge

75. We consider that, although the following proposition is almost self-evident, it would be desirable for the purpose of clarity to recommend its enactment. Similar defences are proposed by the Law Commission for England and Wales.[1] In obligations of confidence arising otherwise than by contract it should be a defence to establish that -

(a) at the time of its acquisition the information was already known to the defender under conditions not inferring any obligation of confidence to the pursuer; or

(b) prior to its use or disclosure the defender came into possession of the information in circumstances not inferring an obligation of confidence to the pursuer

(Proposition 22).

(e) Express or implied authority to disclose

76. 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/

[1] Law Com. No.110, paras.6.102 and 6.103, and draft clause 12(1).

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.[1] Other cases of statutory authority chiefly relate to disclosures as between Government departments.[2] It is not our purpose in this paper to examine such special provisions, but we have endeavoured to ensure that our proposals are not inconsistent with them.

77. Apart from statute, however, 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 transaction in question. A similar argument may also be presented in other contexts, such as the granting of references for the purposes of employment. It would, however, in our view be quite impracticable to state the cases in which a waiver of a right to confidentiality may appropriately be implied.

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[1] We examine these privileges in our Report on Bankruptcy and related aspects of Insolvency and Liquidation (Scot. Law Com. No.68, 1982), para.14.33. We recommend 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.

[2] 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. A very complex provision regulating the disclosure by the Civil Aviation Authority of information supplied to it in pursuance inter alia of s.35 of the Civil Aviation Act 1971 is contained in s.36 of that Act.

78. We consider, therefore, that it should be sufficient to provide that in all proceedings founded upon the alleged breach of an obligation of confidence (however arising) it should be a defence to establish that -

(a) the disclosure of the information by the person subject to that obligation was required or authorised by law, whether or not by virtue of an enactment; or

(b) the right to confidentiality was waived, expressly or by implication.

(Proposition 23).

(f) Privilege

79. We did not in our Consultative Memorandum discuss the questions whether, in actions for breach of an obligation of confidence, the defences of absolute or qualified privilege should be available. The matter is discussed in the Law Commission's report.[1] They 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. We agree.

80. 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. In our view the considerations are not materially different in relation to the law of breach of confidence.

81./

[1] Paras.4.69, 4.70, 6.93 and 6.94.

81. 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 conduct of his own affairs, in matters where his interest is concerned".[1] It is clear, therefore, that the defence of qualified privilege is so 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[2] - to disclose information in the conduct of his own affairs.

82. We provisionally conclude, therefore, that -

(a) it should be a defence in actions for breach of confidence to establish that the disclosure of information occurred in circumstances which, for the purpose of the law of defamation, would confer absolute privilege; and

(b) no defence of qualified privilege should be available

(Proposition 24).

(g) Other defences

83. Finally, we invite views whether there are any other defences which might appropriately be provided in an action for breach of confidence (Proposition 25).

PART VI: REMEDIES

84. We did not in our Consultative Memorandum consider the remedies in this field but we note that the Younger Committee,[3] in recommending that the law relating to breach of confidence should/

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[1] The language is that of Park 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.

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

[3] Cmnd.5012 (1972), para.631.

should be referred to the Law Commissions, considered that among the generally acceptable aims of that branch of the law would be -

> "(d) to afford remedies, whether by way of injunction, damages or claims for loss of profit which do justice to the reasonable claims of plaintiffs and defendants in differing situations."

(a) Interdict

85. We have no doubt that the remedy of interdict should be available where the breach of an obligation of confidence is threatened, but certain special questions arise. One of those is whether, where an obligation of confidence has been assumed by contract in relation to specified information, the person assuming the obligation may be interdicted from using that information after it has become a matter of public knowledge. The question was considered in Levin v. Farmer's Supply Association of Scotland[1] where Lord Kincraig accepted the statement of the law made by Roxburgh J. in Terrapin Limited v. Builders Supply Co. etc.[2] to the effect that a person -

> "who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public."

On this principle interim interdict was granted. The Levin case, as reported, does not determine the further question whether the interdict in such cases could be of unlimited duration and, accordingly, punitive in its effect. It is most unlikely, however,/

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[1] 1973 S.L.T. (Notes) 43.

[2] 1960 R.P.C. 128. The Lord Ordinary also referred to Saltman Engineering Co. v. Campbell Engineering Co. [1963] 3 All E.R. 413.

however, that the Scottish courts would pronounce an interdict which would operate for a longer period than the "springboard" gave the defender an advantage. We do not consider it necessary, therefore, to propose specific legislation on this point.

86. Under the proposals of the Law Commission the granting of an injunction would be a discretionary remedy.[1] We note, too, that in its discussion of injunctions (or interdicts) in the field of copyright law the Whitford Committee pointed out[2] that there were some cases where the grant of an injunction would not be justifiable. They recommended, therefore, that it should be provided that an injunction should not be granted if the damage to the defendant would be out of all proportion to the gravity of the infringement and damage to the plaintiff if an injunction were granted. In Scots law, while interim interdict is always discretionary, "perpetual" interdict can normally be sought as of right (though there may be exceptions in cases relating to buildings or works), and Lord President Inglis has said -

> "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."[3]

While this approach may seem to be a harsh one in relation to certain breaches of obligations of confidence, we would be reluctant to introduce a discretion limited to this branch of the law. Similar questions arise elsewhere and, if the matter is to be examined at all, in our view this examination should take place in a wider context.

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[1] Law Com. No.110, paras.6.108-6.112 and draft Bill, clause 13.
[2] Cmnd.6732 (1977), para.707.
[3] Bank of Scotland v. Stewart (1891) 18 R. 957 at pp.971/2.

87. Our provisional conclusion, therefore, is that no special qualifications or extensions of the powers of the court in actions for interdict should be introduced in relation to the law of obligations of confidence (Proposition 26).

(b) Damages

(i) Compensatory damages

88. Breach of a contractual obligation of confidence would give rise to the ordinary contractual remedies, including damages for breach. Where the breach is of a statutory obligation of confidence under our proposals, it should give rise to claims for damages on principles similar to those applicable to other breaches of statutory duty. A possible difficulty arises here by reason of the element of uncertainty in the present law relating to the status of claims for economic loss which is not associated with physical damage. We invite views, therefore, whether it should be made clear by statute that, in claims for damages founded on the breach of a statutory obligation of confidence, the pursuer should be entitled to claim damages for any economic loss he has sustained (Proposition 27).

(ii) Damages for injury to the feelings

89. 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.[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 English Court of Appeal approved/

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

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

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

approved an award of £1000 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.[1]

90. It may be that 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.[2] In these circumstances we suggested in our 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". This proposal was welcomed (with one exception) by those who submitted comments upon it, and our provisional conclusion is to the same effect. We invite views, however, whether it is necessary to state the same principle expressly in relation to statutory obligations of confidence (Proposition 28).

(iii) Exemplary damages

91. "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[3] the Government, while agreeing that damages based on the value of the infringing copies without regard to/

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[1] 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. 230; Cox v. Philips Industries Ltd. [1976] 3 All E.R. 161.

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

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

to the cost of producing them should no longer be available under section 18(1) of the Act, have accepted the view of the Whitford Committee[1] that the right to exemplary damages under section 17(3) should be retained -

> "An effective deterrent is of course necessary and the Government believes that the power of the courts to award penal damages should be strengthened. Accordingly, it proposes to adopt the recommendation that section 17(3) should be amended so that the discretion of the court to award penal damages in appropriate cases is unfettered."

92. We considered whether or not the court should be conceded power in cases involving the breach of an obligation of confidence to award exemplary or additional damages. The case for conceding such a power is particularly strong in cases where the confidential information has been "stolen" or obtained without authority. The award of exemplary damages, however, would be out of keeping with the general principles underlying the Scottish remedies in contract and in delict[2] and, for this reason, we make no recommendation for their introduction in the present context (Proposition 29).

(c) Accounting for profits

93. 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. 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 consider it important that the remedy of an accounting for profits should be available, because - to use the language of the Law Commission[3] - in the absence of such a remedy a person contemplating/

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[1] Cmnd.6732 (1977).

[2] Broome v. Cassell & Co. [1972] A.C. 1027 per Lord Kilbrandon at p.1133 and per Lord Reid at p.1086.

[3] Working Paper No.58, para.123.

contemplating a breach of confidence might otherwise calculate that the profits he would acquire from the breach would exceed any liability he is likely to incur in damages to the person to whom he owes the duty of confidence. We provisionally conclude, therefore, that as an alternative to a claim for damages, a person to whom an obligation of confidence (however arising) is owed should be entitled to claim from a person who has deliberately acted in breach of that obligation an accounting from him for any profits he may have derived in consequence of the breach (Proposition 30).

(d) Orders for delivery or destruction

94. In our Consultative Memorandum we suggested that, if the proposals therein contained for the development of the actio injuriarum were not implemented, a statutory delict should be introduced, "consisting of the use or disclosure of information amounting to a substantial and unreasonable infringement of a right of privacy".[1] We suggested (in the context only of this statutory delict) that if it were introduced "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".[2] It might at first sight be thought unnecessary to make a similar recommendation in the context of proposals limited to breach of confidence; but a breach of confidence may not necessarily amount to disclosure to the public generally. The remedy, therefore, may be a useful one in certain circumstances. We consider, however, that it should be supplemented by a power to the court to order the delivery to the pursuer of any materials containing the confidential information. A similar recommendation has been made by the Law Commission[3] and we note that the Patents Act 1977 specifically provides that a claim may be made -

"(b)/

[1] Provisional Proposal 11.

[2] Provisional Proposal 12.

[3] Para.6.114(ii)(c).

"(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."[1]

We provisionally conclude, therefore, that in actions for breach of an obligation of confidence (however arising) the court should have a discretion to order the defender to deliver to the pursuer or to destroy at the sight of the pursuer anything in which the information to which the breach relates is contained or is embodied (Proposition 31).

[1] s.61(1)(b).

PART VII: SUMMARY OF PROPOSITIONS

Scope of the forthcoming report

1. Our forthcoming report should be confined to those aspects of the law of privacy which can be protected within the ambit of the law relating to breach of confidence and to the disclosure or use of information unlawfully obtained (paragraph 5).

2. Our report should not enter the field of data protection as such (paragraph 7).

3. Our report should not recommend the introduction of special rules to deal with cases where confidential information is communicated for the purpose of being stored in a computer (paragraph 8).

4. Our report should contain no recommendations for the creation of criminal offences in the context of breach of confidence (paragraph 9).

5. The legislation to follow upon our report should not seek 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 (paragraph 10).

6. 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; and such legislative guidelines should not be introduced (paragraph 14).

Circumstances in which obligations of confidence should arise

7. Obligations of confidence should continue to be created by express or implied agreement, but should not arise exclusively where/

where there is an express or implied agreement to treat information as confidential (paragraph 16).

8. A rule to the effect that a statutory obligation of confidence should arise only where there is an express undertaking to keep the information confidential, or where an undertaking to that effect may be inferred from the relationship between the giver and the recipient or from the latter's conduct, would be likely to be too narrow (paragraph 17).

9. A statutory obligation of confidence should arise if it is a reasonable inference from the nature of the information, the relationship of the parties, and the circumstances in which the information was furnished and accepted, that it was furnished and accepted on the basis that it would be treated as confidential. This statutory obligation of confidence should be owed to the person disclosing the information; but it is also for consideration whether, when the recipient of the information knew or might reasonably have inferred that the discloser of the information was himself subject to an obligation of confidence to a third party in relation to that information, the obligation first mentioned should also be owed to that third party (paragraph 20).

10. A statutory obligation of confidence should arise, where it may reasonably be inferred from the nature of the information, the relationship of the parties and the circumstances of its disclosure that it was furnished on the assumption that it would be treated as confidential (irrespective of whether it was so accepted by the recipient) in the following circumstances -

(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)/

(c) where the recipient or a person acting on his behalf specifically requested the disclosure of the information.

This statutory obligation of confidence should be owed to the person disclosing the information; but it is also for consideration whether, when the recipient of the information knew or might reasonably have inferred that the discloser of the information was himself subject to an obligation of confidence to a third party in relation to that information, the obligation first mentioned should also be owed to that third party (paragraph 36).

11. An obligation of confidence should arise when the recipient of the information obtained it (a) by theft, coercion or fraud; or (b) by taking steps for that purpose from a source which he knew or ought to have known he required the authority of another person to use in circumstances where he lacked that authority or lacked it in relation to the information which he sought to obtain. This obligation should arise whatever the nature of the source of information or method by which the information was obtained from that source. This obligation should be owed to -

(i) the person from whom that information was obtained;

(ii) any third person to whom that person is under an obligation of confidence in relation to the information; and

(iii) any third person to whom or to whose affairs the information relates if from the nature of the information it might reasonably be inferred that it was or would have been disclosed by that person only on the assumption that it would be treated as confidential by its recipient

(paragraph 40).

12. Where a person receives information and at the time of its receipt knew or ought to have inferred, from its nature or other circumstances of which he was aware, that the person supplying/

supplying the information was under an obligation of confidence to a third person, the recipient should be under an obligation of confidence to that third person (paragraph 45).

13. We invite views on the following possible solutions where a person receives information and at the time of its receipt neither knew nor could reasonably have inferred that the person supplying the information was under an obligation of confidence to a third person -

(a) The court should have power to make an order, corresponding to the "adjustment order" proposed by the Law Commission.

(b) The recipient should come under an obligation of confidence from the time when he knew or could reasonably have inferred that the person supplying the information was subject to such an obligation. It should be a defence, however, to any proceedings based on the alleged breach of this obligation 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.

We also invite suggestions for alternative ways of dealing with this problem (paragraph 49).

14. The statutory obligations of confidence should be expressed as obligations not to disclose or use the information for purposes other than "authorised purposes". These should be defined as being such purposes as were reasonably required to enable any person to fulfil an official function in regard to the security of the State or the prevention, investigation or prosecution of crime. In addition, except where a statutory obligation arises under Proposition 11, the/

the definition should extend to such purposes as a reasonable person might assume were authorised by or on behalf of the person to whom the obligation was owed (paragraph 50).

Confidentiality and judicial proceedings

15. It should be made clear in general terms that the courts (including the sheriff courts) have the power, exceptionally, to close doors, and rules of court should be enacted specifying (without prejudice to the above generality) cases where prima facie this power might appropriately be exercised. In relation to confidential information the court should have the power to close doors for the purpose of maintaining the confidentiality of information wherever this seems 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. It should be made clear, moreover, that such a person should have a locus to intervene in the proceedings (paragraph 55).

16. In so far as proceedings are held behind closed doors, any person attending them should have a duty -

(i) to any witness disclosing the information;

(ii) to any person on whose behalf the witness held the information; and

(iii) to any other person who, it might reasonably be expected, would suffer substantial prejudice to his patrimonial interests or (in the case of individuals) injury to the feelings by the disclosure or use of the information

not to use or disclose the information otherwise than for the purposes of those proceedings (paragraph 56).

17. Any person receiving or becoming aware of the contents of any step in process, of any document lodged in process, or of any document recovered under commission and diligence but not lodged/

lodged in process, should owe a duty to specified persons not to use or disclose the information therein contained except for the purpose of the litigation (paragraph 58).

18. Notwithstanding Proposition 17, and subject to any contractual obligation of confidence, there should be no obligation of confidence in relation to any part of the contents of any document which has been disclosed orally in open court (paragraph 59).

Defences in actions for breach of confidence

19. In the absence of contractual stipulations to the contrary, the fact that information was a matter of public knowledge should be a defence, but the expression "public knowledge" should not itself be further defined (paragraph 64).

20. It would be unnecessary and undesirable to make specific statutory provision for a defence of enhancement of personal knowledge, skill or experience (paragraph 68).

21. It should be provided that -

(a) in all actions based on the use or disclosure of confidential information (including actions founded on breach of contract) it should be a defence to establish that such use or disclosure and the manner of such use or disclosure were justified in the public interest; and

(b) 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

(paragraph 74).

22. In obligations of confidence arising otherwise than by contract it should be a defence to establish that -

(a)/

(a) at the time of its acquisition the information was already known to the defender under conditions not inferring any obligation of confidence to the pursuer; or

(b) prior to its use or disclosure the defender came into possession of the information in circumstances not inferring an obligation of confidence to the pursuer

(paragraph 75).

23. In all proceedings founded upon the alleged breach of an obligation of confidence (however arising) it should be a defence to establish that -

(a) the disclosure of the information by the person subject to that obligation was required or authorised by law, whether or not by virtue of an enactment; or

(b) the right to confidentiality was waived, expressly or by implication

(paragraph 78).

24. (a) It should be a defence in actions for breach of confidence to establish that the disclosure of information occurred in circumstances which, for the purpose of the law of defamation, would confer absolute privilege; and

(b) no defence of qualified privilege should be available

(paragraph 82).

25. We invite views whether there are any other defences which might appropriately be provided in an action for breach of confidence (paragraph 83).

Remedies

26. No special qualifications or extensions of the powers of the court in actions for interdict should be introduced in relation to the law of obligations of confidence (paragraph 87).

27./

27. We invite views whether it should be made clear by statute that, in claims for damages founded on the breach of a statutory obligation of confidence, the pursuer should be entitled to claim damages for any economic loss he has sustained (paragraph 88).

28. (a) 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.

(b) We invite views whether it is necessary to state the same principle expressly in relation to statutory obligations of confidence

(paragraph 90).

29. No provision should be made for the award of exemplary damages in the context of actions for breach of confidence (paragraph 92).

30. As an alternative to a claim for damages, a person to whom an obligation of confidence (however arising) is owed should be entitled to claim from a person who has deliberately acted in breach of that obligation an accounting from him for any profits he may have derived in consequence of the breach (paragraph 93).

31. In actions for breach of an obligation of confidence (however arising) the court should have a discretion to order the defender to deliver to the pursuer or to destroy at the sight of the pursuer anything in which the information to which the breach relates is contained or is embodied (paragraph 94).