Scottish Law Commission

DISCUSSION PAPER NO. 92

Confidentiality in Family Meditation

MARCH 1991

This Consultative Memorandum is published for comment and criticism and does not represent the final views of the Scottish Law Commission

SCOTTISH LAW COMMISSION

DISCUSSION PAPER NO 92

CONFIDENTIALITY IN FAMILY MEDIATION

April 1991

Note: This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 30 September 1991. All correspondence should be addressed to -

Mrs A F Bevan
Scottish Law Commission
140 Causewayside
EDINBURGH EH9 1PR

(Telephone: 031-668 2131)

NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper may be used in this way.

2. Further copies of this Discussion Paper can be obtained free of charge, from the above address.

CONFIDENTIALITY IN FAMILY MEDIATION

CONTENTS

CONTENTS (cont'd)

PART I - INTRODUCTION

(1) Purpose of Discussion Paper

1.1 The purpose of this Discussion Paper is to seek views on the question whether any privilege should attach to information acquired in the course of family mediation and to set out some options for the reform of the law.

1.2 Our consideration of this subject has its origins in a proposal made to us by the Scottish Association of Family Conciliation Services (SAFCOS) that such a privilege should be conferred by legislation. In terms of section 3(1)(a) of the Law Commissions Act 1965 it is our duty to receive and consider any proposals for the reform of the law which may be made or referred to us. Such proposals may come from members of the public or from voluntary organisations as well as from official persons or bodies, and we are always pleased to examine them. Having considered the proposal by SAFCOS, we have decided that it is appropriate that we should investigate this topic as part of our general work on the law of evidence which is included in our First Programme of Law Reform.[1]

(2) Definitions

1.3 "Privilege" is a word with several meanings. In this Discussion Paper we use it in a special legal sense[2] to mean the right which the law confers on certain persons in certain circumstances to withhold information from a court. Such a

---

[1] (1965) Scot Law Com No 1.

[2] "Privilege" in this sense is more fully explained in para 2.5 below.

person, if a witness, may refuse to answer a particular question: if the possessor of a document[1] or other physical object, he or she may refuse to produce it to the court; and in some cases, where information has been obtained in the course of a relationship to which he or she has been a party, he or she may also prevent others from giving evidence or producing a document or object which would disclose such information. We shall also be using the words "confidential" and "confidentiality" which, like "privilege", are used in both popular and legal senses. In ordinary life a person may be entrusted in the course of his or her work or social life with information which he or she regards as secret or "confidential" by reason of some professional, contractual, moral or ethical obligation. But the fact that the information may be so regarded does not necessarily mean that it is "confidential" in the legal sense. Information is "confidential" in the legal sense only if its confidential quality is recognised by the law as a ground of "privilege" in the legal sense: in other words, only if it comes within one of the few categories of information which the law allows to be withheld from the court by reason of the circumstances in which it was obtained or the nature of the relationship of the parties between whom it was communicated. As we shall explain, information obtained in the course of family mediation is generally regarded by the mediator and the parties as "confidential" in the popular sense, but it is doubtful whether the Scottish courts

---

[1] By "document" we mean not only printed or written matter such as case records or correspondence but any device by means of which information is recorded such as a disk, tape or film.

would hold it to be "confidential" or "privileged" in law. As Lord Justice-Clerk Ross has recently observed:[1]

> "Under the law as it presently exists, if a conciliator were cited as a witness he or she probably could not claim the right to refuse to answer questions on the grounds of confidentiality. In other words, they could not claim that the information which they had was privileged."

1.4 We now mention a number of terms which are not legally defined and give them provisional definitions for the purposes of our discussion in this Paper. We shall return to the subject of the definition of these terms in Part V.[2] By "mediation" we mean a process whereby the parties to a dispute are encouraged, with the assistance of an impartial person, to reach considered decisions acceptable to both of them on the issues which are in dispute.[3] We include in the term "mediation" both "reconciliation", the object of which is to bring estranged spouses together, and "conciliation" whose object is to assist the parties to resolve outstanding differences between them once it is clear that their partnership is at an end.[4] We include in the term "family dispute"

---

[1] Lord Ross, "Family Conciliation" (1991) 36 JLS 20 at p 21.

[2] See paras 5.25-5.29, 5.32-5.41 below.

[3] S M Cretney and J M Masson, Principles of Family Law (5th ed, 1990), p 152.

[4] There are no generally accepted definitions of "mediation" and "conciliation". In the USA "mediation" generally means "conciliation" as defined above, while "conciliation" generally means "reconciliation". The concept of "conciliation" as we have defined it is further explained in para 1.7

any dispute between spouses or cohabitants as to any matter which is or may be the subject of civil proceedings to which either or both of them are or may be parties, and any dispute as to parental rights. By "family mediation" we mean mediation for the purpose of resolving a family dispute. We include in the term "information" oral and written communications, records of such communications, and observations made or subjective impressions formed about the behaviour or conduct of the mediator or the parties.

(3) Background

1.5 We have framed the definitions in the preceding paragraph in very broad terms. We have done so deliberately because we think it is desirable to take account of the growing range of services which are becoming available in Scotland to assist couples who are or may become involved in proceedings for divorce, separation or parental rights including custody and access.[1] We review these services in the following paragraphs. The factor which is common to all of them, and which invites the question whether the present law is adequate, is that a neutral third party intervenes to assist the couple to reach a decision and that in this process information is disclosed which may be relevant in subsequent legal proceedings.

---

below.

[1] A dispute as to custody or access may arise not only between the child's parents but also between other persons such as a parent and a grandparent. Generally, however, the services to which we refer are used by spouses or cohabitants.

1.6 Among the bodies which provide such services in Scotland are Marriage Counselling Scotland (formerly the Scottish Marriage Guidance Council), the Scottish Catholic Marriage Advisory Council and the Scottish Association of Family Conciliation Services (SAFCOS). The aims and objectives of Marriage Counselling Scotland include the promotion, development and co-ordination of a counselling service throughout Scotland for those in marriage or other intimate personal relationships. Counselling is provided by 15 local councils situated throughout the country from Dumfries to Orkney. The objectives of the Scottish Catholic Marriage Advisory Council include helping people "to prepare for, achieve and sustain successful marriages and to support them when their marriages break down". The Council provides "a confidential, non-judgemental counselling service for married people and others".[1] It does so at centres in Aberdeen, Ayrshire, Dundee, Edinburgh, Falkirk, Glasgow, Lanarkshire and Paisley.

1.7 SAFCOS is concerned with the provision of conciliation services. As we have already explained,[2] the object of conciliation is to assist the parties to resolve outstanding differences between them once it is clear that their partnership is at an end. It has been defined as:[3]

> "a structured process in which both parties to a dispute meet voluntarily with one or more impartial third parties

---

[1] Catholic Marriage Advisory Council Handbook (nd), pp 3-4.

[2] Para 1.4 above.

[3] L Parkinson, Conciliation in Separation and Divorce (1986), p 52.

> (conciliators) who help them to explore possibilities of reaching agreement, without having the power to impose a settlement on them or the responsibility to advise either party individually."

The definition given in the Report of the Committee on One-Parent Families (the Finer Committee) is often quoted:[1]

> "By 'conciliation' we mean assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements."

This definition has been criticised on the grounds that in many cases the breakdown of the marriage is not "established" in any formal sense; and that the definition could apply to conciliatory advice from solicitors and other professionals, rather than to a formal process of conciliation undertaken by a neutrally placed conciliator.[2] The Finer Committee's definition was adopted, however, in the Report of the Matrimonial Causes Procedure Committee (the Booth Committee).[3] The latter Committee added:[4]

> "It is of the essence of conciliation that responsibility remains at all times with the parties themselves to identify

---

[1] (1974) Cmnd 5629, para 4.288.

[2] Parkinson, op cit, p 65.

[3] HMSO 1985, para 3.10. The Finer Committee's definition is also quoted with approval in Bromley's Family Law (7th ed, 1987), p 213.

[4] Ibid.

> and seek agreement on the issues arising from the breakdown of their relationship. The conciliator's role is to assist the parties in this process. He should be neutral not only in the sense that he does not take sides as between the parties, but also in the sense that he does not have a preconceived solution to any particular problem."

A conciliator is accordingly to be distinguished from an adjudicator (who has the power to impose a solution), an arbiter (by whose decision the parties have agreed to be bound) and a negotiator (who acts on behalf of one party only).[1]

1.8 In England,[2] conciliation services which were independent of the courts[3] were first established in 1979. The National Family Conciliation Council (NFCC) was established by 1983, and there are now many such services in England which are affiliated to it. In Scotland, the Scottish Family Conciliation Service (Lothian) was set up in 1984 to promote and support family conciliation in Scotland by developing the services and maintaining high standards of practice. Other services were later formed elsewhere in Scotland, and SAFCOS was established in 1986 to promote the development of

---

[1] Bromley, op cit, p 213.

[2] J M Eekelaar and R Dingwall, "The Development of Conciliation in England", Divorce Mediation and the Legal Process ed R Dingwall and J M Eekelaar (1988), p 3.

[3] The court welfare services which in England are operated by the probation service and are available to parties to matrimonial proceedings have no counterpart in the Scottish civil courts.

conciliation throughout Scotland.[1] There are now a number of local services affiliated to SAFCOS. There is a service in each sheriffdom, but not in certain of the remoter or more sparsely populated sheriff court districts.

1.9 A conciliation process undertaken by a service affiliated to SAFCOS is primarily concerned with the negotiation of workable arrangements which are in the best interests of the children of a partnership which has come to an end. The conciliators do not give legal advice, but rather aim to complement and supplement the services provided by the legal profession to couples in dispute. Thus any question of divorce or separation may be discussed in outline only, and matrimonial property and finance only where questions concerning them arise incidentally to a custody or access dispute: it is then impressed on the parties that the service recommends that they discuss such matters with their solicitors. All the family conciliation services affiliated to SAFCOS have agreed to abide by a National Code of Practice for Conciliators and Solicitors which has been issued by SAFCOS.

1.10 While the services affiliated to SAFCOS are principally concerned with child-related disputes, it is not impossible that in the future these services, or others, may offer "comprehensive mediation", that is, mediation on all issues, including financial arrangements, housing and other property. Such mediation is now offered in England

---

[1] Susan Matheson, "Family Conciliation Services in Scotland", Family Conciliation Within the UK ed Thelma Fisher (1990), p 10.

by the Family Mediators Association (FMA).[1] In the form of mediation offered by the FMA the task of mediation is undertaken by two mediators who work together as a team. One is an experienced family solicitor and the other is professionally qualified in some other area such as counselling, psychology, family therapy or social work and is experienced in working with couples and families. The role of the mediators is to help couples to consider the issues which have to be settled and to work out proposals for settlement which the mediators summarise for them. Since the mediation offered is not a substitute for legal advice, each party is recommended to seek such advice about the summary from a solicitor. It may then be made the subject of a legally binding agreement. The FMA operates in accordance with a code of practice approved by the Law Society of England and Wales. FMA mediation is now available in many parts of England. It seems not unreasonable to assume that comprehensive mediation, whether offered by the FMA or by some other organisation, may become available in Scotland. That prospect would appear to emphasise the desirability of clarification of the law relating to confidentiality in family mediation.

1.11 Mediation in family disputes may be undertaken not only by organisations but also by individuals. A clergyman, doctor, social worker or even a friend of the family who has no relevant professional qualification may become involved in mediation in a family dispute if the parties go to

---

[1] L Parkinson, "Family Mediators Association" [1989] Fam Law 48, "Co-Mediation with a Lawyer Mediator" [1989] Fam Law 135, "Mediation Matters" [1990] Fam Law 477.

him or her for help in resolving their difficulties. There is a question whether the law should prescribe any rules concerning the confidentiality of such completely informal mediation, or should confine itself to regulating the type of informal, but structured, process of mediation which is offered by services linked with organisations such as SAFCOS and, in England, the NFCC and the FMA.

(4) New rules of court

1.12 The proposal made to us by SAFCOS was prompted by the enactment of new rules of court which empower the court in actions concerned with the custody of, or access to, a child to refer the parties to a conciliation service. The new rules came into force on 9 April 1990. Rule 170B(15) of the Rules of the Court of Session[1] provides:

> "Referral to family conciliation service. In any action where the custody of, or access to, a child is in dispute, the court may, at any stage of the action where it considers appropriate to do so and the parties to the dispute agree, refer that dispute to a specified Family Conciliation Service."

Rule 132F of the Ordinary Cause Rules of the Sheriff Court[2] provides:

> "Referral to Family Conciliation Service
>
> 132F. In any cause where the custody of, or access to, a child is in dispute the sheriff may, at any stage of the

---

[1] Inserted by the AS (Rules of the Court of Session Amendment No 1) (Miscellaneous) 1990 (SI 1990, No 705), para 2(12).

[2] Inserted by the AS (Amendment of Sheriff Court Ordinary Cause, Summary Cause, and Small Claim, Rules) 1990 (SI 1990 No 661), para 2(3).

> proceedings where he considers it appropriate to do so, refer the parties to a specified Family Conciliation Service."

The only distinction between the two rules is that in the Court of Session a reference requires the parties' consent, but a sheriff may make a reference without their consent.[1]

1.13 Unlike some of the procedural provisions about mediation in certain other jurisdictions which we notice in Parts III and IV of this Paper, the new rules apply only to court actions where custody or access is in dispute and they do not empower the court to require the specified family conciliation service to submit any report to the court. In terms of an informal agreement between Scottish Courts Administration and SAFCOS, when the court makes a referral under the new rule the following procedures are adopted. The clerk of court intimates the referral to the specified local conciliation service: that service approaches the parties to arrange for conciliation to take place; and once parties have attended, or in the event of one or both of the parties not attending, the service informs the court that this stage in the process has been concluded. Where the court has continued the case to allow the conciliation process to take place, but it appears that the process will take longer than the period of continuation, the local conciliation service may intimate that fact to the clerk of court before the case calls at the continued diet. No other

---

[1] It may be that the object of making the distinction was to ascertain over a period how each rule would work in practice, with a view to the possible enactment of uniform rules in due course: SAFCOS Annual Report 1989-1990, p 9.

provision, formal or informal, is made for any communication by the service to the court.[1]

1.14 Since the new rules have come into force, a question has arisen as to whether, and if so, to what extent, information acquired in the course of conciliation regarding a dispute as to the custody of, or access to, a child should be privileged from disclosure to the court on the ground of confidentiality. Under the present law of Scotland, a conciliator who was called to give evidence in court would be a competent witness - that is, legally qualified to give evidence - and probably would be obliged to answer all questions put to him or her which were competent and relevant - that is, legally correct and sufficiently related to the issue under investigation. It seems likely that if it were to be argued that he or she should not answer any question about information which he or she had acquired during the conciliation process on the ground that the information was confidential, the court would hold that the argument was unsound and that the conciliator was obliged to answer.[2] SAFCOS, however, like other bodies which provide

---

[1] The absence of a duty to report to the court appears to be an advantageous feature of the Scottish rules. In jurisdictions where such a duty exists it complicates the mediator's role and inhibits the parties from speaking frankly: Hugh McIsaac, "Confidentiality: An Exploration of Issues" (1985) 8 Mediation Quarterly 57 at pp 60-63. The English courts have emphasised that mediation and reporting are different functions and should not be performed by the same person: Re H (Conciliation: Welfare Reports) [1986] 1 FLR 476. The Booth Committee (see para 1.7 above) made a recommendation to that effect (para 4.63).

[2] The present law is discussed in Part II.

mediation services, regards confidentiality (in the popular sense)[1] as one of the principles of conciliation. It has issued a Statement of Principles of Conciliation which includes the following:

> **"4. Conciliation is Confidential.**
>
> Conciliation services regard proceedings of conciliation interviews and related correspondence and records as strictly confidential, except in the case of a criminal offence against children being firmly alleged."

In the National Code of Practice for Conciliators and Solicitors[2] paragraph 4(iv)(d) provides:

> "Solicitors should make it clear to clients that the content and process of conciliation is intended by the conciliation services to be confidential, although this cannot be absolutely guaranteed. In the event of a criminal offence against a child being alleged the conciliation services must reserve the right to refer the allegation to the appropriate authorities."

1.15 Notwithstanding the view taken by SAFCOS of the confidentiality of the conciliation process, cases have arisen in which conciliators have been cited as witnesses in cases where custody or access has been in dispute. While no case has yet come to our notice in which a conciliator has been called to give evidence in the witness box, it is not impossible that such cases will arise. The Judicial Procedure Committee of the Law Society of Scotland has expressed concern that in a case where conciliation has failed, a solicitor might be

---

[1] See para 1.3 above.

[2] See para 1.9 above.

subject to an allegation of professional negligence if he failed to cite the conciliator to give evidence in a defended divorce where such evidence would be to the client's advantage. Conversely, say the Committee, such an allegation might be made by a client who had not been warned that what was disclosed to a conciliator was not confidential, if the matters disclosed were used in evidence against the client, the opposing party having cited the conciliator.[1] Cases have come to our notice in which, as a result of the publication of the Committee's views, a solicitor has been reluctant to recommend conciliation to his client, and a solicitor for a party in a case in which conciliation had taken place considered himself obliged to cite the conciliator as a witness at the proof.

1.16 We understand that conciliators are most reluctant to give evidence in court of any information acquired during the conciliation process. It is argued that unless the law attaches a high degree of confidentiality to such information, parties will be reluctant to take part in conciliation and the success of conciliation as a means of resolving such disputes will be put at risk. On the other hand it may be argued that any privilege which might be attached to such information where the parties are in dispute over custody or access would require to be qualified to some extent in view of the court's duty in such cases to regard the welfare of the child involved

---

[1] (1990) 35 JLS 251. We express no opinion as to whether these views are well founded.

as the paramount consideration.[1] SAFCOS has recognised that an exception would have to be made where it was alleged in the course of the process that a criminal offence against a child had been committed.[2] There are further arguments in favour of other exceptions.[3]

(5) Scope of Discussion Paper

1.17 We take it to be implicit in the enactment of the new rules of court that the Scottish courts appreciate the potential value of conciliation in disputes about custody or access. It therefore appears to be important that the effective functioning of the conciliation services to which the parties are referred by the courts should not be impaired by any remediable shortcoming in the law. The present law concerning the privilege of information from disclosure on the ground of confidentiality was developed long before the establishment of conciliation services, and whether the law should now be altered in some way to take account of the work of these services has become a question of urgent practical importance.

1.18 This Discussion Paper therefore seeks views on a number of issues. The principal questions are these. In principle, should information acquired in the course of family mediation be protected by privilege to any extent? If so, to what processes of mediation should the privilege apply? Should the privilege be conferred only on the parties to the

---

[1] Law Reform (Parent and Child) (Scotland) Act 1986, s 3(2). See para 5.8 below.

[2] See para 1.9 above.

[3] See paras 5.57-5.69 below.

dispute, or should it extend to the mediator as well? Finally, should the privilege be subject to any exceptions and, if so, what should those exceptions be?

(6) Summary of Discussion Paper

1.19 In Part II of this Discussion Paper we outline the present law of Scotland concerning the competence and compellability of witnesses and the protection of information from disclosure on the ground of confidentiality. This outline demonstrates that information acquired in the course of family mediation has never been held to occupy any special position in Scots law. We examine the principles underlying the privileges founded on confidentiality and the present rules concerning communications relative to litigation in order to see whether they might provide any justification or model for any new privilege in aid of family mediation.

1.20 In Parts III and IV we survey the laws of certain other jurisdictions concerning the confidentiality of family mediation processes. Many other legal systems have had considerable experience of family mediation, and the confidentiality of the process has been regulated in a wide variety of ways. Some of the courses adopted may be thought to be suitable, at least in part, for adaptation in Scotland.

1.21 In Part V we discuss the issues and set out a number of possible options for reform of the law. Part VI consists of a summary of propositions and questions for consideration.

(7) Other problems

1.22 Questions of privilege are not the only difficult legal issues which may arise in the context of family mediation. Family mediation is only one of a variety of processes whereby the parties to a dispute may resolve their differences with the assistance of a third party as an alternative to resorting to the courts or to arbitration. Such processes are forms of what has come to be called "alternative dispute resolution" or "ADR". It is arguable, therefore, that the question whether there should be a privilege in favour of family mediation should not be considered in isolation from general questions of principle which arise from the adoption of ADR procedures.

1.23 One such general question is: What is the legal position of the mediator - not only in family mediation, but in other forms of mediation? If he is neither an adjudicator nor an arbiter,[1] does it follow that he is not exempted from civil liability for anything he says or does in his capacity as a mediator? In that event he might be sued for negligence in the performance of his duty.[2] But if so, what is the standard of care which he is obliged to exercise: does a mediator profess any special skill or knowledge, so that he is liable in damages for negligence if he fails to show such skill or knowledge and to take such care as would reasonably be expected of a normally skilled and

---

[1] See para 1.7 above.

[2] See Arenson v Casson Beckman Rutley & Co [1977] AC 405; Murphy v Brentwood District Council [1990] 3 WLR 414.

competent mediator?[1] And to whom does he owe the duty of care? If he is mediating in a dispute about a child, does he owe any duty of care towards the child? Suppose that one of the parties credibly informs him that the child is going to suffer some serious harm; the mediator could do something to prevent the harm but does nothing, and the harm is done: could an action of damages be brought against the mediator on behalf of the child on the ground of failure to take reasonable care for the child's safety?[2] Or if, where spouses have entered into mediation about financial or property arrangements, one of them relies on a mis-statement by the mediator and consequently suffers economic loss, would the mediator be liable to that spouse in damages? Again, it may be that a mediator could be sued by a party on the ground of breach of contract. Sometimes an organisation which offers mediation services sets out in a document certain conditions which the parties are required to accept. Is there in any event a contractual relationship between the parties on the one hand and the mediator, or the organisation, on the other? If so, what terms, if any, may be implied into the contract? Could a written contract lawfully limit or exclude liability on the part of the mediator?

1.24 The foregoing paragraph does not exhaust the legal questions relative to ADR procedures. It may be said that such questions are hypothetical and unlikely to arise in practice: even if anyone

---

[1] Hunter v Hanley 1955 SC 200.

[2] Compare Tarasoff v Regents of the University of California (1976) 17 Cal (3d) 425. See para 4.38 below.

considered that he had grounds for suing a mediator, he would probably be advised not to do so, not only because of the novelty of the legal issues but also because of difficulties of proof. Nevertheless we do not regard such questions as unimportant. The devising of appropriate methods of mediation, the training of mediators and the drafting of documents whose terms clients are required to accept all depend on a correct appreciation of the relevant rules of law. Further, if the use of ADR procedures increases in this jurisdiction as it has done in others, it is not impossible that cases might come before the courts in which such questions would arise for decision. In other jurisdictions issues raised by ADR have attracted much attention,[1] and have been studied by law reform bodies.[2] We consider, however, that it is justifiable to isolate in this Discussion Paper the topic of confidentiality in family mediation not only because of the urgent need to resolve issues of immediate practical importance but also because it seems possible to consider these issues without coming to any concluded view on other matters. Thus, for example, we take account of the possibility that the mediator might be sued,

---

[1] eg H T Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harvard Law Review 668.

[2] Alternative Dispute Resolution: Training and Accreditation of Mediators (1989) New South Wales Law Reform Com, DP No 21; Dispute Resolution: A Directory of Methods, Projects and Resources (1990) Alberta Law Reform Institute, Research Paper No 19.

without expressing any opinion as to the validity of any grounds on which such an action might be founded.[1]

(8) Acknowledgements

1.25 In our examination of this subject we received considerable help from Miss Joanna Cherry, LL.B (Hons), LL.M, Dip LP whom we employed during the summer vacation of 1990 to assist us with our work. Miss Cherry undertook extensive research on our behalf in Edinburgh and London and wrote a number of papers for us on the laws of overseas jurisdictions as well as on other matters. Part IV of this Paper, in particular, draws on Miss Cherry's work. We also received valuable advice and information from Professor Brenda Hoggett, QC, who is both a member of the Law Commission for England and Wales and Chairman of the National Family Conciliation Council; Mrs Frances Love, Director of Marriage Counselling Scotland; Miss Susan Matheson, Director of SAFCOS; Professor John P McCrory, Professor of Law and Director of the Dispute Resolution Project, Vermont Law School; Mrs Laura McGrath, Scottish Officer, The Scottish Catholic Marriage Advisory Council; Mr Hugh McIsaac, Director of the Family Mediation and Conciliation Service, Los Angeles County Superior Court; and Mr Andrew Stout, Director of Court Counselling, Family Court of Western Australia. We gratefully acknowledge their assistance.

---

[1] See para 5.77 below.

PART II - THE PRESENT LAW OF SCOTLAND

(1) Introduction

2.1 We have already stated that under the present law of Scotland a conciliator who was called as a witness would probably be obliged to answer questions about information acquired during the conciliation process notwithstanding that he or she regarded that information as confidential.[1] In this Part of the Paper we set that statement in its legal context by explaining briefly the present law concerning the extent to which witnesses are obliged to answer questions in court and the extent to which the law confers privileges to withhold information from the court. We examine the justifications for these privileges and the extent to which they are limited by the law. In Part V we shall consider whether there is any comparable justification for a new privilege in favour of information acquired in the course of family mediation and, if so, to what extent it should be subject to any limitations.

(2) General rules[2]

2.2 As a general rule, all persons are both competent, or legally qualified, to give evidence, and compellable, or obliged by law to answer all questions put to them while testifying which are competent and relevant, that is, which do not contravene any rule of law and are sufficiently

---

[1] Paras 1.3, 1.9 above.

[2] The topics considered in this Part are dealt with in A G Walker and N M L Walker, The Law of Evidence in Scotland (1964) (hereafter "Walkers"), chaps 28 and 31, and I D Macphail and L M Ruxton, "Evidence" in The Laws of Scotland: Stair Memorial Encyclopaedia (hereafter "Encyclopaedia"), vol 10 (1990) paras 524-537, 668-689.

related to the matter under investigation. The rule is subject to the following qualifications, which are broadly stated and ignore the special rules concerning the accused and his spouse in criminal cases.

2.3 There is a small category of persons who are not competent witnesses: persons unable through extreme youth or mental or physical incapacity to understand questions or answer them intelligibly; and persons who have been present in court, where it is not possible to circumvent the archaic provisions of section 3 of the Evidence (Scotland) Act 1840 or the equivalent sections 140 or 343 of the Criminal Procedure (Scotland) Act 1975 which are designed to exclude such persons unless certain conditions are fulfilled. There is a further small category of persons who are not competent witnesses to certain matters: Supreme Court judges, to proceedings before them; jurors, to their deliberations; arbiters, to their awards, except in actions for their enforcement or reduction; and prosecutors, in cases they are conducting.

2.4 Witnesses who are competent but enjoy a freedom to choose whether or not to testify traditionally fall into two classes: those who are not compellable, and those who possess a privilege to refuse to answer questions on certain matters. In each case the effect of the law is the same: the witness may properly withhold from the court evidence which is otherwise admissible. Those who are not compellable are the Sovereign, foreign Heads of State, heads of diplomatic missions and the like, and Members of Parliament.

2.5 "Privilege in the law of evidence is the right of a person to insist on there being withheld from a judicial tribunal information which might assist it to ascertain facts relevant to an issue upon which it is adjudicating."[1] The privilege may be claimed by a witness or haver (the possessor of a document[2] or other physical object) or, where the desired information has been obtained in the course of a particular type of relationship, by a party to the relationship. The ground on which the law allows the information to be withheld is that to answer the question put or to supply the document sought would infringe some interest the protection of which, in the eyes of the law, is more important than the ascertainment of the truth and the administration of justice in the particular case before the court.[3] It will be seen from the outline of the law in the following paragraphs that the common law requires the protection of such an interest to be founded on principle and that it limits the scope of the protection to that which is strictly necessary. The privileges which are recognised by the law of Scotland are those against self-incrimination and those founded on confidentiality. The privileges against self-incrimination are founded on the well-established principle that no one is bound to incriminate himself or herself. They entitle a witness to

---

[1] Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings) (1967, Cmnd 3472), para 1.

[2] For our definition of "document" see para 1.3. Since other physical objects are rarely sought, for convenience we refer hereafter only to documents.

[3] See R Cross and C Tapper, Cross on Evidence (7th ed, 1990) (hereafter "Cross"), pp 416-418.

refuse to answer a question if a true answer will render him or her liable to prosection and conviction for a crime or will involve an admission of adultery, which used to be regarded and punished as a crime.[1] The privileges founded on confidentiality are noticed in paragraphs 2.7-2.22 below.

2.6 The exclusion of evidence on the ground of public policy, where the court is satisfied that disclosure would be against the public interest, used to be said to be based on "Crown privilege". That expression, however, came to be regarded as misleading because there is no question of any privilege in the ordinary legal sense of the word: the real question is whether the public interest requires that the information shall not be disclosed and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence.[2] This ground of exclusion of evidence is now generally referred to in England as "public interest immunity". In Scotland, an objection on this ground has not yet been upheld when stated by a person or body other than a Minister of the Crown or the Lord Advocate.[3] There is not yet any

---

[1] It has been submitted that the privilege as to adultery should be abolished: I D Macphail, Evidence (1987) (hereafter "Macphail"), para 18.18. The corresponding English privilege was abolished by s 16(5) of the Civil Evidence Act 1968.

[2] R v Lewes JJ, ex p Home Secretary [1973] AC 388 per Lord Reid at p 400.

[3] Higgins v Burton 1968 SLT (Notes) 52; Strathclyde RC v B, Sheriff Principal Dick, Glasgow Sh Ct, 17 February 1984, unreported (see Macphail,

judicial support in Scotland for the view that objections to the disclosure of evidence on the ground of public policy should be statable by local authorities or other agencies such as the RSSPCC.[1] We consider later a view that claims to privilege for information acquired in family mediation should be tested by reference to the principles of public interest immunity.[2]

(3) Confidentiality

2.7 Certain information is privileged from disclosure to the court on the ground of confidentiality. But the mere fact that information may be regarded as confidential by reason of a contractual, professional or moral obligation does not of itself create a right or privilege to withhold it in legal proceedings.[3] Privileges founded on confidentiality are conferred principally in relation to communications between spouses and communications relative to litigation. These categories, and the principles underlying them, are considered in the following paragraphs. The principles and rules concerning communications between a professional legal adviser and his client, and concerning the privilege conferred on admissions made by a party in the course of abortive negotiations for settlement of a dispute, may suggest justifications and models for the proposed new privileges. The other privileges

---

para S18.54C); WP v Tayside RC 1989 SCLR 165.

[1] cf D v NSPCC [1978] AC 171, discussed in para 3.13 below.

[2] See paras 5.15-5.16 below.

[3] Santa Fe International Corporation v Napier Shipping SA 1985 SLT 430. See para 1.3 above.

founded on confidentiality are noticed only briefly since they seem unhelpful in this respect. The law is usually stated with reference to "communications" and many of the cases are concerned with questions asked of a witness about oral communications. The same principles apply, however, to written communications and other documents, and whether the person from whom the information is sought is a witness or the possessor of a document.

(a) Communications between spouses

2.8 The privileges conferred on communications between spouses were created by statute. Since they may be difficult to justify on grounds of principle, we only mention them briefly for the sake of completeness. The earliest provision is section 3 of the Evidence (Scotland) Act 1853, which makes provision for the protection of communications in civil cases to the effect that neither spouse is competent or compellable to give evidence against the other of any matter communicated by the other to him or her during the marriage. In England, the equivalent provision was abolished in relation to civil proceedings by section 16(3) of the Civil Evidence Act 1968, and in relation to criminal proceedings by Schedule 7, Part V of the Police and Criminal Evidence Act 1984. The next provision is section 7 of the Law Reform (Miscellaneous Provisions) Act 1949, which created a new privilege concerning marital intercourse. No convincing justification in principle for this privilege has ever been identified. In England the statutory successor of section 7 was abolished in relation to civil proceedings by section 16(4) of the Civil Evidence

Act 1968, and in relation to criminal proceedings by section 80(9) of the Police and Criminal Evidence Act 1984. Finally, the Criminal Procedure (Scotland) Act 1975 provides, in effect, that in criminal proceedings a spouse is competent to disclose any communication made between the spouses during the marriage, but may not be compelled to do so.[1] This rule is also difficult to justify on grounds of principle.[2] In England, section 1(d) of the Criminal Evidence Act 1898, which is to the same effect, was repealed by section 80(9) of the Police and Criminal Evidence Act 1984.

(b) Communications relative to litigation

(i) Communications between professional legal adviser and client

2.9 Communications between a professional legal adviser and his client are privileged although they may not relate to any suit depending or contemplated or apprehended.[3] It is important to observe that such communications occupy an exceptional position in the common law of Scotland, since no privilege has been explicitly conferred by the common law on communications between other professional persons and their clients, although there appear to be doubts as to communications

---

[1] ss 143(2)(b), 348(2)(b), substituted by the Criminal Justice (Scotland) Act 1980, s 29, and in effect restating s 1(d) of the Criminal Evidence Act 1898: see Hunter v HMA 1984 JC 90 at p 92.

[2] E M Clive, Husband and Wife (2nd ed 1982), pp 370-371.

[3] McCowan v Wright (1852) 15 D 229 per Lord Wood at p 237. See also Lady Bath's Exrs v Johnston 12 November 1811, Fac Dec 345; Munro v Fraser (1858) 21 D 103 per L P McNeill at p 107.

between clergymen and penitents[1] and between doctors and patients.[2] By statute, privileges have been conferred on communications to a conciliation officer in an industrial dispute,[3] on persons responsible for publications,[4] and on communications with patent agents and trade mark agents and with persons providing conveyancing or executry services.[5]

2.10 An examination of the justification for the privilege conferred on communications between a professional legal adviser and his client indicates the approach of the common law to the question whether a claim to privilege should be recognised. Since the effect of upholding the claim is to withhold relevant information from the court "at the expense of what may be abstract justice to one of the parties", it is essential to ascertain "whether there is some interest protected by the privilege which is at least as significant as the proper administration of justice."[6] In the case of communications between a professional legal adviser and his client, the justification for the privilege is that without it the administration of justice would be impossible. The principle is well

---

[1] See para 2.20 below.

[2] See para 2.21 below.

[3] See para 2.17 below.

[4] See para 2.18 below.

[5] See para 2.19 below.

[6] Cross, p 417.

settled,[1] and has been re-stated in modern language as follows:[2]

> "The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. None the less there are powerful considerations which suggest that the privilege should be confined within strict limits."

---

[1] Stair, IV, 43, 9(8); Erskine, Institute, IV 2, 25; Bell, Principles (10th ed, 1899), para 2254; Hume, ii, 350.

[2] Grant v Downs (High Court of Australia) (1976) 135 CLR 674, per Stephen, Mason and Murphy JJ at p 685 discussing the privilege attaching to communications and materials submitted by a client to his solicitor for the purpose of advice or for the purpose of use in existing or anticipated litigation. These dicta are not affected by the observations on Grant v Downs in Waugh v British Railways Board [1980] AC 521. The dicta of Lord Brougham LC in Greenough v Gaskell (1833) 1 My & K 98 at p 103 cited by W G Dickson, A Treatise on the Law of Evidence in Scotland (3rd ed, 1887) (hereafter "Dickson"), para 1663, are to the same effect.

2.11 It has been said in the English courts that the protection afforded by the privilege "is of a very limited character" and will not be extended "beyond what necessity warrants";[1] and that the privilege "is a ground of exemption from production adopted simply from necessity, ... and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety".[2] For the purposes of this Discussion Paper it will be useful to note the limits which have been placed on the privilege by the Scottish courts. First, the communication must have been made for professional purposes between a qualified lawyer and the party by whom he is professionally instructed.[3] "Made for professional purposes" means "for the purpose of either seeking advice or giving instructions",[4] although it may that such purposes would be broadly construed.[5] This qualification means, however, that a conversation between a lawyer and his client is not necessarily privileged.[6] As the professional relationship is of the essence of the privilege, communications made to a non-professional person in the capacity of

---

[1] Wheeler v Le Marchant (1881) 17 Ch D 675 per Jessel M R at pp 681-682.

[2] Glyn v Caulfield (1851) 3 Mac & G 463 per Lord Truro LC at p 474.

[3] Hume, ii, 350; Dickson, para 1665. Dickson states that the privilege extends to "counsel and law agents, with their several clerks".

[4] Walkers, para 393.

[5] Balabel v Air India [1988] 1 Ch 317 at pp 330-332.

[6] Minter v Priest [1930] AC 558 at p 568 per Lord Buckmaster LC (with whom Lord Thankerton agreed at pp 586-587).

legal adviser are not generally protected.[1] Further, the privilege is said to apply only to matters which formed the subject of the consultation: while communications of both an oral and written nature are protected, the privilege does not apply to facts observed, of which the adviser is bound to give evidence.[2]

2.12 It is also important to observe that the title to claim the privilege lies with the client, not with the adviser. If the client waives it, the adviser is obliged to testify or to produce any documents he may hold.[3] If the client calls the adviser as a witness, there is no question of confidentiality.[4]

2.13 Further, there is no privilege where the issue before the court is the existence of the professional relationship itself;[5] or where the extent of the adviser's authority is in dispute;[6] or where the question whether a particular communication took place is necessarily the subject-matter of the inquiry.[7] Nor is there any privilege where fraud or some other criminal or

---

[1] Dickson, para 1666.

[2] Wilkinson, The Scottish Law of Evidence (1986), (hereafter "Wilkinson"), p 95, citing English authority.

[3] Bell, Prin, para 2254; Dickson, para 1682; Walkers, para 393.

[4] Evidence (Scotland) Act 1852, s 1.

[5] Fraser v Malloch (1895) 3 SLT 211.

[6] Kid v Bunyan (1842) 5 D 193.

[7] Anderson v Lord Elgin's Trs (1859) 21 D 654.

unlawful act is alleged against a party, and his professional legal adviser has been directly concerned in carrying out the very transaction which is the subject-matter of inquiry.[1]

(ii) Communications made post litem motam

2.14 Communications made to or by a litigant with a view to the preparation of his case are privileged. The justification of the rule is that it facilitates the obtaining and preparation of evidence by a party to an action in support of his case.[2]

(iii) Privileges in aid of negotiations for settlement

2.15 Admissions made by a party in the course of abortive negotiations for settlement of a dispute are privileged and may not be admitted as evidence in future proceedings.[3] The privilege is justified by the public interest in encouraging the settlement of disputes expeditiously and without recourse to litigation or, where litigation has ensued, with as little expenditure of time and money as possible. Without it, negotiations involving compromise on both sides for the purpose of avoiding litigation to judgment would be

---

[1] Micosta SA v Shetland Islands Council 1983 SLT 483 at p 485. See also McCowan v Wright (1852) 15 D 229; Morrison v Somerville (1860) 23 D 232; Millar v Small (1856) 19 D 142.

[2] Anderson v St Andrew's Ambulance Association 1942 SC 555 per Lord Moncrieff at p 559.

[3] Dickson, para 305; Fyfe v Miller (1835) 13 S 809; Williamson v Taylor (1845) 7 D 842; Bell v Lothiansure Ltd 1990 SLT 58.

impossible.[1] Offers made as a result of such negotiations are usually said to be made "without prejudice" to the position of the party making them.[2] The court may, however, take such offers into consideration when determining questions of expenses.[3]

2.16 The rule was recently considered by the House of Lords in an English appeal, Rush & Tompkins Ltd v Greater London Council[4] Lord Griffiths, with whose speech the other judges agreed, said:[5]

> "The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in Cutts v Head [1984] Ch 290 at 306:
>
> > 'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in

---

[1] Rush & Tompkins Ltd v Greater London Council [1989] AC 1280. See para 2.16 below.

[2] Assessor for Dundee v Elder 1963 SLT (Notes) 35; Burns v Burns 1964 SLT (Sh Ct) 21; Ware v Edinburgh D C 1976 SLT (Lands Tr) 21.

[3] Critchley v Campbell (1884) 11 R 475 per LP Inglis at p 480; O'Donnell v AM & G Robertson 1965 SLT 155 (sequel, 1965 SLT (Notes) 32).

[4] [1989] AC 1280.

[5] Ibid, pp 1299-1300.

> the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed Clauson J in Scott Paper Co v Drayton Paper Works Ltd (1927) 44 RPC 151, 156, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'
>
> "The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent on the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

In Rush & Tompkins Ltd the House of Lords held that "without prejudice" correspondence entered into with the object of effecting the compromise of an action remained privileged after the compromise had been reached and accordingly was inadmissible in any subsequent litigation connected with the same

subject-matter whether between the same or different parties and, furthermore, was also protected from subsequent discovery by other parties to the same litigation.

(c) Miscellaneous statutory privileges

2.17 A statutory privilege in favour of conciliation in disputes relating to employment is contained in the Employment Protection (Consolidation) Act 1978. Sections 133 and 134, as amended, make provision as to conciliation officers. Each section places a conciliation officer under a duty to endeavour to promote the settlement of certain complaints in prescribed circumstances. Each of sections 133(6) and 134(5) provides:

> "Anything communicated to a conciliation officer in connection with the performance of his functions under this section shall not be admissible in evidence in any proceedings before an industrial tribunal, except with the consent of the person who communicated it to that officer."

The object of this provision is to preserve the confidentiality of conciliation in the hope of promoting a settlement.[1] It was said of the predecessor of section 134(5):[2]

> "In our judgment, this subsection is intended to exclude evidence that statements were made or documents communicated to a conciliation officer in connection with the performance of his functions under section 146. It is not intended to render evidence inadmissible which could have been given if there had been no communication to the conciliation

---

[1] Hepple & O'Higgins, Employment Law (4th ed, 1981), p 372.

[2] M & W Grazebrook Ltd v Wallens [1973] 2 All ER 868 at pp 869-870.

officer. As the tribunal pointed out, were it otherwise either party could conceal any inconvenient evidence by simply communicating it to a conciliation officer. The test is whether evidence exists in an admissible form apart from evidence based upon such communication to the conciliation officer."

2.18 Section 10 of the Contempt of Court Act 1981 provides:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

In In re an Inquiry under the Company Securities (Insider Dealing) Act 1985 Lord Griffiths said:[1]

> "The effect of the section is to recognise and establish that in the interests of a free and effective press it is in the public interest that a journalist should be entitled to protect his sources unless some other overriding public interest requires him to reveal them. The section is so cast that a journalist is prima facie entitled to refuse to reveal his source and a court may make no order that has the effect of compelling him to do so unless the party seeking disclosure has established that it is necessary under one or other of the four heads of public interest identified in the section."

The privilege is not confined to journalists but extends to any person who is responsible for a "publication", which includes any speech, writing,

---

[1] [1988] AC 660 at p 702. See also Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339 and, on "the interests of justice", X Ltd v Morgan-Grampian (Publishers) Ltd [1990] 2 WLR 1000.

broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public.[1]

2.19 The Copyright, Designs and Patents Act 1988 confers privileges on communications with patent agents and trade mark agents by extending to them "the rules of law which confer privilege from disclosure in legal proceedings in respect of communications".[2] The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 extends the privilege conferred on communications between professional legal adviser and client[3] to communications made to or by (a) an independent qualified conveyancer or an executry practitioner in the course of his or its acting as such for a client, or (b) a recognised financial institution in the course of providing executry services for a client.[4]

(d) Doubtful cases

2.20 It is doubtful whether the law of Scotland confers any privilege on communications made to a clergyman which are confidential in the popular sense of the word.[5] It is clear that the fact that a communication was made to a clergyman is not in itself sufficient to render it privileged from

---

[1] 1981 Act, ss 19, 2(1).

[2] 1988 Act, ss 280(4), 284(4).

[3] See paras 2.9-2.13 above.

[4] 1990 Act, s 22.

[5] For an analysis of the cases and textbook writers, see Macphail, paras 18.38-S18.44.

disclosure.[1] In an unreported modern trial of a husband for the culpable homicide of his wife the trial judge apparently ruled, after hearing argument, that the court could not compel a Roman Catholic priest who had been called as a Crown witness to disclose what the dying wife had told him in the course of her last confession about who had caused her injuries. The submissions and any reasons given for the decision are not reported.[2] Earlier reported decisions are few and inconclusive.[3] Hume questions the admissibility of confessions made by a prisoner awaiting trial but favours the admissibility of confessions made during a course of criminal conduct.[4] Later writers express differing opinions.[5]

---

[1] McLaughin v Douglas and Kidston (1863) 4 Irv 273.

[2] HMA v Daniels, Lord Patrick, Glasgow High Court, September 1960, unreported, described in J Beltrami, The Defender (1980) pp 186-191.

[3] Anderson and Marshall (1728) Hume, ii, 335 (confession to clergyman admitted, but it was made in the presence of others); HMA v Hope or Walker (1845) 2 Broun 465 (confession to jailer excluded, but he acted not only as the accused's spiritual adviser but also as her agent in communicating with her friends relative to her defence). The general question of the admissibility of confessions to clergymen was expressly reserved in Hope or Walker, supra; HMA v Ross (1859) 3 Irv 434; and McLaughlin, supra.

[4] Hume, ii, 335, 350.

[5] G Tait, A Treatise on the Law of Evidence in Scotland (2nd ed, 1827), pp 396-397; A Alison, Practice of the Criminal Law of Scotland (1833), pp 471, 537, 586; Dickson, paras 1684, 1685; J H A Macdonald, The Criminal Law of Scotland (5th ed, 1948) pp 314, 315, 476, 477; W J Lewis, A Manual of the Law of Evidence in Scotland (1925) p 127; Walkers, para 397(d); Wilkinson, p 106; Encyclopaedia, para 685.

2.21 Whether privilege attaches to communications by a patient to a medical adviser is doubtful only in the sense that there appears to be no reported Scottish decision which is in point. It seems to be generally accepted that no privilege attaches to such communications.[1]

2.22 It has been stated in one textbook that communications between partners are privileged,[2] but that view is not supported by other writers and it has been submitted that it is incorrect.[3]

(e) Courts' residual discretion

2.23 In HM Advocate v Airs[4] the Court observed:

> "... it is hard to figure any circumstances in which a relevant question could, in course of a trial or proof, be judged unnecessary or not useful but, if such circumstances were ever to arise, and they could only be quite exceptional circumstances, there remains a residual discretion in the Court to excuse a witness, who seeks to be excused upon a ground of conscience, from answering a relevant question in accordance with his legal duty."

This residual discretion has not been exercised in any reported case.

(4) Summary

2.24 It appears from the foregoing review that the present law of Scotland does not recognise the

---

[1] AB v CD (1851) 14 D 177 per Lord Fullerton at p 180; AB v CD (1904) 7 F 72 at pp 74 (Note), 83, 7 F (HL) 109; Walkers, para 397(c); Wilkinson, p 105.

[2] Walkers, para 391.

[3] Macphail, para 18.52.

[4] 1975 JC 64 at p 70.

characterisation of a communication as "confidential" (in the popular sense) as justifying the withholding of relevant evidence in legal proceedings except in the cases of spouses;[1] client and professional legal adviser[2] or patent agent, trade mark agent, independent qualified conveyancer, executry practitioner or recognised financial institution providing executry services;[3] person responsible for publication and his or her source;[4] clergymen and penitent (perhaps);[5] communications made post litem motam[6] or made "without prejudice" in the course of negotiations for settlement;[7] and communications to a conciliation officer in a dispute relating to employment.[8] Pleas of confidentiality have been repelled in other cases.[9]

---

[1] Para 2.8 above.

[2] Paras 2.9-2.13 above.

[3] Para 2.19 above.

[4] Para 2.18 above.

[5] Para 2.20 above.

[6] Para 2.14 above.

[7] Paras 2.15-2.16 above.

[8] Para 2.17 above.

[9] Wright v Arthur (1831) 10 S 139 (information obtained by party's accountant in course of professional employment); McDonald v McDonalds (1881) 8 R 357 and Elder v English and Scottish Law Life Assurance Co (1881) 19 SLR 195 (medical and other reports on insured persons made to insurers); Kinloch v Irvine (1884) 21 SLR 685 (medical reports on damages claimant made to railway company, sought in unrelated action after death of claimant); and Foster, Alcock & Co v Grangemouth Dockyard Co (1886) 23 SLR 713 (communications between bankers and their correspondents as to credit of firm).

2.25 In other cases communications may be made in confidence that they will not be disclosed; and if the confidant thereafter discloses the confidence to another he or she may be held to have acted in breach of his or her professional code of ethics, or may be liable in damages for breach of confidence,[1] or both. But he or she cannot refuse to testify in court unless excused in the wholly exceptional exercise of the residual discretion,[2] because in court the ascertainment of the truth is given precedence over the respect due to the confidential nature of the communication or the professional code or obligation of the confidant.[3]

2.26 Thus, information acquired in the course of family mediation has never been held to occupy any special position in Scots law.[4] It seems likely that if a solicitor were to be professionally consulted by both husband and wife, or by both parties to a dispute concerning custody or access, communications between him and either of the parties would be privileged from disclosure, the

---

[1] D M Walker, Delict (2nd ed, 1981) pp 709-710, 913-916; Breach of Confidence (Scot Law Com No 90); Roxburgh v Seven Seas Engineering Ltd 1980 SLT (Notes) 49.

[2] Para 2.23 above.

[3] Santa Fe International Corporation v Napier Shipping SA 1985 SLT 430 at p 432.

[4] No question of confidentiality arose in Whitehall v Whitehall 1957 SC 30, where both parties founded on letters written to the wife by the Soldiers' Sailors' and Airmen's Families Association during negotiations for a reconciliation.

privilege being that of the client.[1] Again, if negotiations for the settlement of a family dispute were to take place between the parties themselves, or between their respective solicitors,[2] the privilege accorded to communications made without prejudice[3] might be held to attach to their communings. In other cases, however, it cannot be affirmed with confidence that information acquired in the course of family mediation would be protected from disclosure.

2.27 We have not been entirely certain in our predictions of what a Scottish court might decide in the event that a privilege was claimed for information acquired in the course of family mediation.[4] We have not expressed our views in definite terms because we consider that it is not impossible that, if no legislation were enacted, the Scottish courts might evolve rules on the subject by the application of appropriate principles in a series of cases in which live practical questions arose for decision. In Part V we offer consultees the option that no new law should be enacted and the creation of any privilege should be left to the courts.[5] In the following

---

[1] See para 2.12 above. Cf Harris v Harris [1931] P 10.

[2] Such negotiations do not fall within our definition of "mediation" which involves the intervention of an impartial third party: see para 1.4 above.

[3] See paras 2.15-2.16 above.

[4] Paras 1.3, 1.9, 2.1, 2.24 above.

[5] See paras 5.12-5.16 below.

Part we explain how in England and Wales the law on the subject has been judicially developed in that way.

PART III - THE LAW IN ENGLAND AND WALES

(1) Introduction

3.1 In a series of cases beginning in 1949 the courts in England and Wales have developed a privilege attaching to communications made in the course of attempts to bring about the reconciliation of estranged spouses. The new law was originally evolved by analogy with the rule concerning "without privilege" negotiations, but more recently it has been said to be founded on the public interest in the stability of marriage.[1] While this tract of authority has not yet been judicially considered in Scotland, it has been influential in other jurisdictions. The only objective of family mediation with which it is concerned is reconciliation, although it seems capable of extension to the settlement of other family disputes. Conciliation,[2] on the other hand, has been encouraged by procedural rules some of which include provisions concerning confidentiality. In recent years a number of proposals for law reform have included recommendations about the confidentiality of conciliation. In the following paragraphs we discuss in turn the case law, the procedural provisions and the relevant proposals for reform.

(2) Common law

3.2 Cross states the law in these terms:[3]

> "If a solicitor is consulted by both husband and wife, professional privilege may attach to statements made to him by

---

[1] See para 3.13 below.

[2] For the distinction between "conciliation" and "reconciliation" see para 1.4 above.

[3] Cross, p 454.

> either of them so that he may not disclose them in subsequent matrimonial proceedings without the consent of the makers.[1] The ordinary law concerning without-prejudice statements applies to negotiations between the parties personally, or between their solicitors, which take place with a view to compromising a matrimonial cause; but some recent cases have been concerned with statements made to a mediator and the question arises as to whether he can decline to give evidence concerning them without the consent of the parties. The answer is in the affirmative, and although this would probably be the case with all negotiations carried on through a mediator, the promotion of marital harmony is an additional reason in favour of the promotion of the fullest possible privilege when the dispute is between husband and wife. A reconciliation between estranged spouses is not the same thing as the compromise of a disputed claim."

3.3 In the recent cases referred to by Cross the English courts have developed a rule, which now appears to be well settled, that a privilege attaches to communications made with a view to the reconciliation of spouses. There do not appear to be any reported cases on conciliation. The privilege concerning reconciliation is that of the spouses, not of the mediator. Neither spouse can give or adduce evidence of communications made in the course of negotiations for reconciliation unless the other spouse consents; and the mediator cannot, without the consent of both spouses, disclose any communications with either of them if made while he was acting as mediator betweem them in connection with pending or contemplated matrimonial proceedings. The mediator need not be a

---

[1] Harris v Harris [1931] P 10.

person with any official status; and privilege attaches whether the initiative for reconciliation came from one of the parties or from the mediator himself. The privilege extends to communications between the spouses themselves where no mediator intervenes. The position will be most readily understood by reviewing the decisions in chronological order.

3.4 In McTaggart v McTaggart[1] estranged spouses attended an interview with a probation officer at the latter's suggestion. In subsequent divorce proceedings each party subpoenaed the probation officer and gave evidence about the interview. The probation officer also gave evidence about it, without objection by either party. Cohen and Denning LJJ made it clear that no privilege attached to the probation officer. They observed, however, that either spouse could have objected, since the rule as to "without prejudice" negotiations applied to negotiations for reconciliation. Denning LJ stated that it applied "whenever the dispute has got such dimensions that litigation is imminent".[2] His Lordship observed that the law favoured reconciliation, and he added that even though nothing is expressly said, the parties must be taken to negotiate on the understanding that what they say will not be disclosed.

3.5 In Bostock v Bostock[3] Ormerod J repelled an objection by a wife to evidence by her husband of a

---

[1] [1949] P 94.

[2] At p 97.

[3] [1950] P 154.

meeting between the spouses and their respective solicitors with a view to a possible reconciliation, apparently on the ground that the meeting had not been specifically stated to be without prejudice. Bostock, however, was disapproved by Denning LJ in Mole v Mole[1] and was not followed by Havers J in Pool v Pool.[2] It is criticised by Cross,[3] Phipson,[4] and Murphy.[5]

3.6 In Mole v Mole[6] the Court of Appeal held that privilege attached to a letter written by the husband in reply to one from a probation officer whom the wife had consulted. The Court rejected a submission that McTaggart[7] only applied when both parties had accepted the probation officer as a conciliator between them, and held that the husband had been entitled to object to evidence from the probation officer about the letter. Bucknill LJ, with whose judgment the other two members of the Court agreed, stated that in matrimonial disputes the State was also an interested party: it was more

---

[1] [1951] P 21 at p 24.

[2] [1951] P 470.

[3] Cross, p 455 ("most unlikely that the case will be followed in the divorce court").

[4] Phipson on Evidence (14th ed, 1990), para 20-68 ("against the tenor of other decisions on the subject").

[5] P Murphy, A Practical Approach to Evidence (3rd ed, 1988), p 390, n 98 ("can hardly be correct").

[6] [1951] P 21.

[7] [1949] P 94. See para 3.4 above.

interested in reconciliation than in divorce.[1] Denning LJ, having expressed disapproval of Bostock,[2] said:[3]

> "I take it that the principle laid down in McTaggart v McTaggart applies not only to probation officers but also to other persons such as clergy, doctors, or marriage guidance councillors, to whom the parties or one of them go with a view to reconciliation, there being a tacit understanding that the conversations are without prejudice. I see no reason why the solicitors of the parties should be in any different position."

3.7 In Pool v Pool[4] there were two meetings between the parties' respective counsel and solicitors with a view to exploring the possibility of a reconciliation. The husband was present at the first, and both spouses were present at the second. Havers J, applying McTaggart and Mole and not following Bostock, sustained an objection taken by the wife to questions put to her leading counsel concerning the first meeting, and held that both meetings were privileged. His Lordship inferred from the circumstances that there had been a tacit understanding that the meetings were without prejudice.

3.8 In Henley v Henley[5] a vicar on his own initiative went to see the husband as a conciliator and was so accepted by the husband. He then went to

---

[1] [1951] P 21 at p 23.

[2] [1950] P 154. See para.3.5 above.

[3] [1951] P 21 at p 24.

[4] [1951] P 471.

[5] [1955] P 202.

the wife, making it clear to her that he had come as a conciliator, and on that basis a conversation took place between the vicar and wife. Sachs J, applying McTaggart and Mole, sustained an objection by the wife to evidence by the vicar of that conversation, rejecting the husband's argument

> "that for privilege to attach the initiative must have come from one of the parties and that one can exclude cases where the conciliator, from a knowledge of the circumstances, thinks it wise and proper in the interests of the parties, and thus in the interests of the State, to make the approach."[1]

3.9 In Broome v Broome[2] a representative of SSAFA was called by the wife and gave evidence after a claim to Crown privilege had failed on procedural grounds. Sachs J noted in his judgment that when the witness's evidence "began to verge on later matters, which had been her concern in her capacity as conciliator, it was easy to ensure that the principles laid down in Mole v Mole were applied".[3]

3.10 In Slade-Powell v Slade-Powell[4] an independent witness who had attempted to effect a reconciliation was called by the husband to give evidence that the wife had asked the witness to see if the husband would agree to a quick divorce. Scarman J held that the evidence was privileged and inadmissible, since it would be prejudicial to the function of independent mediators if parties who

---

[1] At p 204.

[2] [1955] P 190 (considered in Whitehall v Whitehall 1957 SC 30: see para 2.26 above).

[3] At p 201.

[4] (1964) 108 SJ 1033.

dealt with or spoke to them could not rely on what they said being privileged.

3.11 In Theodoropoulas v Theodoropoulas[1] a private individual who had no official standing approached the wife at the request of the husband with a view to reconciliation. The husband alleged that on another occasion the wife had called on him and made overtures for a reconciliation, and that a third party had been present during part of their conversation. Sir Jocelyn Simon P refused to allow the husband (1) to cross-examine the wife as to what had been said between herself and the private individual or as to the conversation between the parties themselves, (2) to give evidence as to that conversation, or (3) to lead the evidence of the third party. His Lordship accordingly decided three points:

(1) that the reasoning in McTaggart[2] and Mole[3] applied "with equal force to a private individual's attempts at reconciliation as to those of an official person";[4]

(2) that the principles in these cases were "just as applicable to communications

---

[1] [1964] P 311.

[2] [1949] P 94 per Denning LJ at p 97. See para 3.4 above.

[3] [1951] P 21 per Bucknill LJ at p 23. See para 3.6 above.

[4] [1964] P 311 at pp 313-314.

between the parties themselves with a view to reconciliation as to those conducted through intermediaries";[1] and

(3) that the evidence "of an independent witness who was fortuitously present when those communications were made and who overheard or read them" was inadmissible.[2]

3.12 In Pais v Pais[3] a priest applied to set aside his subpoena on the ground that the only evidence he could give had been derived from the parties while he was acting as a marriage guidance counsellor and trying to effect a reconciliation between them. Baker J held that no privilege attached to the priest as a conciliator, and that the privilege attaching to communications made to a conciliator was the privilege of the spouses, which could be waived only by both of them.[4] His Lordship further held that the privilege could be waived in part: in Pais it was waived as to the priest's evidence as to the dates when he saw each party and, in particular, which of them had approached him first.

3.13 The principal decisions reviewed in the foregoing paragraphs were referred to in D v

---

[1] Ibid at p 314.

[2] Ibid at p 314.

[3] [1971] P 119.

[4] Baker J founded on dicta by Cohen and Denning LJJ in McTaggart (para 3.4 above) and by Lord Denning MR in A-G v Mulholland, A-G v Foster [1963] 2 QB 477 at 489.

NSPCC,[1] an English appeal in which the House of Lords held that public interest as a ground for non-disclosure of information should be extended to the identity of persons who had given information to the NSPCC as to the alleged ill-treatment or neglect of a child. Lord Hailsham of St Marylebone observed:

> "... the law of evidence has steadily developed since my own practice at the Bar began in 1932. This can be seen by a consideration of cases like McTaggart v McTaggart [1949] P 94; Mole v Mole [1951] P 21; Theodoropoulas v Theodoropoulas [1964] P 311, which undoubtedly developed from the long recognised category of 'without prejudice' negotiations but which in my opinion has now developed into a new category of a public interest exception based on the public interest in the stability of marriage."

Lord Simon of Glaisdale, who as Sir Jocelyn Simon P had decided Theodoropoulas,[2] said:[3]

> "Before I leave the authorities I venture to note that there is a line of cases which defies the respondent's argument that there is a closed number of unextendable categories of relevant evidence which may be withheld from forensic scrutiny. These are the cases relating to marriage conciliation (see, for example, McTaggart v McTaggart [1949] P 94; Mole v Mole [1951] P 21; Theodoropoulas v Theodoropoulas [1964] P 311), where we can watch a recent development of the law. Incidentally, too, they provide a neat example of the way that 'Privilege' in this branch of the law is based on public interest just as much as those categories of excluded evidence collected under the heading of 'Public Policy'. With increasingly facile divorce and a vast rise in the number of

---

[1] [1978] AC 171.

[2] [1964] P 311. See para 3.11 above.

[3] [1978] AC 171 at pp 236-237.

> broken marriages, with their concomitant penury and demoralisation, it came to be realised, in the words of Bucknill LJ in Mole v Mole, at page 23: 'in matrimonial disputes the State is also an interested party: it is more interested in reconciliation than in divorce'. This was the public interest which led to an application by analogy of the privilege of 'without prejudice' communications to cover communications made in the course of matrimonial conciliation (see McTaggart v McTaggart per Cohen LJ at p 96, Denning LJ at p 97; Denning LJ in Mole v Mole at p 24; Theodoropoulas v Theodoropoulas at p 314) - so indubitably an extension of the law that the textbooks treat it as a separate category of relevant evidence which may be withheld from the court. It cannot be classified, like traditional 'without prejudice' communications, as a 'privilege in aid of litigation' (see Law Reform Committee Sixteenth Report (Privilege in Civil Proceedings) (1967) (Cmnd 3472), paragraph 18)."

It may be observed that the position in Scotland, where public policy has not yet been successfully pleaded by any party other than the Crown,[1] is to be contrasted with the view of the House of Lords in D v NSPCC that the categories of public interest are not closed and there is no reason or authority for confining it to departments or organs of central government.[2]

(3) The procedural provisions

3.14 The public interest in the reconciliation of estranged spouses was reflected in the enactment of provisions designed to encourage reconciliation,

---

[1] See para 2.6 above.

[2] Lord Diplock at p 220; Lord Hailsham of St Marylebone at pp 226, 230; Lord Simon of Glaisdale at pp 235-236; Lord Edmund-Davies at pp 245-246. See paras 5.14-5.16 below.

initially in section 3 of the Divorce Reform Act 1969, which was replaced by section 6 of the Matrimonial Causes Act 1973, and in section 26 of the Domestic Proceedings and Magistrates' Courts Act 1978. Section 3 of the 1969 Act (section 6 of the 1973 Act) requires rules of court to be made requiring the solicitor for the petitioner in a divorce action to certify whether he has discussed with him the possibility of a reconciliation and given him the names and addresses of persons qualified to help effect a reconciliation. It also empowers the court to adjourn the proceedings to enable reconciliation to be attempted. The directions made thereafter[1] do not deal with the question of privilege. The provisions about adjournment in section 6 of the 1973 Act and section 26 of the 1978 Act are to the same effect as section 2(1) of the Divorce (Scotland) Act 1976 and apparently have been just as ineffective. The provisions of section 2 of the 1973 Act, like those of section 2(2)-(4) of the Divorce (Scotland) Act 1976, are designed to enable the spouses to try to effect a reconciliation by resuming cohabitation for a limited period without prejudicing their right to sue for divorce if the attempt fails.

3.15 It has been said that the ineffectiveness of the provisions in the Matrimonial Causes Act encouraging attempts at reconciliation has led to the belief that conciliation, or assisting the parties to deal with the consequences of the established breakdown of their marriage, is much more likely to be successful. Two types of conciliation have developed: "in-court", under a

---

[1] Practice Notes (Divorce: Conciliation) [1971] 1 WLR 223; [1972] 1 WLR 1309.

conciliation scheme prescribed by Practice Direction, and "out-of-court" conciliation schemes which are independent of the court and to which parties may resort before they embark on litigation.[1]

3.16 As to "in-court" conciliation, the Practice Direction (Family Division: Conciliation Procedure)[2] sets out a conciliation scheme in contested applications in matrimonial proceedings for custody, access and variation thereof. By a direction of the Senior Registrar dated 23 September 1983[3] the scheme was extended to include applications made under section 41 of the Matrimonial Causes Act 1973, where before pronouncing decree of divorce, nullity or separation the judge requires further evidence or enquiry regarding the children from a court welfare officer: instead of directing a welfare report, the judge may refer the case to a registrar. The Practice Direction (Family Division: Conciliation Procedure) (No 2)[4] extended it to contested applications for custody and access in guardianship proceedings and for care and control and access in certain wardship proceedings, other than those in which a local authority is involved. Where an application to which the Practice Direction applies is lodged, a conciliation appointment before the registrar is made. The Practice Direction provides:

---

[1] P M Bromley and N V Lowe, Bromley's Family Law (7th ed, 1987), pp 213-215.

[2] [1982] 1 WLR 1420.

[3] Printed in Rayden on Divorce (2nd cum supp to 14th ed, 1986) pp B479-480.

[4] [1984] 1 WLR 1326.

> "Each registrar will be attended by a court welfare officer. It is essential that both the parties and any legal advisers having conduct of the case attend. The nature of the application and the matters in dispute will be outlined to the registrar and the welfare officer. If the dispute continues, the parties and their advisers will be given the opportunity of retiring to a private room together with the welfare officer to attempt to reach agreement. These discussions will be privileged and will not be disclosed on any subsequent application. Anything which is said before the registrar on such appointments will also remain privileged."

It further provides:

> "The party who has living with him or her any child aged 9 years or over, in respect of whom the dispute exists, should bring that child to the conciliation appointment, because it will sometimes be appropriate for the child to be seen by the registrar or the welfare officer."

3.17 The Domestic Proceedings and Magistrates' Courts Act 1978 provides by section 12(3) that the court, before exercising its powers to make an order for custody or access, or to commit a child to the care of a local authority may obtain a report from an officer of the local authority or from a probation officer. Section 12(7) provides that such a report must not include anything said by either of the parties to a marriage in the course of an interview which took place with, or in the presence of, a probation officer with a view to the reconciliation of those parties, unless both parties have consented to its inclusion.

(4) Proposals for reform

3.18 In 1956 the Royal Commission on Marriage and Divorce (the Morton Commission) recommended the

conferment of a privilege on marriage guidance counsellors relative to communications made to them,[1] but that recommendation was not implemented.

3.19 In 1967 the subject of privilege for communications made for the purposes of conciliation (essentially, it appears, in the sense of "reconciliation") in matrimonial disputes was examined in the Sixteenth Report of the Law Reform Committee.[2] The Committee record that it caused them some difficulty.[3] They concluded that they did not feel justified in recommending any change in the law as embodied in Mole,[4] Pool[5] and Theodoropoulas;[6] and that it would be wrong to confer any statutory privilege on marriage guidance counsellors or others who endeavoured to assist spouses to effect a reconciliation. They considered that any privilege attaching to negotiations for the purpose of reconciliation should continue to be the joint privilege of the parties and to be capable of being waived by them if both so wished.

3.20 The English decisions and reports mentioned in the foregoing paragraphs appear to have been concerned with reconciliation rather conciliation. In recent years, however, the concept of

---

[1] Report, Cmnd 9678, paras 358-359, p 101.

[2] Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings), Cmnd 3472, paras 36-40, 55, pp 15-17, 23.

[3] Ibid, para 37.

[4] [1951] P 21. See para 3.6 above.

[5] [1951] P 471. See para 3.7 above.

[6] [1964] P 311. See para 3.11 above.

conciliation has been discussed in several official reports: the Report of the Committee on One-Parent Families (the Finer Committee) (1974);[1] the Home Office Consultative Document, "Marriage Matters" (1979); the Report of the Inter-Departmental Committee on Conciliation (1983); and the Report of the Matrimonial Causes Procedure Committee (the Booth Committee) (1985). The latter Committee discussed the question of privilege in relation to conciliation but did not make any formal recommendation. They recommended that in contested divorce suits there should be an initial hearing before a registrar in every case involving a child to whom section 41 of the Matrimonial Causes Act 1973 applied[2] and in cases where the respondent had stated an intention to oppose the grant of a decree. One of the purposes of the hearing would be to refer the parties to conciliation where appropriate.[3] As to whether conciliation should be privileged, the Committee said:[4]

> "Our firm view is that conciliation requires that there should be a full and free exchange between the parties and that this is unlikely to occur if there is a possibility of matters disclosed in conciliation being referred to in subsequent proceedings. We would wish to see absolute privilege attaching to conciliation. Having said that, however, we are also of the view that this is not strictly a procedural matter but is rather a question of the admissibility of evidence to be determined by the court."

---

[1] Cmnd 5629, paras 4.288-4.134.

[2] See para 3.16 above.

[3] Report (HMSO, 1985), para 3.5.

[4] Ibid, para 4.60.

3.21 The Committee's view is supported in the latest edition of Bromley's Family Law, where the authors write:[1]

> "Conciliation is likely to be successful only if statements made by both parties are to be regarded as absolutely privileged. We have already seen that no statement made in the course of effecting a reconciliation may be put in evidence without the consent of the spouse who made it; it is strongly urged that this rule should be extended to statements made in the course of conciliation."

Other writers express the view that any privilege attaching to conciliation could not be absolute because in exceptional circumstances such as a crime against the child the court's duty to regard the welfare of the child as the first and paramount consideration[2] would override the privilege. They add:[3]

> "Whether privilege would be affected by this 'best interests' principle in less extreme circumstances is less clear, but, given current trends, unlikely. A few unreported cases have arisen in England recently in which one party or a solicitor has sought to breach any privilege attaching to conciliation by including in an affidavit controversial evidence derived from the conciliation process, such as a statement allegedly made by the conciliator about the parental fitness of one parent. In almost

---

[1] Bromley (7th ed, 1987), p 215 (authors' emphasis).

[2] That was the court's duty under s 1 of the Guardianship of Minors Act 1971. Under s 1 of the Children Act 1989 "the child's welfare shall be the court's paramount consideration". For s 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986 see para 5.8 below.

[3] D Parker and L Parkinson "Solicitors and Family Conciliation Services: A Basis for Professional Co-operation" (1985) 15 Fam Law 270 at p 273.

> all these cases the court has upheld the privilege by ruling that evidence derived from conciliation (including failure to attend an appointment) is not admissible."

The same writers propose that the privilege should attach to all parties, so that it could be waived only with the consent of the conciliator as well as of both parties. They suggest that resolving a credibility conflict between conciliator clients who choose to testify as to what was said in a conciliation session is an awkward and inappropriate function for a conciliator. They also propose that conciliation discussions, unlike "without prejudice" negotiations, should remain confidential even where they are successful, although the terms of any agreement reached should not be confidential.[1]

3.22 In 1985 the Government established a Conciliation Project Unit at the University of Newcastle-upon-Tyne to investigate the costs and effectiveness of conciliation schemes in England and Wales. The Unit's Report,[2] which was published in 1989, concluded that conciliation "generates important social benefits"[3] and proposed a national conciliation service which would be one part of a network of local services, independent of the

---

[1] Ibid.

[2] Report to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales (University of Newcastle-upon-Tyne, Conciliation Project Unit, 1989) (hereafter "the Newcastle Report").

[3] Ibid, para 20.48.

courts and the probation service, which could be called "The Family Advisory, Counselling and Conciliation Bureau".[1]

3.23 The Unit undertook a consultation exercise in which the respondents were invited to submit views on a range of topics including what the policy of the law ought to be in regard to "confidentiality and privilege in relation to conciliation appointments".[2] The Report observes that the current law of England as to privilege in relation to conciliation, as distinct from reconciliation, is not clear, although it seems highly probable that the courts would, by analogy with the reconciliation cases, declare that privilege attaches to statements made during conciliation appointments, although it is unlikely that the privilege would be absolute.[3] Discussing the responses to consultation, the Report states:[4]

> "... there emerged clear and strong support for the following propositions:
>
> (a) both confidentiality and privilege are essential to the proper functioning of conciliation;
>
> (b) neither can realistically be claimed in absolute terms;
>
> (c) each must yield where there is evidence of child abuse."

The Report goes on to record differing views as to what further exceptions, in addition to child abuse, should qualify the privilege and as to

---

[1] Ibid, para 20.23.

[2] Ibid, paras 5.2, 5.78.

[3] Ibid, paras 2.32-2.33.

[4] Ibid, para 5.78.

whether the privilege should extend to the conciliator.[1] The Report does not make any proposals for reform but notes that confidentiality and privilege are key issues which would have to be addressed if a national conciliation service were to be established.[2]

3.24 Positive proposals for reform are made by the Law Commission for England and Wales in their Report, Family Law: The Ground for Divorce, which was published in 1990.[3] The Commission recommend that irretrievable breakdown of the marriage should remain the sole ground for divorce and that such breakdown should be established by the expiry of a minimum period of one year for consideration of the practical consequences which would result from a divorce and reflection upon whether the breakdown in the marital relationship is irreparable.[4] One object in determining the length of the period of one year for consideration and reflection was "to give every opportunity to couples and individuals to avail themselves of such [counselling and conciliation] services as are available".[5] The Commission propose that such opportunities should be built into the procedures for divorce. They recommend, in particular, that the court should have power to refer the parties to a specified conciliator or mediator in order to discuss the

---

[1] Ibid, paras 5.79-5.84. We discuss these issues in Part V of this Paper.

[2] Ibid, paras 6.17, 20.31, 20.44.

[3] Law Com No 192.

[4] Ibid, para 3.48.

[5] Ibid, para 5.31.

nature and potential benefits of conciliation or mediation[1] in their case, and a further power to adjourn the proceedings to enable the parties to participate in conciliation or mediation.[2]

3.25 Given the increasing role of conciliation and mediation in divorce under the Commission's proposals, they consider that the law relating to privilege should be placed beyond doubt and they recommend that a statutory privilege should be conferred upon statements made during the course of conciliation or mediation processes. While their recommendation is necessarily limited to conciliation or mediation in disputes which are or may become connected with divorce or separation, they observe that there appears no reason in principle why they should not be applied to all disputes which are or may become the subject of family proceedings.[3] They further recommend that, consistently with the privilege for "without prejudice" negotiations and reconciliation attempts upon which it is based, the privilege should attach to the parties rather than to the conciliator or mediator.[4] Evidence of any agreements reached or arrangements made would be admissible for the purposes of enabling the court to approve, modify or terminate them, and of enabling them to be

---

[1] In this part of their Report the Commission regard the terms "conciliation" and "mediation" as synonymous: Ibid, para 5.30, n 35.

[2] Ibid, paras 5.36-5.39.

[3] Ibid, para 5.44.

[4] Ibid, para 5.45.

enforced.[1] The recommendations are not intended to derogate from the English common law relating to legal professional privilege or the privilege relating to reconciliation.

3.26 The Commission consider that the privilege attaching to conciliation or mediation should be absolute. They deal with the issue of child abuse in this way:

> "5.46 Professional conciliators and mediators also make it clear to their clients from the outset that they feel free to report any statements which could impinge upon the welfare of a child to the relevant authorities. In this connection, however, it is easy to confuse the concepts of confidentiality and evidential privilege [Newcastle Report, para 5.78]. Like other professionals, conciliators and mediators believe that their duty to protect a child who may be at risk transcends their duty of confidentiality to the client. However, any report which they make, in confidence, to the authorities will itself be covered by public interest immunity [D v NSPCC [1978] AC 171]. It does not, therefore, follow that they should be obliged to testify in court to any admissions which may have been made. Were the matter to be tested before a court, the court might regard the welfare of the child as overriding all other considerations and require the mediator to testify irrespective of the wishes of the spouses. It is equally possible that a court might decide that the public policy considerations which led both to the extension of "without prejudice" privilege to this area, and to the public interest immunity, should prevail.
>
> "5.47 The Booth Committee [Booth Report, para 4.60] concluded that they would wish to see absolute privilege attaching to

---

[1] Ibid, Draft Divorce and Separation Bill, cl 10(2).

conciliation, whereas the Newcastle Report concluded that there should be an exception for 'allegations of child abuse' [Newcastle Report, para 20-44; presumably they meant admissions].

"5.48 It seems to us that the basic concern is that essential information which could help to protect a child from harm should be passed to the relevant authorities. We are in complete agreement with this objective, but see it as quite distinct from whether the conciliator who passes on the information should have to give evidence in any proceedings which follow, irrespective of the wishes of the spouses. It is a matter of judgment whether the welfare of the child would be better protected by compelling the conciliator to give evidence in such proceedings or by the greater frankness which an absolute privilege would encourage during the conciliation or mediation process. In practice, once the information is passed to the authorities, an investigation will take place and it is upon that rather than the initial referral that any subsequent proceedings will be based. We consider that, on balance, the welfare of any children would be better protected by an absolute privilege, given that the codes of practice of the relevant professionals include a provision to the effect that confidence will not be maintained in respect of matters relating to protection of children, such as allegations of abuse. We therefore recommend that statements made during the course of any conciliation or mediation process which indicate a risk of harm to a child should be privileged but not confidential. This recommendation follows the approach in other jurisdictions [Family Law Act (Australia) 1975, s 18; Family Proceedings Act (New Zealand) 1980, s 18]."[1]

---

[1] Our own researches lead us to suppose that the law in Australia is not entirely clear: see paras 4.3-4.17 below, esp para 4.9. For New Zealand, see paras 4.25-4.31 below.

3.27 In Part V of this Paper we include among the options for consideration by consultees an option based on the latter recommendation.[1]

[1] See paras 5.55-5.60 below.

PART IV - THE LAW IN OTHER JURISDICTIONS

(1) Introduction

4.1 In this Part we examine some of the legal rules about confidentiality in family mediation which have been developed in certain foreign jurisdictions. We do not think it necessary to attempt a comprehensive survey of the wide variety of rules which have evolved through judicial decision or legislative enactment in the many jurisdictions in which family mediation has been established for longer than in the United Kingdom. We confine ourselves to selecting from the information available to us a number of illustrations of the differing approaches which have been adopted. Those which appear to us to provide ideas worthy of consideration will be reflected in the options for reform which we propose for consideration in Part V.

4.2 It will be seen in the following paragraphs that some legislatures have not conferred a privilege but have enacted an exclusionary rule of evidence which renders certain information relative to family mediation inadmissible for any purpose in any proceedings.[1] It has not been represented to us that such a course would be appropriate in Scotland, and indeed it would appear to be a fairly extreme step. If, as we shall explain, "paramount considerations of general policy" are required in order to justify the creation of a privilege,[2] even more compelling arguments would be required to support the exclusion of a particular class of

---

[1] See paras 4.7, 4.11, 4.13, 4.14, 4.20, 4.24, 4.28, 4.33 below.

[2] See para 5.2 below.

evidence altogether. It is noteworthy that in one jurisdiction where an exclusionary rule has been enacted, considerable doubt appears to be entertained as to whether the rule should be understood to be qualified by any considerations of public policy.[1] Accordingly, although we notice the existence of such exclusionary rules in certain other jurisdictions, we do not include the enactment of any such rule for Scotland among our options for reform in Part V.

(2) Australia

(a) Introduction

4.3 In Australia, some protection of communications in relation to family mediation is afforded both by statute and by the common law. The statutory protection is accorded to discussions with counsellors who are court officials or are authorised by organisations approved by a Minister, while the common law has been held to protect some less formal communings. For the purposes of this Discussion Paper it is interesting to note not only certain doubts which have arisen owing to the language of the legislation, which indicate difficulties to be avoided, but also the differing ambits of the legislation and the common law. In Part V of this Paper we shall invite consultees' views on an option which would confine any new legislation to the protection of mediation conducted by an organisation approved by a Minister and would leave to the courts the development of any protection of less formal mediation.[2]

---

[1] See para 4.9 below.

[2] See paras 5.20, 5.24 below.

(b) Statute

4.4 The Family Law Act 1975, which created the Family Court of Australia at federal level and provided for the establishment of State Family Courts, encourages both reconciliation and, where the marriage has completely broken down, conciliation. The Court in exercising its jurisdiction is directed to have regard to the need to preserve and protect the institution of marriage and to the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.[1] The Act gives some protection to communications made at conferences with marriage counsellors, family court registrars and welfare officers. We consider in turn the provisions relating to each type of conference. We also notice a special provision in favour of family mediation in the State of Victoria.

4.5 The 1975 Act makes provision for the attachment of counsellors to family courts,[2] but the definition of "marriage counsellor" includes not only a court counsellor but also a person authorised by an approved marriage counselling organisation to offer marriage counselling on behalf of the organisation and a person authorised under regulations to offer marriage counselling.[3] An "approved" marriage counselling organisation is a voluntary organisation approved as such by the

---

[1] 1975 Act, s 43(a), (d).

[2] ss 11-13, 37(8).

[3] s 4.

Attorney-General,[1] while an "authorised" person is so authorised by the Attorney-General.[2]

4.6 The definition of "marriage counselling"[3] includes the counselling of a person in relation to:

> "(a) entering into marriage;
>
> (b) reconciliation of the parties to a marriage;
>
> (c) separation of the parties to a marriage;
>
> (d) the dissolution or annulment of a marriage; or
>
> (e) adjusting to the dissolution or annulment of a marriage,
>
> whether that counselling is provided in relation to the proposed marriage, marriage or former marriage of that person or in relation to the proposed marriage, marriage or former marriage of another person or other persons, and whether that counselling is provided to that person individually or as a member of a group of persons."

4.7 The Act requires a marriage counsellor to take an oath or affirmation of secrecy[4] in these terms:[5]

> "... I will not disclose to any person any communication or admission made to me in my capacity as a marriage counsellor

---

[1] s 12. Cl 3 of the Family Law Amendment Bill currently before the Commonwealth Parliament provides that a list of approved organisations should be published annually.

[2] Family Law Regulations 1975, reg 7.

[3] 1975 Act, s 4(1).

[4] 1975 Act, s 19.

[5] Family Law Regulations 1975, reg 9.

except in so far as it is necessary for me to do so for the proper discharge of my functions as a marriage counsellor."

The meaning to be assigned to the exception is not specified. Section 18, however, provides that evidence is inadmissible in any court "of anything said or of any admission made at a conference with" a marriage counsellor or with "a person to whom a party to a marriage has been referred by a marriage counsellor ... for medical or other professional consultation". While there are procedural provisions whereby the parties to proceedings for a dissolution of marriage are encouraged or required to attend upon a marriage counsellor,[1] any person may seek counselling although no proceedings have been raised, either from an approved voluntary organisation or from the counselling facilities of the family court.[2] The exclusion of evidence by section 18 applies to any conference whether or not proceedings have begun.

4.8 It has been suggested[3] that the protection afforded by section 18 is limited in various undesirable respects. First, since it applies to "anything said or any admission made" it may not apply to written communications or records or to conduct or to impressions formed at a conference.

---

[1] s 14.

[2] ss 15, 16(2). In practice, family court counsellors generally do not undertake counselling with a view to reconciliation or the improvement of the parties' relationship but refer requests for such counselling to approved non-government organisations. They do, however, provide counselling for the purpose of resolving difficulties about custody or access.

[3] M D Broun and S G Fowler, Australian Family Law and Practice Reporter (1988), paras 628-633.

There is also room for debate about the nature and circumstances of the communings which are necessary in order to constitute a "conference".[1] Again, the definition of "marriage counselling" in section 4(1)[2] suggests that no protection is afforded to the counselling of unmarried cohabitants (unless about entering into a marriage) or to family counselling in relation to a matter other than those listed in section 4(1)(a) to (e) such as a problem concerning a couple's child (eg irrational behaviour, absence from school, drug-taking) or a relationship between a child and one parent or between the couple and a relative such as a parent-in-law.

4.9 It has also been suggested[3] that notwithstanding the terms of section 18 the protection must be qualified by a number of "public policy" exceptions in relation to child abuse; communications to further a fraudulent criminal purpose; and the paramount public interest in the welfare of the child. The two latter are exceptions to the privilege conferred by the law of Australia on communications between a client and his legal adviser, and it is suggested that it would be difficult for marriage counsellors to argue successfully that their profession should be exempt from equivalent public policy exceptions. There appears to be considerable doubt about the legal position of marriage counsellors with regard to the

---

[1] In Marshall v Marshall (1983) FLC 91-341, cit Broun and Fowler supra, "conference" was held to include an unsolicited telephone call to a counsellor from a person seeking advice.

[2] See para 4.6 above.

[3] Broun and Fowler, supra.

disclosure of suspected probable past or future child abuse,[1] especially in those States of Australia where State laws require the mandatory reporting of child abuse by certain professions including some to which many marriage counsellors belong, such as registered psychologists, employees of agencies providing health or welfare services to children, and social workers employed in hospitals, health centres or medical practices.[2]

4.10 Order 24, rule 1, of the Family Law Rules is concerned with pre-trial conferences before a registrar of the family court which are normally held where the parties are in dispute over property. Rule 1(8) provides that subject to the provisions of rule 1(9), "evidence of anything said, or of any admission made" in the course of such a conference is not admissible in any court. Rule 1(9) provides that rule 1(8) does not prevent anything said or any admission made in the course of a conference being admitted in evidence (a) on the trial of a person for an offence committed at the conference; (b) upon the hearing of an application for contempt or for non-compliance with an injunction; or (c) upon the hearing of an application for costs arising out of the conference. It has been judicially observed obiter that where a written agreement is signed at a pre-

---

[1] See the account of the practice of court counsellors in Western Australia in para 4.13 below.

[2] Cl 12 of the Family Law Amendment Bill currently before the Commonwealth Parliament adds to the 1975 Act a controversial new s 70BB(1) which obliges a court counsellor who suspects child abuse to notify a prescribed child welfare authority on pain of a fine of $6000.

trial conference, evidence of the written agreement is admissible in later court proceedings.[1] Oral agreements, however, are inadmissible.[2] It has been said that the whole situation is far from satisfactory.[3]

4.11 Part VII of the Family Law Act 1975, which is concerned with the welfare and custody of children, contains in section 62 provisions which correspond closely with the new Scottish rules of court.[4] Section 62 provides:

> "(1) Where--
>
> (a) there is a child (being a child who has not attained the age of 18 years) of a marriage in respect of which proceedings for principal relief[5] have been instituted; or
>
> (b) proceedings for the custody or guardianship of, or access to, a child of a marriage who has not attained the age of 18 years are contested,
>
> the court may, at any stage of the proceedings, of its own motion or upon the request of a party to the proceedings, make an order directing the parties to the proceedings to attend a conference with a welfare officer to

---

[1] Johnston v Johnston (1986) FLC 91-710.

[2] In the marriage of Borninkhof (1986) FLC 91-752; In the marriage of Gray (1986) FLC 91-771.

[3] F Bates, "Some Recent Evidentiary Developments in Australian Family Law" (1987) 61 ALJ 271 at p 275.

[4] For the terms of the Scottish rules see para 1.12 above.

[5] "Proceedings for principal relief" include proceedings for dissolution of a marriage, nullity or declarator of validity of a marriage: s 4(1).

discuss the welfare of the child and, if there are any differences between the parties as to matters affecting the welfare of the child, to endeavour to resolve those differences.

(2) Where the court makes an order under sub-section (1), it may fix a place and time for the conference to take place or direct that the conference shall take place at a place and time to be fixed by a welfare officer.

(3) If a party fails to attend a conference in respect of which an order has been made under sub-section (1), it is the duty of the welfare officer to report the failure to the court.

(4) The court may adjourn any proceedings referred to in sub-section (1) until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the court considers desirable, and may receive the report in evidence.

(5) Subject to sub-section (4), evidence of anything said or of any admission made at a conference that takes place in pursuance of an order made under this section is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of Australia or of a State or Territory, or by consent of parties, to hear evidence."

4.12 The principal differences between section 62 and the Scottish rules are that the Australian court may obtain a report from the welfare officer and that an exclusionary rule is enacted in section 62(5). Section 62(5) reproduces the language of section 18(2) and of rule 1(8) of Order 24, but the protection afforded is qualified not

only in the way discussed above[1] but also by the court's power to obtain a report.[2] The court has wide discretionary powers as to the disclosure of the report to the parties and its reception in evidence, and as to whether to permit oral examination of the welfare officer.[3] The report is admissible only in proceedings in which the welfare of the child is relevant.[4]

4.13 The bulk of the counselling by court counsellors in Australia is carried out under section 62. While section 62(5) makes evidence of anything said or of any admission made at a conference inadmissible, it does not prevent a counsellor from reporting to the appropriate authority any matter raised in a conference which causes concern for the safety of a child or adult. Family court counselling services in different States have devised their own policies for such situations. In Western Australia, if the matter has not already been reported and the person who has raised it in the conference refuses to do so, the counsellor discusses the situation with the director of the court counselling service, who then takes the responsibility for reporting the matter and advises the parties that that has been done.

---

[1] See paras 4.8, 4.9 above.

[2] In Western Australia, if a report is required it is prepared by an officer who has not already counselled the parties and it is explained to all concerned that any information acquired by the officer will not be kept confidential.

[3] Family Law Regulations 1975, reg 117.

[4] R v Cook, ex p Twigg (1980) 31 ALR 353 at p 360.

4.14 In the State of Victoria an exclusionary rule in favour of family mediation is contained in the Evidence Act 1958 as amended in 1985. Section 21J provides:

> "Evidence of anything said or of any admission or agreement made at a conference with a family mediator in connexion with a family mediation centre is not admissible in any court or legal proceeding."

Again, the language of section 18, which we have already considered,[1] is adopted to define the evidence which is excluded. A "family mediation centre" is an organisation declared to be such by Order of the Governor in Council, and "family mediator" means a person who is a marriage counsellor under the Family Law Act 1975 or is declared to be a family mediator by the Secretary to the Law Department.

(c) Common law

4.15 It is possible that the common law may protect negotiations for the settlement of a family dispute which are not covered by any of the statutory provisions discussed above. In Rodgers v Rodgers[2] evidence was led, in proceedings for maintenance, of negotiations between the parties and their solicitors with a view to reconciliation and later, when it appeared that reconciliation was impossible, with a view to determining what

---

[1] Paras 4.8, 4.9 above.

[2] (1964) 114 CLR 608.

financial provision should be made for the wife. The High Court of Australia held that the evidence was inadmissible, and said:[1]

> "That husband and wife who are parties to a subsisting cause in the Matrimonial Causes jurisdiction, or, who contemplate such proceedings, should be able to negotiate with a view to reconciliation or as to what financial provision should be made for one party freely and without fear that, failing agreement, what is said or done by them may later be used in evidence is, in our view, not open to question. It is, we think, unnecessary to refer to authorities on this point but we mention the comparatively recent cases of McTaggart v McTaggart; Mole v Mole; Pool v Pool; and Henley v Henley in which the purpose and application of the rule in the Matrimonial Causes jurisdiction are discussed."

4.16 In In the Marriage of Lace[2] the Family Court of Australia held to be inadmissible the evidence of admissions[3] made by the husband to a pastor of the church to which the parties belonged and to a community psychiatric nurse while they were assisting in discussions between the parties during a period of marital crisis with a view to effecting a reconciliation, although neither the pastor nor the nurse was a marriage counsellor as defined in the Family Law Act 1975 or was operating under a referral pursuant to section 18. The Court referred

---

[1] At p 614.

[2] (1981) FLC 91-080.

[3] The subject-matter of the admissions is not disclosed in the report.

to Rodgers,[1] Henley[2] and Theodoropoulas[3] as well as to the emphasis placed by the Family Law Act on reconciliation and conciliation.

4.17 The Law Reform Commission of Australia in their Interim Report on Evidence did not favour any amendment of section 62(4) and (5) of the Family Law Act[4] on the ground that close study of the operation of the sections would be required before any changes were recommended.[5] Clause 113 of the draft Bill appended to their final Report is a provision of general application regarding the exclusion of evidence of settlement negotiations. It provides that evidence may not be adduced of communications made in attempts to settle a justiciable civil dispute (including those where a party's agent or a mediator is involved). The provision does not apply where the parties consent to the admission of the evidence or where the communications are made in furtherance of fraud or other unlawful activities.[6]

(3) Canada

(a) Common law

4.18 In Canada the common law, as we understand it, is not entirely clear. There appear to be several

---

[1] See para 4.15 above.

[2] See para 3.8 above.

[3] See para 3.11 above.

[4] See paras. 4.11-4.13 above.

[5] Law Reform Commission - Australia: Evidence (Report No 26, Interim, 1985), vol 1, paras 450, 893.

[6] Evidence (Report No 38, 1987), pp 124-125, 187-189.

relevant decisions by judges of first instance. In some of these[1] the judge has held, or observed obiter, that information acquired in the course of attempts to settle issues in pending family proceedings was protected by the common law privilege concerning "without prejudice" negotiations as in McTaggart and subsequent English cases.[2] Judges have also held that a privilege attaches to information passing between the parties and a marriage counsellor with a view to possible reconciliation,[3] and to information passing between the parties and a mediator in a dispute concerning custody and access.[4] On the other hand, in one case it was held that no privilege attached to statements made by a husband to a clergyman who had been attempting to reconcile the parties.[5]

4.19 Differing views have been expressed on the question whether any exclusionary rule in favour of mediation is qualified by any exception. In Cronkwright v Cronkwright[6] Wright J said:

> "... legislation and rules which render evidence absolutely inadmissible are to be strictly construed. They represent, of

---

[1] Hillesheim v Hillesheim (1974) 6 OR (2d) 647, 19 RFL 42 (Ont); Keizars v Keizars (1982) 29 RFL (2d) 223 (Ont); Porter v Porter (1983) 40 OR (2d) 417, 32 RFL (2d) 413 (Ont); Sinclair v Roy (1985) 65 BCLR 219, 47 RFL (2d) 15, 20 DLR (4th) 748 (SC).

[2] See paras 3.4-3.12 above.

[3] Shakotko v Shakotko (1976) 27 RFL 1 (Ont HC).

[4] Porter, supra.

[5] Cronkwright v Cronkwright (1970) 3 OR 784, 2 RFL 241, 14 DLR (3d) 168 (HC).

[6] supra.

> course, a statement of public policy but not necessarily a value judgment between conflicting public policies. Is it, for example, our public policy that an innocent man should go to gaol for life so that the sanctity of reconciliation be preserved, or that a child be entrusted to a wayward addict rather than the truth about the matter be known? I cannot believe that those results should be law, unless the language of authority is strong enough to justify a specific breach in the dikes of our society."

In Porter v Porter,[1] however, Gravely UFCJ said:

> "It is reasonable to assume that in any mediation regarding custody or access there is the possibility that information will be generated that could be of great importance in deciding the future of a child."

Having cited the dicta of Wright J quoted above, he continued:

> "While the competing interests related to public policy are plain, it is, in my view, of far greater importance that parties, with the aid of a mediator, are able to engage in frank and open discussion that can lead to agreed upon arrangements in the interests of children than that some information may be lost to a court in a subsequent proceeding."

(b) Statute

4.20 Certain provisions in relation to mediation are contained in the Divorce Act 1986, enacted by the Federal Parliament, and in the enactments of the provincial legislatures of Ontario, British Columbia and Quebec. The Divorce Act 1986 obliges the parties' legal advisers and the court to encourage reconciliation. Section 10 provides that the court may nominate a person with experience or training in marriage counselling or guidance or, in special circumstances, some other suitable person

---

[1] supra.

to assist the spouses to achieve a reconciliation. It further provides:

> "(4) No person nominated by a court under this section to assist spouses to achieve a reconciliation is competent or compellable in any legal proceedings to disclose any admission or communication made to that person in his or her capacity as a nominee of the court for that purpose.
>
> "(5) Evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a reconciliation is not admissible in any legal proceedings."

There are conflicting single-judge decisions on the question whether the provisions from which these subsections are derived should be read conjunctively or disjunctively. The statements made to the clergyman in Cronkwright[1] were held not to be protected by the predecessor of subsection (5) because he had not been nominated by the court. In Shakotko,[2] however, the court read the two provisions disjunctively.

4.21 In Ontario section 31 of the Children's Law Reform Act 1980 provides for the appointment by the court of a mediator on the issues of custody and access, while under section 3 of the Family Law Act 1986 the court may appoint a person selected by the parties to mediate any of a number of issues including custody, access, child support, spousal support, division of property and family residence. Under each Act, before entering into mediation the parties must decide whether the mediator is to prepare and lodge with the court a full report on

---

[1] See para 4.18 above.

[2] See para 4.17 above.

the mediation, including anything that he or she considers relevant, or only a limited report which sets out only the agreement reached by the parties, or states only that the parties did not reach agreement. The former type of mediation is commonly known as "open mediation" and the latter as "closed mediation". If the parties opt for "closed mediation" a privilege is conferred in the following terms:[1]

> "If the parties have decided that the mediator is to file a limited report, no evidence of anything said or of any admission or communication made in the course of the mediation is admissible in any proceeding, except with the consent of all parties to the proceeding in which the mediator was appointed."

These provisions, however, do not qualify the statutory duty to report to the appropriate child protection authorities any disclosure of child abuse which is made in mediation.[2]

4.22 In British Columbia section 3 of the Family Relations Act 1979 provides that the Attorney General may appoint a person to be a family court counsellor and that the latter may offer advice and guidance to the parties to a family dispute which has given or may give rise to proceedings. Section 3(3) provides:

> "Subject to the law of Canada, where
>
> (a) a family court counsellor receives under subsection (2) evidence, information or a communication in confidence from a person who is a party to the proceeding, or from a child; and

---

[1] 1980 Act, s 31; 1986 Act, s 3(6).

[2] Child and Family Services Act 1984, s 68.

(b) the person who gave the evidence, information or communication to the family court counsellor under subsection (2) does not consent to the family court counsellor disclosing the evidence, information or communication,

the family court counsellor shall not disclose the evidence, information or communication in a proceeding in a court or tribunal, and no person shall examine him for the purpose of compelling him to disclose that evidence, information or communication."

Thus, the privilege attaches only to evidence, information or communications received by a family court counsellor under section 3, and not by any other mediator; and it is the privilege of the party who gives it, not of the family court counsellor who receives it. It has been said that a common law privilege attaches both to mediation under section 3 and to private mediation.[1]

4.23 In Quebec the Code of Civil Procedure accords a privilege to the parties to a "conference of conciliation or reconciliation" as follows:[2]

"Unless the parties consent thereto, nothing said or written during a conference of conciliation or reconciliation is admissible as evidence in a court proceeding."

(4) Republic of Ireland

4.24 In the Republic of Ireland the Judicial Separation and Family Reform Act 1989 provides a further example of an exclusionary rule relative to communications which is expressed in wholly

---

[1] Sinclair v Roy, cit para 4.18 above.

[2] Code of Civil Procedure, s 815.3.

unqualified terms. Section 7(1) of the Act provides that in an action for judicial separation[1] the court must give consideration to the possibility of a reconciliation of the spouses and may adjourn the proceedings for the purpose of affording them an opportunity, if they both so wish, to consider a reconciliation between themselves with or without the assistance of a third party. Section 7(3) states that where it appears to the court that no reconciliation of the spouses is possible, it may adjourn the proceedings to afford them an opportunity, if they both so wish, to establish agreement (with or without the assistance of a third party) on the terms, so far as is possible, of the separation. Section 7(6) provides that where the court adjourns under section 7(1) or 7(3) it may at its discretion advise the spouses concerned to seek the assistance of a third party for the purpose set out in the appropriate subsection. The rule is enacted in section 7(7) in these terms:

> "Any oral or written communication between either spouse and any third party to whom subsection (1), (3) or (6) of this section relates (whether or not made in the presence of the other spouse) and any record of such communication caused to be made by such third party, shall not be admissible as evidence in any court."

(5) New Zealand

4.25 The law of New Zealand is of considerable interest. As in Scotland, the courts have not had occasion to adopt or reject the English line of

---

[1] The enactment of any law providing for the grant of a dissolution of marriage is forbidden by the Irish Constitution, art 41.3.2.

authority from McTaggart to Pais.[1] There are, however, two relevant statutory provisions. One Act confers a privilege on court-related family mediation only, while another Act gives the court a discretion to excuse any witness in any proceeding from giving any particular evidence. It may be that any information acquired in the course of family mediation which was not court-related would be capable of being protected by the exercise of the court's discretion under the latter Act. Among the options for reform which we set out in Part V are a proposal that any new privilege should be restricted to court-referred conciliation only;[2] and a further proposal that any claim to non-disclosure should be determined by the court, having regard to particular specified considerations.[3]

4.26 Part II of the Family Proceedings Act 1980, which is derived in part from earlier legislation, deals with two kinds of court-related processes: conciliation by a conciliator and mediation by a judge. As to the first, the registrar of a family court may arrange counselling before any proceedings have commenced.[4] Where separation proceedings have been commenced, the registrar must generally refer the matter to a counsellor.[5] The counsellor to whom the registrar refers the parties

---

[1] See paras 3.4-3.12 above. It has been said that English authority applies: B D Inglis, Family Law (2nd ed, 1968), vol i, p 94.

[2] See para 5.18 below.

[3] See paras 5.14-5.16 below.

[4] 1980 Act, s 9.

[5] Ibid, s 10.

must explore the possibility of reconciliation, but if reconciliation does not appear to be possible, must attempt to promote conciliation between them.[1] Thereafter the counsellor must submit a report to the registrar stating whether or not the parties wish to resume or continue the marriage and, if not, whether any understandings have been reached between them on matters at issue.[2]

4.27 As to mediation by a judge: where an application is made for separation, maintenance, custody or access, either party or a family court judge may ask the registrar to arrange for a mediation conference to be convened.[3] The chairman of the mediation conference is a family court judge. The objectives of the conference are to identify the matters in issue between the parties and to try to obtain agreement between them on the resolution of those matters. The chairman makes a written record of the matters on which agreement is reached and on which no agreement is reached.[4] He may also make orders by consent of the parties.[5]

4.28 An exclusionary rule relative to each of these processes is enacted by section 18(1), which provides:

> "(1) No evidence shall be admissible in any Court, or before any person acting

---

[1] Ibid, s 12.

[2] Ibid, s 11(2).

[3] Ibid, s 13.

[4] Ibid, s 14.

[5] Ibid, s 15.

judicially, of any information, statement, or admission disclosed or made -

(a) To a counsellor exercising his functions under this Part of this Act; or

(b) In the course of a mediation conference."

The rule does not apply to the written record or to any consent order made by the judicial chairman of a mediation conference, or to any proceedings for the review of such a consent order.[1]

4.29 The confidentiality of the counselling process is further protected by a provision that it is a criminal offence, punishable by a fine not exceeding $500, for a counsellor to disclose to any other person any information, statement or admission received by or made to him in the exercise of his functions under Part II of the Act, except to the extent that disclosure is necessary "in the proper discharge of that counsellor's functions".[2] As with the Australian marriage counsellor's oath or affirmation,[3] the scope of this exception is obscure.

4.30 While these provisions of the Family Proceedings Act 1980 are concerned only with court-related conciliation and mediation, the Evidence Amendment Act (No 2) 1980 endows all courts with a discretion to excuse any witness from giving any particular evidence. It seems possible that information acquired in the course of other forms

---

[1] Ibid, s 18(2).

[2] Ibid, s 18(3).

[3] See para 4.7 above.

of conciliation or mediation could be protected by the exercise of such a discretion. Section 35 of the Act provides:

> "(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.
>
> "(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:
>
> (a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding:
>
> (b) The nature of the confidence and of the special relationship between the confidant and the witness:
>
> (c) The likely effect of the disclosure on the confidant or any other person.
>
> "(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or

by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

"(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law."

4.31 Section 35 was considered by the New Zealand Court of Appeal in R v Howse[1] where the question was whether the trial judge had been right to admit evidence from a minister of religion of conversations which he had had with the accused. The appellant relied on section 31 of the Act, and alternatively on section 35. Section 31(1) provides that a minister must not disclose in any proceeding any confession made to him in his professional capacity, except with the consent of the person who made the confession. Section 31(2) excludes from the protection given by section 31(1) any communication made for any criminal purpose. The Court said:[2]

"As to s 35, this is a characteristic piece of statutory law reform in the New Zealand tradition. Identifying an area as having problems not lending themselves to solution by fixed rules, the legislature has conferred a discretion on the Court to weigh the competing public interests bearing on each particular case, having regard to broad criteria. The section enables a witness to be excused (on his own application or that of a party) from disclosing confidences. It does not authorise a direction that he refrain from disclosure. It goes only to whether he can be compelled to do so. Here the minister evidently did not wish to be

---

1 [1983] NZLR 246.

2 At p 251.

> excused, so the section had no application. The Judge expressed the view that in any event this was not a case when the discretion ought to be exercised. That may well be so, but we are not called upon to discuss the point further.
>
> "We add that the very existence of s 35 is a reason for not placing an unduly wide interpretation on s 31. There is no reason why a minister of religion who has received in confidence information not constituting a confession within the scope of s 31 should not be excused from disclosure under s 35 if the Court in its discretion, having regard to the prescribed matters, so decides. The jurisdiction under s 35 should enable professional advisers and others to ensure that confidences are never lightly broken in evidence."

(6) United States of America

4.32 In the United States of America there is no federal law dealing with mediation, but since 1980 several States have incorporated into their divorce procedures a variety of statutory mediation schemes. Most of these schemes place some restriction on the use of information acquired during mediation. These restrictions generally apply only to the statutory mediation scheme. Thus, whether any privilege attaches to a private mediation process depends on the general law of evidence of the particular State.[1] The divorce mediation legislation generally provides that information acquired during mediation is protected from disclosure either by an exclusionary rule or by a privilege. Where a privilege is enacted, there are differing provisions as to the proceedings in which it may be claimed, whether it may be claimed

---

[1] See para 4.39 below.

by the mediator as well as by the parties, and the circumstances in which it does not attach. We note examples of such provisions in subsequent paragraphs.

4.33 We notice first, however, that certain States have enacted exclusionary rules in order to protect information acquired during mediation. In New York State article 9 of the Family Court Act[1] makes provision for conciliation procedure and provides by article 9.15:

> "All statements made in proceedings under this article are confidential and shall not be admissible in any subsequent proceeding or action."

In Maine, Evidence Rule 408, as amended, provides:

> "Evidence of conduct or statements by a party or mediator at a court-sponsored domestic mediation session is not admissible for any purpose."

There are provisions to the same effect in Illinois,[2] Oregon[3] and Maricopa County, Arizona.[4] In Delaware, on the other hand, the restriction is limited to evidence against a participant in subsequent proceedings in the Family Court:[5]

> "Nothing said by the parties or other persons participating during the [mediation] conference may be used against them in subsequent proceedings in this court."

---

[1] As amended to 1 September 1986.

[2] Not-For-Profit Dispute Resolution Center Act, s 6(a).

[3] Oregon Revised Statutes Annotated ss 107.755-107.795.

[4] Maricopa County Superior Court Local Rule 6.8.

[5] Delaware Family Court Rule 470.

In Minnesota, similarly, the divorce mediation legislation prohibits the use of any records of mediation proceedings

> "as evidence in any action for marriage dissolution and related proceedings on any issue in controversy in the dissolution."[1]

4.34 Other States provide a statutory privilege which may be waived by the parties.[2] There are differing provisions regarding the mediator as a witness. In States where there is an exclusionary rule, it is clear that the mediator is neither a competent nor a compellable witness to the excluded matters.[3] In some States where there is a privilege instead of an exclusionary rule, the mediator is compellable for limited purposes only. Thus in Kansas, while the parties may waive their privilege, the mediator cannot be compelled to disclose any matters disclosed in the process of setting up or conducting the mediation except communications relevant to child abuse[4] or the commission of a crime during the mediation process or an expressed intent to commit a crime in the

---

[1] Minnesota Statutes Annotated s 518.619 (Contested Custody: Mediation Services).

[2] Kansas Statutes Annotated s 23-606(a) (Mediation of Domestic Disputes: Custody and Visitation Issues) (see para 4.36 below); Louisiana Revised Statutes ss 9:351-356 (Mediation in a Custody or Visitation Proceeding).

[3] As to "competent" and "compellable" see para 2.2 above.

[4] The mediator has a statutory duty to report if he has reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse: Kansas Statutes Annotated, 1984 Supp, s 38-1522(a).

future.[1] In Missouri[2] communications to the mediator are privileged and he

> "shall not be examined or made to testify to any privileged communication without the prior consent of the person who received his professional services, except in violation of the criminal law."

In Iowa the mediator cannot be examined regarding confidential communications except where he or she has reason to believe that a party to a dispute has given perjured evidence.[3] In Utah[4] and New Jersey[5] there is no privilege where the mediator is a defendant in any civil, criminal or disciplinary action arising from the mediation process.

4.35 It is clear from the statutes noted in the preceding paragraph that there is a variety of legislative provisions in different States as to the circumstances in which the privilege does not apply. There are two sets of rules which are of special interest since they were recently enacted after consideration of some of the issues which it will be necessary to address when proposing any alteration in the law of Scotland. These are the rules in the Kansas divorce mediation statute, and the Los Angeles Superior Court Local Rule. In both, there are provisions imposing a duty of confidentiality as well as rules of evidence regarding information privileged from disclosure in court.

---

[1] Kansas Statutes Annotated, s 23-606(b). See para 4.36 below.

[2] Missouri Revised Statutes s 377.540.

[3] Iowa Code Annotated ss 598.41, 679.1-679.14.

[4] Utah Code, s 58-39-10.

[5] New Jersey Revised Statutes s 45:8B-29.

4.36 The relevant sections of the Kansas statute are in these terms:

> "**23-605. Confidentiality.** A mediator appointed under K.S.A. 1985 Supp. 23-602 [custody or visitation mediation] shall treat all information obtained from and about the participants through the mediation process as confidential and shall not disclose any such information except as necessary for the conduct of the mediation or as required by law.
>
> "**23-606. Mediator-party privilege.** (a) A party ordered to participate in mediation under K.S.A. 1985 Supp. 23-602 has a privilege in any action to refuse to disclose, and to prevent a witness from disclosing, any communication made in the course of the mediation. The privilege may be claimed by the party or anyone the party authorizes to claim the privilege. There is no privilege under this section as to a communication relevant to: (1) Information the mediator is required to report under K.S.A. 1984 Supp. 38-1522 [child abuse] and amendments thereto, (2) the commission of a crime during the mediation process or (3) an expressed intent to commit a crime in the future.
>
> (b) No person appointed as a mediator under K.S.A. 1985 Supp. 23-602, nor that person's agent, may be subpoenaed or otherwise compelled to disclose any matters disclosed in the process of setting up or conducting the mediation except as to matters not privileged under subsection (a)."

4.37 The Family Conciliation Court of Los Angeles County, which was established in 1939, was one of the first of its kind in the United States. Among its basic objectives are the following:[1]

> "1. To provide a non-adversarial means of settling conflict within the Superior Court, maximizing participation of the

---

[1] Hugh McIsaac, Family Mediation and Conciliation Service (Los Angeles County Superior Court, 1984), p 1.

parties involved and giving them maximum responsibility for their own individual and collective lives.

2. To help families reconcile and divert from the divorce process.

3. To help families going through the divorce process handle the crisis of dissolution effectively and settle their differences amicably."

Among the services which the Family Mediation and Conciliation Service offers are marriage counselling, that is, "crisis marriage and family counselling for families who wish to explore alternatives to dissolution and divorce", and mediation in disputes over custody or access.

4.38 Confidentiality and privilege are regulated by the Los Angeles County Superior Court Local Rule which is printed below. We insert after each of the numbered exceptions an italicised paragraph of commentary by Mr Hugh McIsaac, Director of the Family Mediation and Conciliation Service.[1]

"A. Except as provided herein, it is the general policy of the Los Angeles County Superior Court for all conciliation court marriage counseling and family mediation services to be confidential. Confidentiality is seen as essential to the court's effective functioning.

Staff members of the conciliation court may not disclose information to persons other than the participants and their counsel, nor may they produce records in violation of this policy. No counselor, party, counsel, or participant may be compelled to testify concerning any information acquired (including but not

---

[1] Hugh McIsaac, "Confidentiality: An Exploration of Issues" (1985) 8 Mediation Quarterly 57 at pp 64-66.

limited to communications or observations made in connection with providing conciliation court services.).

B. Exceptions:

1. Nothing in this section shall restrict any person from reporting or serving as a witness where a crime has been committed, or is alleged to have been committed, in his or her presence.

This provision means that if a crime is committed in the presence of the mediator, the mediator may testify about the crime but may not reveal other information not related to the crime. (This provision does not apply to admissions regarding past criminal behavior).

2. Nothing in this section shall restrict any conciliation court staff member from complying with any law requiring the reporting of child abuse.

Mediators must report any instances of child abuse to the Protective Services Unit of the Department of Public Social Services, not to the trial court that is hearing the custody dispute. The Protective Services Unit investigates the allegations and carries the information forward, as necessary.

3. Nothing in this section shall restrict a conciliation court staff member from complying with the requirements of Tarasoff v The Regents of the University of California, (1976) 17 Cal.(3d) 425.[1]

Mediators also must inform persons intended as targets of threats about the

---

[1] In Tarasoff a patient killed a woman after telling his psychotherapist of his intention to do so. The Supreme Court of California held that the psychotherapist had a duty to warn the victim or someone, such as her parents, who might have warned her: the duty was held to arise from the special relationship between the psychotherapist and the patient.

threats, if made in the presence of mediators. The report of the threat is made to the intended target, not to the *trial court that is hearing the custody dispute.*

4. The fact that conciliation court session took place, the time and place of that session, and the identities of participants shall not be deemed confidential.

Conciliation court referrals are contained in the divorce file, which is a public record. Therefore, the fact that a conciliation court session was held is not confidential, but the contents of the session are protected.

5. The fact that an agreement was, or was not, reached, and the contents of any stipulation and order resulting from a conciliation court session shall not be deemed confidential.

Any agreements made into court orders are entered in the divorce file, a public record. While the agreement itself is not confidential, all transactions and negotiations leading to it are protected.

6. Nothing in this section prevents the conciliation court from recommending that a matter be referred for a child custody evaluation[1], or that an attorney be appointed for a child or children.

When there is no agreement, the mediator may recommend to the trial court that a child custody evaluation be conducted or that an attorney be appointed for the child. Such a recommendation should be made to protect the best interest of the child and would not in itself reveal anything adverse about either of the parties.

---

[1] The child custody evaluation is conducted outside the mediation process by the Child Custody Evaluator's Office which is separate from the Family Mediation and Conciliation Service.

7. Nothing in this section shall prevent the conciliation court counselor from meeting with the judicial officer hearing a contested custody matter in an in-chambers conference with both attorneys and the parties when the parties themselves have both requested and consented to such a conference following the parents' completion of the mediation process.

When both parents request and consent to a conference in chambers, the mediator may participate in the settlement conference. Nevertheless, the conciliation court reserves the right to assert absolute privilege, even if the parents request the mediator's testimony. Under no circumstances do mediators participate in the trial process if efforts toward settlements fail."

4.39 Thus far we have considered only American enactments on the subject of confidentiality in family mediation which is related to court proceedings and authorised by the legislation. In some States other forms of family mediation, often referred to as "private mediation", often do not enjoy any statutory protection. In Washington DC the Divorce and Marital Stress Clinic provides private mediation on the practical issues faced by divorcing couples including custody and access. Before mediation all parties sign a contract which includes an agreement that the mediation will remain confidential in regard to the court. The validity of such an agreement has not been tested in the courts of that State. In a Californian case, however, the court rejected an argument that a similar agreement was contrary to public policy since it was a contract to suppress evidence. The court held that that consideration was outweighed

by the public policy of favouring "procedures designed to preserve marriages, and counseling has become a promising means to that end."[1]

[1] Simrin v Simrin (1985) 43 Cal Rptr 376.

PART V - THE ISSUES AND OPTIONS FOR REFORM

(1) Introduction

5.1 In this Part we begin by considering the general question whether, in principle, some kind of privilege should attach to information acquired in the course of family mediation. Our provisional conclusion is that that question should be answered in the affirmative. We then examine the following important issues which must be addressed if that conclusion is accepted. Should the definition of the scope of the privilege be left to be developed by judicial decision, or should it be precisely defined by statute? If a statutory privilege is to be enacted, to what types of family mediation, and to what categories of information, should it apply? Should the mediator, as well as the parties, be entitled to claim the privilege? Should the privilege be available in all kinds of legal proceedings, or only in certain defined categories of proceedings? Once such general issues have been settled, it is necessary to consider the difficult question whether the privilege should be subject to any exceptions in respect of particular classes of information which should not be protected from disclosure in court, and if so, what those exceptions should be? Finally, we note that in exceptional circumstances a mediator may have difficulty in deciding whether a serious matter which has come to his or her notice should be disclosed to a third party or to some public authority. We therefore discuss the question whether in any proceedings for breach of confidence arising from family mediation it should be a defence that disclosure was in the public interest, and the disclosure of any information which is excepted from the privilege should be deemed to

have been in the public interest. If that were so, any information which was excepted from the privilege against disclosure in court could be disclosed out of court to the appropriate authorities without there being any breach of any restriction imposed by agreement or otherwise on the disclosure of information acquired during the mediation process.

(2) Should any privilege attach to information acquired in the course of family mediation?

5.2 It appears to us that an examination of this general question must begin by recognising that since the effect of a privilege is to permit relevant evidence to be withheld from the court at the risk of obstructing the administration of justice by the concealment of the truth, powerful and compelling arguments are necessary to justify any proposal to create any new privilege. As we have noted, various statutory privileges in favour of spouses have been criticised (and their equivalents abolished in England)[1] and only a few new statutory privileges have been created[2] most of which are analogous to the client and legal adviser privilege, itself regarded by the common law as exceptional and justified only because it is essential to the functioning of the legal system.[3] The search must therefore be for what Dixon J (as he then was) in the following passage called "paramount considerations of general policy":[4]

---

[1] See para 2.8 above.

[2] See paras 2.17-2.19 above.

[3] See paras 2.10-2.13 above.

[4] McGuiness v A-G of Victoria (1940) 63 CLR 73 at p 102.

> "... the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and State secrets, and, by [Australian] statute, physician and patient and priest and penitent, an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box."

5.3 It may be useful to test whether "paramount considerations of general policy" exist in the case of family mediation by ascertaining whether family mediation can satisfy the four conditions which Wigmore considered to be essential to the recognition by the law of a privilege of non-disclosure. He wrote:[1]

> "General Principle of Privileged Communications. Looking back upon the principle of Privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a Court of Justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of

---

[1] 8 Wigmore on Evidence (3rd ed, McNaughton revision, 1961) (hereafter "Wigmore") para 2285 (Wigmore's emphasis).

communications between persons standing in a given relation:

> "(1) The communications must originate in a confidence[1] that they will not be disclosed.
>
> "(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> "(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> "(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

These conditions are no doubt utilitarian in that they regard confidentiality not as in itself a justification of privilege, but as an instrument designed to protect relationships which are of importance to the community.[2] Nevertheless they have often been cited with approval in courts of the highest authority in cases where the issue was whether a communication was inadmissible on the ground of privilege.[3] It is important to notice, however, that in mediation three parties are concerned. There is therefore more than one "relation" which may have a claim to protection.

---

[1] We take "confidence" to mean in this context "firm trust" or "assured expectation" (Shorter OED sv "Confidence", 1, 2) (our footnote).

[2] R Weisberg and M Wald, "Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform" (1984) 18 Family Law Quarterly 143 (hereafter "Weisberg and Wald") at p 183.

[3] eg Slavutych v Baker (1975) 55 DLR (3d) 224 at pp 228-229 (Sup Ct of Canada); D v NSPCC [1978] AC 171 per Lord Simon of Glaisdale at pp 237-238.

There is not only the relationship between the parties themselves, but also the relationship between the parties as a couple and the mediator and the relationships between the mediator and each of the parties as individuals. Further, the "communications" made in the course of mediation are not only communications by either or both of the parties to the mediator but also communications by the mediator to either or both of them and communications between the parties themselves. Each of the participants may also obtain information not only through written or oral communications but also through observation of another participant's demeanour or conduct. When considering Wigmore's criteria we propose to have regard to all the relationships involved and to all the information obtained during the mediation process.

5.4 As to the first condition, it is clear that information acquired in the course of mediation provided by any of the organisations mentioned in Part I of this Paper[1] originates in a confidence[2] that it will not be disclosed unless in exceptional circumstances. All these organisations stress the confidentiality of their services, making only some very limited qualification for highly exceptional cases. Marriage Counselling Scotland recognise "that there <u>are</u> situations where the demands of humanity must be regarded as stronger even than those of confidentiality" and they refer, in particular, to the need to protect a third party, including a child who is believed to

---

[1] See paras 1.6-1.10 above.

[2] For the meaning of "confidence" here see footnote to para 5.3 above.

be at risk.[1] The policy of the Scottish Catholic Marriage Advisory Council is that under normal circumstances confidentiality is absolute and only in cases of extreme danger to the client or another person should disclosure be contemplated. Such cases are rare and are always referred to the Chief Executive.[2] In SAFCOS one of the principles of conciliation is that conciliation services are strictly confidential "except in the case of a criminal offence against a child being alleged".[3] Clients of the FMA are advised that the FMA treat the mediation as completely confidential. "The sole exception is where a member of the family is said to be, or appears to be, at risk of serious harm. In such event we would normally discuss the action to be taken with you both before taking any action ourselves to contact a medical or welfare agency."[4] Thus, subject to these exceptions, the forms of family mediation offered by these organisations would appear to fulfil Wigmore's first condition. Where the mediator is not connected to such an organisation but is a third party such as a clergyman, social worker or trusted friend who is trying to help the parties quite informally, it seems reasonable to assume that the information likewise originates in a confidence that it will not be disclosed. Indeed

---

[1] Confidentiality: Principle and Practice in Marriage Guidance (1984), para 2.4, pp 12-14.

[2] CMAC Centre Handbook (nd), pp 26-30.

[3] SAFCOS Statement of Principles of Conciliation, para 4.

[4] Para 5 of the standard letter signed on behalf of both mediators and countersigned by the clients to confirm their acceptance of its terms at the first mediation meeting.

some clergymen would regard such information as absolutely confidential.

5.5 As to Wigmore's second condition, it is clear that the organisations mentioned above regard the element of confidentiality (in the popular sense), qualified only to the extent indicated, as essential to the full and satisfactory maintenance of the various relationships between the participants and, in particular, that between the parties and the mediator. A similar view was expressed by respondents to the consultation exercise on the future course of conciliation which was conducted by the Conciliation Project Unit. The respondents represented a wide range of professions and interests. As we have already noted,[1] the Newcastle Report records that there was "clear and strong support" for the propositions that (a) both confidentiality and privilege were essential to the proper functioning of conciliation; (b) neither could realistically be claimed in absolute terms; and (c) each must yield where there was evidence of child abuse.[2] The view which is generally expressed in support of proposition (a) in relation to privilege is that unless the client feels assured that the mediator cannot be forced to reveal any confidential communications in court, he or she will be reluctant to speak as candidly as the success of the mediation process requires, or will choose not to seek mediation at all.[3]

---

[1] Para 3.23 above.

[2] Newcastle Report, para 5.78.

[3] cf Wigmore, para 2191, cit Weisberg and Wald at p 158.

5.6 We are not aware that that view has ever been challenged. Widely though it is held, it seems difficult to obtain precise information which would support it, but material which may be of some relevance is contained in a study which was conducted in Texas following the enactment of that State's first privilege law covering psychotherapists. The findings indicated that patients did not directly rely on privilege laws in deciding whether to seek psychotherapy or to be candid with their therapists: while patients wanted confidentiality, they found assurance of confidentiality in their perception of the general ethical conduct of psychotherapists rather than in any rule of law. It follows, however, from the patients' desire for confidentiality that if actual or potential patients became aware that therapists might lawfully disclose information which the patients regarded as confidential, they might be deterred from confiding in psychotherapists.[1] Clearly there is no precise correspondence between family mediation and the psychotherapist-patient relationship, but it seems reasonable to assume that a mediator's potential clients, like patients, do not approach the mediation service with the law of privilege in mind but nevertheless assume that any information which they give will not be disclosed elsewhere. The potential clients of the mediation services we have mentioned are indeed given assurances of only marginally qualified confidentiality. It appears from the success of these services that their clients are satisfied

---

[1] Shuman & Weiner, "The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege" (1982) 60 NCL Rev 893, cit and discussed by Weisberg and Wald, pp 186-188.

with such assurances even although they might well not be supported by the Scottish courts. If, however, the law were to refuse to acknowledge that any confidentiality attached to the mediation process, or if it were to grant only very limited confidentiality by prescribing additional qualifications which had the effect of substantially extending the range of matters which the mediator might lawfully disclose, it seems difficult to deny that potential clients would be deterred from seeking mediation. We are inclined to think, therefore, that the degree of confidentiality which is at present extended to the clients of these services probably satisfies Wigmore's second condition.

5.7 Wigmore's third condition is that the relation in question must be "one which in the opinion of the community ought to be sedulously fostered". We think there can be no doubt that this condition is fulfilled by each of the relationships involved in the mediation process. The interest of the State in reconciliation was referred to by Bucknill L J in Mole[1] and by Sachs J in Henley[2] in dicta which have been frequently cited with approval. As to conciliation, we have already said[3] that we take it to be implicit in the enactment of the new rules of court that the Scottish courts appreciate the potential value of conciliation in disputes about custody and access. Conciliation gives parties an opportunity to avoid the familiar disadvantages of conducting such disputes, and disputes over

---

[1] [1951] P 21 at p 23; see para 3.6 above.

[2] [1955] P 202 at p 204; see para 3.8 above.

[3] Para 1.16 above.

financial arrangements or property, in an adversarial system of litigation:[1]

> "This can be, and very often is, a bruising experience from which both parties emerge with varying degrees of bitterness and resentment. The consequential attitudes very frequently affect the children and in particular their relationships with their parents. The damage which is inflicted on the individuals concerned takes its toll in delinquency and ill health."

The Newcastle Report states that conciliation, other than court-based conciliation with high judicial control, "is at least as effective as other, more traditional, procedures in generating satisfactory settlements and on several measures of effectiveness often achieves much more than that".[2] A smaller study by the Central Research Unit of the Scottish Office assessed the effectiveness of conciliation both from the viewpoint of clients and in terms of preventing defended court actions. Conciliation was taken to be effective for the clients if they had been helped by their attendance and if there was an agreement on at least one issue which was working by the time of the survey. It was found that conciliation was effective in around half the cases surveyed, ineffective in one quarter and beneficial (helpful but no agreements) in one-fifth. Where parties attended conciliation before an action was raised, conciliation was effective in terms of preventing defended actions.[3] We have already noted the emphasis placed on

---

[1] Sir John Arnold, "The Case for Conciliation" (1983) 13 Fam Law 1.

[2] Newcastle Report, para 20.11.

[3] Family Conciliation in Scotland (Central Research Unit, Scottish Office, 1990), p 7.

mediation in the Law Commission's proposals for reform of the law of divorce in England and Wales.[1] We ourselves have referred in previous publications to the advantages of mediation.[2] We think, therefore, that the relationships concerned, including that between the mediator and the parties, satisfy Wigmore's third condition.

5.8 Wigmore's fourth condition presents more difficulty than the other three. It stipulates that "the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation". This may be thought to be true of the relationships between the participants, but it seems necessary to acknowledge that in some important classes of case a judicial decision which is incorrect due to the exercise of a privilege to withhold relevant information may have very damaging consequences. In any action for the custody of, access to, or aliment for a child, the child is an unrepresented third party whose interests are of primary

---

[1] Para 3.24 above.

[2] The Ground for Divorce: Should the Law be Changed? (Scot Law Com D P No 76, 1988) pp 17-18; Report on Reform of the Ground for Divorce (Scot Law Com No 116, 1989), paras 2.3, 4.7; Twenty-fourth Annual Report (Scot Law Com No 123, 1989), para 1.2.

importance.[1] The duty of the Scottish civil courts in relation to the child is laid down by statute as follows:[2]

> "In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration and shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child."

Accordingly, if by the exercise of a privilege the court were to be prevented from receiving information relevant to the welfare or interests of the child, the court's ability to perform its statutory duty correctly would be imperilled. If the risk of the court's reaching an incorrect decision which would be detrimental to a child is to be balanced against the risk of injury to the relationships between the participants in the mediation process through the denial of a privilege, then it appears to us that the scales must come down in favour of the child.

5.9 It is possible to envisage other cases in which it is at least arguable that the relationships between the participants must be regarded as of secondary importance to some overriding public interest, such as the disclosure of perjury or other offences against the course of justice, or the detection of other crimes or the administration of justice generally. We think, however, that while such cases are of sufficient

---

[1] This point is well made by Wilkinson, p 102, where it is submitted that any privilege in favour of conciliation should not apply to negotiations over custody, access or aliment.

[2] Law Reform (Parent and Child) (Scotland) Act 1986, s 3(2).

importance to merit discussion when exceptions to any new privilege come to be considered,[1] they will seldom arise in practice. We refer to the experience of Marriage Counselling Scotland. In their document on Confidentiality they conclude with the following words a discussion of "the kinds of exceptional circumstances in which the principle of confidentiality may have to yield to some competing pressure or value:"[2]

> "Because of the disproportionate prominence given to exceptions, it is desirable to end this chapter with an insistence that the occasions for breaking confidence are truly exceptional and that they play little or no part in the working experience of most counsellors."

There is a question whether this would continue to be true if the range of exceptions were to be extended somewhat beyond those contemplated by the document, which relate to the protection of a third party. Subject to the important reservations expressed in this and the preceding paragraph, we think that the relationships between the participants satisfy Wigmore's fourth condition.

5.10 We have found few expressions of opinion to the effect that a privilege in favour of family mediation should not be created. In 1977 the Law Reform Commission of Tasmania rejected a submission that there should be such a privilege, but their opposition appears to have been based principally on what they considered to be the difficulty of defining the category of persons to whom, and the circumstances in which, the privilege

---

[1] See paras 5.63-5.69 below.

[2] Confidentiality (see para 5.4 above) para 2.1, p 9; para 2.7, p 16.

should apply.[1] In our Memorandum entitled Law of Evidence which was published in 1980[2] we sought views on the question whether there should be introduced into Scots law a privilege in favour of spouses against the disclosure of communications made to a mediator. We proposed that no privilege should be conferred on the mediator. The respondents who expressed views on these matters were divided on the question whether such a privilege should be introduced, but were virtually unanimous in agreeing that no privilege should be conferred on the mediator. We have already noted that Sheriff Wilkinson, writing in 1986, submitted that any privilege in favour of conciliation should not apply to negotiations over custody, access or aliment.[3] In those days, however, the conciliation movement in the UK was in its infancy,[4] and it is now desirable that the whole matter should be reconsidered in the light of substantial further experience of family mediation both in this country and abroad.

5.11 Having tested the characteristics of family mediation against Wigmore's four conditions, we

---

[1] Law Reform Commission of Tasmania Report No 16 (1977, Parliament of Tasmania Paper No 63), "Supplementary Report and Recommendations on Submission by Tasmanian Marriage Guidance Council Inc relating to competence and compellability of spouses to give evidence in criminal proceedings preferred against the other spouse and certain suggestions regarding 'privilege' for marriage and family counsellors".

[2] (1980) Scot Law Com Memo No 46, paras S.28, S.29.

[3] See para 5.8 above.

[4] See para 1.7 above.

consider that the public interest in family mediation may be fairly described as "a paramount consideration of general policy"[1] which appears to require that there should be a privilege attaching to information acquired in the course of it, albeit that it seems necessary to make provision for disclosure in exceptional cases. We therefore propose:

1. **In principle, some degree of privilege should attach to information acquired in the course of family mediation.**

(3) Is legislation necessary?

5.12 If our first proposition is accepted, the question may be asked whether, if it is so obvious that there should be some privilege in favour of family mediation, it is necessary to contemplate the creation of a privilege by legislation. Could not the scope of the privilege be defined by the courts as questions of privilege arise for decision? We think it is quite possible that, in the absence of legislation, the law could develop in that way. If a party sought to lead evidence of matters which a Scottish judge considered should be privileged, he could exclude such evidence by treating as persuasive the English decisions regarding communications relating to reconciliation[2] and either follow them if the issue before him was concerned with reconciliation, or extend their reasoning if it was concerned with conciliation upon the view that the same considerations of public policy applied to conciliation as to reconciliation. An alternative,

---

[1] See para 5.2 above.

[2] See paras 3.1-3.13 above.

although perhaps less likely, course would be to excuse the witness from answering in the exercise of the court's residual discretion.[1]

5.13 We consider, however, that it might well be some years before there accumulated a body of authoritative judicial decisions which defined the scope of the privilege and dealt with all the issues which we have set out in paragraph 5.1 above including, in particular, the nature of any exceptions to the privilege. Since couples are now resorting to mediation in increasing numbers, either spontaneously or because they have been referred by a court, and since there is well-founded concern among mediators, lawyers and others that the law is not settled, it appears to us to be urgently necessary that the law should be made clear and predictable. We therefore favour the enactment of legislation which would cover, at least, family mediation provided by an organisation such as SAFCOS and the other services mentioned in Part I.[2] There may be a question whether it is necessary for the legislation to cover completely informal, unstructured mediation such as may be offered to a couple by a third party who is not attached to any such organisation. We address that question in the following section of this Part.[3]

5.14 There is, however, one mode of legislating which would both permit judicial development of the law and avoid the necessity of coming to any decision not only as to informal mediation but also

---

[1] See para 2.23 above.

[2] See paras 1.6-1.10 above.

[3] See para 5.23 below.

as to all the other issues mentioned in paragraph 5.1 above. Such legislation would simply confer on the court a general discretion to excuse any person from providing information to the court on the ground that to provide the information would be a breach of confidence, and would prescribe the factors which the court must take into account in reaching its decision. An example of such legislation is section 35 of the New Zealand Evidence Amendment Act (No 2) 1980 which is set out in paragraph 4.30 above. A provision on these lines would be in accordance with the view that the established categories of privilege which we have noticed in Part II - self-incrimination, husband and wife, client and professional legal adviser, and others - are too inflexible to cope with "the infinite variety of factual contexts in which disparate social values relevant to evidentiary privilege need to be evaluated".[1] That, indeed, is the reason why Wigmore formulated his four conditions and urged that privilege should be conferred if they were fulfilled. The "category" approach to privilege is also inconsistent with the thinking of the Law Reform Committee of England and Wales in their Sixteenth Report, where they described the approach of the common law of England and Wales in this way:[2]

> "Privilege in the main is the creation of the common law whose policy, pragmatic as always, has been to limit to a minimum the categories of privileges which a person has an absolute right to claim, but to accord to the judge a wide

---

[1] G L Peiris, "Are the Rules of Evidence Obsolete?" 9th Commonwealth Law Conference (1990) Papers, p 415 at pp 418-419.

[2] Cmnd 3472 (1967) para 1.

> discretion[1] to permit a witness, whether a party to the proceedings or not, to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed. Where under this discretionary power disclosure is compelled, the court can impose such limitations as it thinks fit as to the persons to whom the information is to be disclosed and as to the use to be made of it outside the particular proceedings in which it is disclosed (cf Chantrey Martin & Co v Martin [1953] 2 QB 286). This policy has, we think, in general worked satisfactorily. In exercising his discretion the judge can take into account all the circumstances of the case. To replace this wide judicial discretion by a more comprehensive and rigid statutory classification of privileges together with detailed provisions as to the circumstances in which each of them could or could not be claimed would, we think, be more likely to defeat than to promote the interests not only of justice but also of those social values which it is the object of a privilege to protect."

5.15 That statement of the law has been seriously questioned. In D v NSPCC Lord Hailsham of St Marylebone accepted it, but Lord Simon of Glaisdale and Lord Edmund-Davies expressed considerable reservations about its accuracy.[2] Some members of the Criminal Law Revision Committee also expressed serious misgivings.[3] No doubt, however, the question which the passage raises for our

---

[1] See Attorney-General v Clough [1963] 1 QB 773; Attorney-General v Mulholland [1963] 2 QB 477. (Committee's footnote).

[2] [1978] AC 171 at pp 227, 239-240, 243-244.

[3] Criminal Law Revision Committee Eleventh Report: Evidence (General) (Cmnd 499, 1972), para 275.

consideration is not whether it is right or wrong but whether the law of Scotland should adopt such a policy as it describes. It seems clear that any view that there is a closed number of traditional categories of privileged information which the courts are powerless to extend could only be founded on a misapprehension of the role of the courts in the development of Scots law. It is another matter, however, to recommend that new privileges should be created by the courts in the exercise of a general discretionary power conferred by statute. There has been a somewhat similar suggestion that public interest immunity would provide an appropriate basis "for deciding confidentiality issues that may arise as matrimonial mediation matures and its use becomes widespread".[1] On this view it is maintained that questions such as we have raised in paragraph 5.1 above "are difficult questions, but answers can be found by using the guiding principles of the public interest immunity doctrine ... It requires the identification, analysis and balancing of competing public interests".[2]

5.16 It appears to us that none of these proposals is satisfactory, because it is of primary importance in this area of the law to remove doubt by providing clear and simple rules. The reaching of a decision on a novel question of privilege which involved a balancing of competing public interests would be a difficult, distracting and time-consuming exercise, particularly in a criminal

---

[1] John P McCrory, "Confidentiality in Mediation of Matrimonial Disputes" (1988) 51 MLR 442 at pp 455ff.

[2] Ibid at pp 464-465.

jury trial; and in order to perform it the judge would require to know the content of the information which it was desired to withhold. "The privilege must ... be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept."[1] Perhaps the weightiest objection is that a series of ad hoc balancing exercises by individual judges would be likely to lead to confusion and lack of predictability in the law. Accordingly, although we have taken account of the fact that section 35 of the Evidence Amendment Act (No 2) 1980 was referred to in favourable terms by the New Zealand Court of Appeal,[2] we do not propose legislation in such terms for Scotland. We propose instead that there should be legislation in conventional terms which would define the scope of the privilege and deal with such of the issues raised in paragraph 5.1 above as may seem appropriate after consultation. We envisage that such legislation would expressly preserve existing privileges and any discretion, such as the residual discretion, which is vested in the court under the existing law. We therefore suggest for consideration that:

2. The scope of the privilege should be defined by legislation in conventional terms.

(4) To what types of family mediation should the privilege apply?

5.17 We have already explained that in Scotland at the present day family mediation services are

---

[1] R v Cox and Railton (1884) 14 QBD 153 per Stephen J at p 175.

[2] See the extract from R v Howse [1983] NZLR 246 at p 251 quoted in para 4.31 above.

offered by Marriage Counselling Scotland, the Scottish Catholic Marriage Advisory Council and SAFCOS[1] and that where a court refers parties to a specified local conciliation service in terms of the new rules of court, in practice it refers them to a service affiliated to SAFCOS.[2] We have also mentioned the services offered in England by the FMA.[3] We have noted that family mediation may also be undertaken by individuals on a completely informal basis.[4]

5.18 The question which now arises is, to what forms of family mediation should any new privilege apply? The narrowest approach would be to confer a privilege only in relation to a mediation process to which the parties have been referred by a court in terms of the new rules of court. There are certainly some analogous precedents for such a course: for example, in the exclusionary rules enacted by section 10 of the Canadian Divorce Act 1986[5] and section 18(1) of the New Zealand Family Proceedings Act 1980.[6] We are inclined to think, however, that there is no substantial difference between a court-referred mediation process and other mediation processes conducted by a service affiliated to SAFCOS. The former process is procedurally distinctive in that it is initiated by the court and the service informs the court when

---

[1] See para 1.6 above.

[2] See paras 1.12-1.13 above.

[3] See para 1.10 above.

[4] See para 1.11 above.

[5] See para 4.20 above.

[6] See para 4.28 above.

the process has been concluded, or that further time is required.[1] Further, court-referred mediation is restricted to disputes about custody or access. But there appears to be no essential distinction between mediation by a SAFCOS-affiliated service in a dispute over custody or access where the parties have been referred by a court, and where there has been no such reference. It may therefore seem reasonable to adopt a less narrow approach and confer the privilege on any mediation relative to custody or access which is conducted by a SAFCOS-affiliated service.

5.19 We doubt, however, whether there could be any justification for restricting the ambit of the privilege to that extent. Mediation is offered by other organisations besides SAFCOS, and not only in relation to disputes over custody or access. Moreover, it is not unlikely that the parties to such a dispute may be at issue over other matters as well. We have noted the possibility of the development in Scotland of "comprehensive mediation", that is, mediation on all issues, including financial arrangements, housing and other property, such as is now offered in England by the FMA.[2] It also seems important to keep in view the public interest in reconciliation as well as in conciliation,[3] and to take account of the encouragement of reconciliation by such bodies as Marriage Counselling Scotland and the Scottish Catholic Marriage Advisory Council. It may be

---

[1] See paras 1.12-1.13 above.

[2] See para 1.10 above.

[3] For a definition of these terms, see para 1.14 above.

desirable, therefore, for any new statutory privilege to be expressed in terms which would take account of the whole range of mediation services which are or may become available in Scotland.

5.20 One way of achieving this objective would be to extend any new statutory privilege to mediation by a person or persons who are approved by, or who are attached to an organisation approved by a Minister. There are provisions to that effect in the Australian Family Law Act 1975,[1] the Victoria Evidence Act 1958[2] and the British Columbia Family Relations Act 1979.[3] Ministerial approval of an organisation is not unfamiliar in Scottish family law: section 3 of the Adoption (Scotland) Act 1978 makes provision for the approval of adoption societies by the Secretary of State. The approval of persons or organisations for the purpose of conferring a privilege in relation to the mediation services offered by them would appear to be a matter for the Lord Advocate, who has ministerial responsibility for the general oversight of the law of evidence in Scotland.[4]

5.21 An alternative way of achieving the protection of mediation by the whole range of services available at any given time would be to adopt the course followed in clause 10 of the Draft Divorce

---

[1] See para 4.5 above.

[2] See para 4.14 above.

[3] See para 4.22 above (an example of Ministerial appointment rather than approval).

[4] HC Deb vol 848, col 456 (Prime Minister's statement on Scots Law (Ministerial Functions), 21 December 1972), printed in 1973 SLT (News) 11-12.

and Separation Bill appended to the Law Commission's Family Law: The Ground for Divorce.[1] That clause protects statements made in the course of any "recognised conciliation or mediation procedure" which is defined as the doing of anything both (a) for the purposes of conciliation or mediation, and (b) "in accordance with arrangements made by a person who has given notice that he is available, in cases of disputes between the parties to a marriage, to provide help with conciliation or mediation".[2] The Law Commission's explanatory note relative to this part of the clause states:

> "If agencies or individuals wish to bring themselves within the definition they will have to give notice to an appropriate court office that they are available to provide such services. Such lists may then be used by legal advisers whose clients, or parties who themselves, wish to consult such agencies or individuals."

There does not appear to be any requirement of any official check by the court or a Minister on the nature or quality of the services offered.

5.22 We would suggest that if the view is accepted that the creation of a privilege is a matter of importance, justifiable only on compelling grounds of public policy,[3] it is not appropriate that one of the conditions for the application of a privilege should be the mere assertion by an individual or agency that he or she or it provides mediation services. It appears to us that it may be

---

[1] Law Com No 192.

[2] Cl 10(3).

[3] See paras 5.1, 5.2 above.

preferable that the application of a statutory privilege should be controlled by a system of official approval of the organisations or individuals to whose mediation services the privilege is to attach. It may be that approval should be granted only to organisations which meet certain standards in the training and qualifications of their mediators.[1] This, however, is a matter on which we seek views.

5.23 Thus far we have contemplated the application of any statutory privilege (a) to court-referred mediation; or (b) to mediation provided by a service affiliated to SAFCOS in relation to custody or access disputes;[2] or (c) to mediation provided by organisations or individuals who either have given notice of their availability or have been approved by a court or Minister.[3] We now consider a fourth option: the extension of the privilege to private individuals who mediate between parties quite informally without any official approval and outside the structure of any organisation. We tend to doubt whether it is necessary or desirable that any statutory privilege should extend to mediation of this kind, for three reasons. First, there appears to be no pressing necessity for such an extension, as there is in the case of mediation

---

[1] The training and regulation of practitioners of mediation in alternative dispute resolution procedures, including mediation in family disputes, are considered in Alternative Dispute Resolution: Training and Accreditation of Mediators (1989) New South Wales Law Reform Com DP No 21.

[2] See para 5.18 above.

[3] See paras 5.19-5.22 above.

following a reference by the court.[1] While informal mediation no doubt takes place, there are no reported Scottish cases in which any problem relating to privilege in that context has arisen. Secondly, it might be difficult to legislate for all the varying circumstances in which such mediation may occur: the English and Australian cases on reconciliation[2] illustrate the diversity of the situations in which the English common law privilege may apply. While it is possible to explain the scope of that privilege in fairly concise language in a textbook, it might be a complex matter to do so in statutory terms which were at the same time both specific and wide enough to encompass any further situations which might arise. Thirdly, we think that in the event of a privilege being claimed in respect of information obtained during informal mediation, a Scottish court when finding and applying the common law relative to the particular situation before it might well have regard to English and other authority[3] as well as to the conditions for the application of any new statutory privilege.[4] This, however, is another matter on which we invite views.

5.24 We would therefore welcome comments on the following questions.

---

[1] See para 1.17 above.

[2] See paras 3.4-3.13, 4.15-4.16.

[3] See para 5.12 above.

[4] See the approach of the Family Court of Australia in In the Marriage of Lace (para 4.16 above).

3. **Should any new statutory privilege apply:**
   (a) **only to mediation provided by a service to which parties have been referred in terms of a rule of court; or**
   (b) **only to mediation provided by a service affiliated to SAFCOS in relation to a dispute over custody or access; or**
   (c) **to mediation provided by any person (an organisation or an individual) who either**
      (i) **is officially approved by the Lord Advocate; or**
      (ii) **has given notice to an appropriate court office that he is available to provide mediation services?**

4. **Should any new statutory privilege extend to mediation provided informally by an individual outside the structure of any organisation or any system of official approval or notice?**

5.25 It seems appropriate that any statutory rules should include a definition of "family mediation" or whatever other expression may be selected to signify the nature of the process to which the privilege is to apply. There are two considerations in favour of a statutory definition. First, there are no generally accepted definitions of "mediation" and "conciliation".[1] Secondly, if there were to be a system of official approval, as

---

[1] See para 1.4 above.

envisaged in paragraph 5.20 above, the qualifications for approval would require to be specified.[1] We envisage that any statutory definition would convey the concept of the provision of advice, facilities or services by the intervention of a third party or third parties to assist the parties to a personal relationship with a view to bringing about a settlement of difficulties or disputes between them, or reducing the area and intensity of conflicts between them.[2] It would be premature, however, to offer any precise definition at this stage. We only suggest for consideration that:

5. **The statutory provisions should include a definition of the nature of the mediation process during which the information protected by the privilege is acquired.**

(5) To what types of dispute should the privilege relate?

5.26 Any discussion of definitions raises questions as to the nature of dispute to which the privilege should relate, and the identity of the parties to it. So far we have been using the expression "family mediation", which we have provisionally defined as "mediation for the purpose of resolving a family dispute"; and we have included in the term "family dispute" any dispute between spouses

---

[1] The English Law Commission's Draft Divorce and Separation Bill, which does not make provision for an approval system, does not define "conciliation" or "mediation" although there is a valuable discussion of these concepts in the Report: Law Com No 192, paras 3.37, 3.38, 5.29-5.39.

[2] This formulation is based in part on the terms of reference of the Inter-Departmental Committee on Conciliation, cit Newcastle Report, para 4.20.

or cohabitants as to any matter which is or may be the subject of civil proceedings to which either or both of them are or may be parties,[1] and any dispute as to parental rights.[2] We now invite comments on these tentative definitions.

5.27 We believe that our inclusive definition of "family dispute" covers the kind of issues which are the principal concern of the organisations currently providing mediation services in Scotland. It seems clear that disputes about custody or access must be covered in view of the terms of the rules of court.[3] Such disputes might best be included by making a comprehensive reference to all disputes as to parental rights. Parental rights are defined by section 8 of the Law Reform (Parent and Child) (Scotland) Act 1986 as:

> "tutory, curatory, custody or access, as the case may require, and any right or authority relating to the welfare or upbringing of a child conferred on a parent by any rule of law."

5.28 We suggest that any other disputes to which the privilege relates should also be justiciable disputes, that is, disputes about matters which are or may be the subject of civil proceedings, and not about comparatively trivial domestic issues which in themselves could not reasonably be litigated. We doubt whether the justiciable disputes should be disputes between spouses only, since in many situations mediation between cohabitants may be

---

[1] Scots law has no convenient definition of "family proceedings" as in s 8(4) of the Children Act 1989.

[2] See para 1.4 above.

[3] See para 1.12 above.

desirable: for example, in a dispute as to aliment for a child, or the occupancy of a house, or conduct liable to be interdicted,[1] or as to any rights which might be conferred on cohabitants by legislation in the future.[2]

5.29 We have used the words "civil proceedings to which either or both of them may be parties" to cover not only any proceedings where they are or would be on opposite sides in court, but any proceedings where they are not formally opposed but in fact take differing views, or where only one compears to state a view which is opposed by the other, for example where they are at odds as to whether consent to the adoption, or freeing for adoption, of a child should be withheld;[3] or whether a local authority's resolution assuming parental rights should be opposed;[4] or whether the grounds of referral of a child to a children's hearing by the Reporter should be accepted.[5]

5.30 There may be a question whether our tentative definition goes far enough. We have noted that one of the limitations of the definition of "marriage counselling" in section 1(4) of the Australian Family Law Act 1975 is that it does not cover such matters as a problem concerning a couple's child (for example, irrational behaviour, absence from

---

[1] See the Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 18.

[2] See The Effects of Cohabitation in Private Law (1990) Scot Law Com DP No 86.

[3] Adoption (Scotland) Act 1978, ss 16, 18.

[4] Social Work (Scotland) Act 1968, s 16.

[5] Ibid, s 42.

school or drug-taking) or a relationship between a child and one parent or between the couple and a relative such as a parent-in-law.[1] We think, however, that it is necessary to distinguish between mediation and counselling. These are examples of situations where there is a problem which may be assisted by counselling, not a dispute which might be resolved by mediation. The question of the nature of the disputes to which the privilege should relate is, however, a matter on which we have not reached any conclusion.

5.31 We would therefore welcome views on the following.

6. The privilege should relate to -

(a) any dispute as to parental rights; and

(b) any dispute between spouses or cohabitants as to any matter which is or may be the subject of civil proceedings to which either or both of them may be parties.

7. Should the privilege extend to disputes of any other kind, and if so, to what categories of dispute?

(6) To what information should the privilege attach?

5.32 Once it has been decided in principle that a statutory privilege should attach to information acquired in the course of mediation relative to particular categories of family disputes, the next matter to be considered is the nature of the information which the privilege should be designed

---

[1] See para 4.8 above.

to protect. It appears to us that in defining that information the objective must be to give such protection as is a necessary condition for the success of the mediation process in any given case. We consider later the question whether particular categories of information should not enjoy the protection of the privilege.[1] Here we examine the general question of the nature of the information to which the privilege should attach. In Part I we set out a provisional definition of "information" which included oral and written communications, records of such communications, and observations made or subjective impressions formed about the behaviour or conduct of the mediator or the parties.[2] We now explain our reasons for the breadth of that definition and refer to other matters which may require to be protected.

5.33 It seems important to make some provision for the protection of information, and not simply to provide that particular persons shall not be compellable to give evidence of specified matters in particular proceedings. The latter method was used in the statutory provisions intended to protect communications between spouses,[3] with the result that a third party may be examined as to communications made between the spouses in his presence, a written communication between them which has been intercepted may be produced and used

---

[1] See paras 5.64-5.78 below.

[2] See para 1.4 above.

[3] See para 2.8 above.

in evidence,[1] and there appears to be no privilege in proceedings to which the spouses are not parties.[2] Another method which seems unsatisfactory is to protect only oral communications, as in the Australian legislation,[3] and thus to admit evidence of written communications or records and evidence of conduct at, or of impressions formed at, a mediation meeting. In some jurisdictions protection is extended to written communications and records as well as to oral communications.[4] Other jurisdictions also exclude evidence of conduct[5] or of conduct and demeanour,[6] so that a witness cannot give evidence[7] of a party's behaviour at a mediation meeting or of the witness's observations or subjective impressions of a party's demeanour.[8] We have taken these formulations into account in offering our provisional definition.

5.34 It also seems necessary to take account of the fact that in the course of the mediation process

---

[1] Cf Theodoropoulas, para 3.13 above, point (3).

[2] Wilkinson, p 103.

[3] See paras 4.8, 4.10 above.

[4] eg Quebec (para 4.23 above); the Republic of Ireland (para 4.24 above).

[5] eg Maine (para 4.33 above).

[6] eg Texas Alternative Dispute Resolution Act, s 154.053(c).

[7] The question of waiver of the privilege is considered in paras 5.48-5.49 below.

[8] The privilege of the legal adviser's client in Scots law is said not to extend to facts observed by the adviser: see para 2.11 above.

the mediator may see the parties separately,[1] or may meet and obtain information from a person other than the parties to the dispute. In disputes concerning a child some mediators find it appropriate to involve the child in the making of certain decisions,[2] and in the recent survey of family conciliation in Scotland it was found that children attended at least one conciliation session in 15 per cent of the cases.[3] It therefore appears to be essential to protect not only information obtained when both parties are present with the mediator, but also information obtained by the mediator when only one of them is present, and information which the mediator obtains from a child or other third party during the mediation process. We accordingly suggest that the information to be protected should simply be information acquired during that process. Here we have in mind the formulation in the Los Angeles County Superior Court Local Rule: "any information acquired ...".[4] On the other hand we doubt whether it is necessary to go as far as section 18 of the Australian Family Law Act 1975 and protect any information obtained by a person to whom a party has been referred by the mediator "for medical or other professional

---

[1] G Davis, "Conciliation and the Professions" (1983) 13 Fam Law 6 at p 9.

[2] Newcastle Report, para 5.11. Information from a child is specifically protected by the Family Relations Act 1979 s 3(3)(a) (British Columbia): see para 4.22 above.

[3] Family Conciliation in Scotland (Central Research Unit, Scottish Office, 1990) para 3.5.

[4] See para 4.38 above.

consultation".[1] However, these are all matters on which we invite views.

5.35 There is, however, one necessary qualification of the proposition that the information to be protected should be any information acquired during the mediation process. It is that the information must have been communicated for the purposes of the mediation process. We have noted that the professional relationship is of the essence of the privilege conferred on communications between a professional legal adviser and his client, and that a conversation between them is not necessarily privileged: in order to be protected, a communication must have been made for professional purposes, albeit that those purposes might be broadly construed.[2] We consider that it would be both consistent with principle and correct for practical purposes that any privilege in favour of family mediation should be similarly qualified. Thus, if a client were to divulge to a mediator information which had no relevance to the subject-matter of the dispute, no privilege would attach to such information. It should not be possible for a party to shield any information from disclosure simply by stating it to the mediator.[3] To take some striking, if extreme, examples: if a client at a mediation meeting relative to a dispute over financial arrangements were to tell the mediator that he had committed a crime against a person or

---

[1] See para 4.7 above.

[2] See para 2.11 above.

[3] See the extract from M & W Grazebrook Ltd v Wallens in para 2.17 above.

property quite unrelated to the dispute, or that he intended to commit such a crime in the future, it would be absurd that privilege should attach to such a statement, since it would have nothing to do with the purposes of the mediation. In practice, of course, any matters irrelevant to the mediation of which a mediator is likely to be told would generally be of a much less sensational nature. And in some cases it might be difficult to decide whether a matter should be regarded as having been communicated for the purposes of the mediation process. It nevertheless seems to us to be necessary that there should be some such qualification.

5.36 We therefore invite comments on the following.

8. Should the privilege attach to any information acquired in the course of, and for the purposes of, the mediation process?

9. Alternatively, should the privilege attach only to specific categories of such information, and if so, should it attach to any of the following -

(a) oral communications between either of the parties and the mediator;

(b) written communications between either of the parties and the mediator;

(c) records of such oral and written communications;

(d) evidence of behaviour or conduct by either of the parties or the mediator;

(e) evidence of the demeanour of either of the parties or the mediator;

(f) information acquired by the mediator from a third party?

10. Should the privilege attach to information acquired by a person to whom a party has been referred by the mediator for medical or other professional consultation?

5.37 We have already noted the decision in Theodoropoulas and mentioned the need to exclude evidence of communications which have been overheard or intercepted.[1] A more general question is whether evidence of protected information which has been illegally or irregularly obtained should also be excluded. The present law of Scotland as to the admissibility of evidence so obtained is that in criminal cases the general rule is that it must be excluded unless the irregularity of the circumstances in which it was obtained can be excused, but in civil cases there is no such rule and the evidence appears to be admissible regardless of the circumstances in which it was procured.[2] We suggest that in both civil and criminal cases the evidence should be excluded irrespective of how it has been obtained. We further suggest that secondary evidence of protected information, such as copies of original documents, should also be excluded. We therefore suggest:

---

[1] See para 5.33 above.

[2] Lawrie v Muir 1950 JC 19; Rattray v Rattray (1895) 25 R 315. On the whole matter see Encyclopaedia, vol 10, paras 691-703.

11. The privilege should attach to information which has been -

(a) overheard by a third party;

(b) intercepted by a third party;

(c) illegally or improperly obtained by a third party.

12. The privilege should attach to secondary evidence of information in any of the categories mentioned in propositions 8-11 above.

5.38 It may be helpful to make it clear that the privilege which we are considering is one which would attach to information acquired during the mediation process, and not to the fact that the mediation process has taken place. We do not think it is necessary that any privilege should attach to that fact. Where the parties have been referred to a mediation service by a court, it seems clear that the court should be entitled to know whether any mediation meetings have taken place and if so, when and where, and who attended. Such information may also be relevant where there has been no reference by a court, for example where mediation has been attempted before any question has arisen of the court's deciding whether to make a reference. One party may wish to lead evidence that the parties had attended a mediation meeting or meetings but had failed to resolve their dispute. Or one party may wish to lead evidence that he or she had wanted to try mediation and had gone to see a mediator but the other party would not go. We consider later the question of the disclosure of

the results of mediation meetings.[1] We do not think, however, that there is any reason why the mere fact of attendance at a mediation meeting, if relevant, should be protected by privilege. We therefore suggest:[2]

> **13. No privilege should attach to the fact that a mediation meeting has taken place, the time and place of the meeting, or the identities of the participants.**

5.39 As to the results of mediation meetings, it seems necessary to make some special provision for agreements reached in the course of mediation. Where any agreement is reached on a matter which concerns the court, whether by virtue of a reference under the rules of court or otherwise, we consider that it should be competent to disclose to the court the fact of agreement and the terms of the agreement in order that the court may take them into account either as a circumstance relevant to an issue which it has to decide, or as a matter which it may approve or vary. For example, the fact that the parties had reached an agreement in particular terms relative to custody or access, and the extent to which the agreement had worked, may be relevant to a decision as to future custody or access. Again, the parties may wish to move the court to interpone its authority to, and pronounce a decree in terms of, a joint minute which expresses the terms of an agreement reached through mediation; and thereafter the court may be moved to vary such a decree. It seems clear that in such

---

[1] See paras 5.39-5.45 below.

[2] See the Los Angeles Rule, exception 4, set out in para 4.38 above.

circumstances as these either party or both of them should be able to bring the agreement to the notice of the court. Both the English Law Commission's Draft Divorce and Separation Bill[1] and the Los Angeles County Superior Court Local Rule[2] contain provisions to that effect. We would suggest that any Scottish provision should apply only to agreements which are contained in a document. We understand that in practice agreements reached through a mediation service are reduced to writing. To allow reference to be made to oral agreements which have not been recorded in any document[3] would seem to permit disputes as to whether any agreement had been reached.

5.40 We therefore invite comments on the following:

14. No privilege should attach to the fact that agreement was reached as the result of mediation, or to the terms of any written agreement.

15. Should any privilege attach to oral agreements which have not been recorded in a document?

5.41 A further question relative to the application of the privilege where an agreement is reached is whether the information acquired in the course of mediation should remain privileged after the agreement has been reached. We think it should be

---

[1] The Ground for Divorce (1990) Law Com No 192, Appendix A, cl 10(2).

[2] Set out in para 4.38 above. See exceptions 4 and 5.

[3] See para 1.3 above, footnote, for a provisional definition of "document".

made clear that information acquired in the course of family mediation remains privileged whether the mediation is successful or not. There should not be room for any argument that the information is not privileged once an agreement has been reached: the maxim "once privileged, always privileged" should apply. Such a rule in family mediation would be consistent with the law of England as to the privilege attaching to "without prejudice" correspondence after settlement.[1] We therefore seek views on the following:

16. Information acquired in the course of family mediation should remain privileged irrespective of whether the mediation results in any agreement between the parties.

5.42 In England "without prejudice" correspondence is admissible for the purpose of ascertaining whether or not an agreement has been reached.[2] It may be that there should be a similar rule in the case of family mediation. On the other hand, if agreements reached in family mediation are recorded in writing in clear terms which are accepted by both parties there should be little scope for any argument that evidence of prior communings at mediation meetings should be admitted. We accordingly invite comments on the following:

17. Should the privilege be inapplicable where there is a dispute as to whether an agreement has been reached?

---

[1] Rush & Tompkins Ltd v Greater London Council [1989] AC 1280. See para 2.16 above.

[2] Tomlin v Standard Telephones & Cables [1969] 1 WLR 1378, [1969] 3 All ER 201.

5.43 There is also a question whether privilege should attach to the fact of failure to reach an agreement. Where the parties have been referred to mediation by a court and have failed to agree, the fact of failure will be readily inferred by the court if, the service having intimated to the court that the mediation process has been concluded,[1] the action proceeds with the issue on which they went to mediation still unresolved. It may be better to enable either party, or the service, to advise the court that mediation has failed and to enable a party to lead evidence of the fact of failure where such evidence is relevant. There is a question whether in such a case the law should go further and permit the admission of evidence as to why the mediation has failed. The reason for failure might be quite simple, for example that a party had failed to attend a mediation appointment.[2] Or it might be that a party has deliberately abused the mediation process, for example by attending meetings but failing to talk or to co-operate in any way with the other participants. There could well be circumstances in which such behaviour could be relevant to questions of fact or credibility. It could also be relevant to questions of expenses, as we mention later.[3] We therefore seek views on the following:

18. Where the parties have been referred to a mediation service by a court, no privilege should attach to the fact that they have failed to reach agreement.

---

[1] See para 1.13 above.

[2] Cf the Australian Family Law Act 1975, s 62(3), set out in para 4.11 above.

[3] See para 5.74 below.

19. Where the parties have been referred to a mediation service by a court and have failed to reach agreement, should any privilege attach to the circumstances in which they have failed to reach agreement?

5.44 The same issues arise where parties have resorted to a mediation service without a reference by the court, but no agreement has been reached. We doubt whether the fact of a court reference should make any difference to the way in which these issues should be resolved. We nevertheless seek views on the following:

20. Where mediation has taken place without a reference by a court and no agreement has been reached, no privilege should attach to the fact of failure to reach agreement.

21. Should any privilege attach to the circumstances in which no agreement was reached in mediation which has taken place without a reference by a court?

5.45 We have now considered the applicability of the privilege where agreements have been reached and where they have not been reached. There remains a question whether any privilege should attach to information disclosed where only one party has gone to a mediator but the other has not, so that no mediation could take place. Such a situation could arise whether or not the parties had been referred to a mediation service by the court. It may be that privilege should attach to information disclosed to the mediator by the party who attended, just as it

would attach to information disclosed in the course of mediation where the mediator has seen the parties separately.[1] It might seem unfortunate if the party who attended could not prevent disclosure of what the mediator had learned when the party was attempting to obtain his or her assistance in resolving a dispute. It may be that in Scotland communications made by a potential client to a solicitor who declines to act are not confidential;[2] but this has been described as "a hard doctrine"[3] and it has been argued that the case in which the question arose was wrongly decided.[4] In England, privilege attaches to communications made with the object of obtaining a solicitor's services even if these are not in fact retained, provided that the relationship of solicitor and client is at least in contemplation and the communications are fairly referable to that relationship.[5] We therefore seek views on the following question:

22. Should any privilege attach to information acquired by a mediator from a potential client or clients?

5.46 It may be thought that there are certain categories of information to which the privilege should be declared not to attach, for the avoidance of doubt. In Scotland the client of the

---

[1] See para 5.34 above.

[2] HMA v Davie (1881) 4 Coup 450. See Macphail, para 18.21.

[3] Walkers, para 393.

[4] R Black, "A Question of Confidence" (1982) 27 JLS 299, 389.

[5] Minter v Priest [1930] AC 558; Cross, p 429.

professional legal adviser has no privilege where the issue before the court is the existence of the professional relationship itself, or where the question whether a particular communication took place is necessarily the subject-matter of the inquiry.[1] We doubt whether it would be necessary to make provision for such matters in any new privilege rule in favour of family mediation, but we invite views on whether these matters, or any others, should be covered.

23. Are there any other matters to which the privilege should attach, or should be declared not to attach?

(7) Who should be entitled to claim the privilege?

5.47 Having considered the general nature of the proposed privilege with reference to the types of mediation, dispute and information to which it should relate, we now discuss a series of questions as to the extent of the privilege. Who should be entitled to claim it?[2] In what proceedings should it be claimable?[3] Are there any classes of information to which the privilege relates which, exceptionally, should not be capable of being shielded from disclosure by a claim to the privilege?[4] We think that the key to the answers to these questions is to be found in the principle that the privilege must not be extended "beyond what necessity warrants".[5] Just as the privilege of

---

[1] See para 2.13 above.

[2] See paras 5.43-5.44 above.

[3] See paras 5.55-5.63 below.

[4] See paras 5.64-5.78 below.

[5] Wheeler v Le Marchant, cit para 2.11 above.

the client of the professional legal adviser "ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety",[1] so also should any new privilege in favour of family mediation extend no further than absolutely necessary to enable the mediation to succeed. Even then, however, it is necessary to consider whether public policy might dictate that certain considerations must be allowed to qualify the extent of the privilege because they are of greater importance than the success of the mediation.

5.48 The first question as to the extent of the privilege is, Who should be entitled to claim it? Although it is convenient to speak of a privilege as "attaching" to certain information, a privilege is a right which is conferred on a person and has the effect that certain evidence is inadmissible without his or her consent.[2] He or she may so consent, or "waive" the privilege, either expressly by declining the benefit of the privilege, or by implication, for example by failing to take timeous objection to the introduction of such evidence or by introducing such evidence himself or herself. Any participant in a family mediation process who held the proposed privilege would be entitled, not only to decline to give evidence of the information which is the subject of the privilege but also to prevent any other person, including the other participants, from doing so. There are two options: to confer a

---

[1] Glyn v Caulfield, cit para 2.11 above.

[2] See the formulae quoted in paras 4.21, 4.22, 4.23, 4.34 above.

privilege only on the parties to the dispute, or to confer a privilege on the parties and a separate privilege, independent of any privilege of the parties, on the mediator.

5.49 The effect of conferring the privilege on the parties only would be that either party could assert the privilege, so that the evidence of the information could be withheld if only one of them so desired; and that the evidence could not be given unless both of them so desired: both would have to waive the privilege. Thus, if the parties waived the privilege, not only would each of them be entitled to give evidence about what was said or done in the course of the mediation, but the mediator, if called as a witness, would be required to give evidence about these matters regardless of his own wishes. That is essentially what happened in McTaggart:[1] the parties gave conflicting evidence of what had been said at a meeting with a probation officer; each subpoenaed the probation officer, who gave evidence with reluctance; and the judge accepted the husband's evidence mainly because he considered that it was corroborated by the evidence of the probation officer. There are two views about such a situation. On one view, the effect of adducing the evidence of the mediator is to give the court the best means of resolving the conflict between the parties and ascertaining the truth. Some of those who hold this view would argue that if the mediator had a privilege he or she would be likely to insist on it and the court would thus be deprived of valuable evidence and might

---

[1] [1949] P 94. See para 3.4 above.

reach an unjust decision.[1] The other view is that resolving a credibility conflict between parties who choose to testify as to what was said at a mediation meeting is an awkward and inappropriate function for a mediator, and that the privilege should extend to the mediator as well as to the parties.[2]

5.50 Whether a privilege should be conferred on the mediator is an important issue and a matter of particular concern to mediators. In 1967 Sir Jocelyn Simon (as he then was), then the President of the Probate, Divorce and Admiralty Division, unsuccessfully urged upon the Law Reform Committee the desirability of conferring on professional conciliators a statutory privilege, independent of any privilege of the spouses, which would entitle a conciliator, regardless of the spouse's wishes, to refuse to disclose communications made to him by either spouse in the course of attempts at reconciliation. The President's proposal had the support of the judges of his Division. The National Marriage Guidance Council (as it then was) made similar representations to the Committee in respect of marriage guidance counsellors.[3] The case for a mediator's privilege is made with particular force by Professor John P McCrory, Professor of Law and

---

[1] Law Reform Committee, Sixteenth Report (1967, Cmnd 3472), para 40.

[2] D Parker and L Parkinson, "Solicitors and Family Conciliation Services - A Basis for Professional Co-operation" (1985) 15 Fam Law 270 at p 273. See para 3.21 above.

[3] Sixteenth Report (cit supra), para 39.

Director of the Dispute Resolution Project at Vermont Law School. He writes:[1]

> "The parties are likely to seek evidence from their mediator when they believe it will help them prevail in litigation. Using a mediator in this fashion is inappropriate and a misuse of the mediation process. It compromises the mediators' impartiality, as well as confidentiality.
>
> "If mediators can be compelled to testify, it is likely to influence the way they function. Some may take a more formal approach to their job. They will be less prone to ask probing questions and more oriented toward keeping a log of the parties' statements and positions. Others may avoid keeping notes and records that might be used as evidence. Either approach would seriously undermine the effectiveness of mediation.[2]
>
> "The policy statements that support the privilege in matrimonial reconciliation cases recognise the importance of protecting mediators from being compelled to testify or produce evidence. But, incongruously, the courts have held that they may be required to do so when the parties waive the privilege. The courts have applied a rule that was formulated for unassisted negotiations, failing to take into account the detrimental effect upon the mediation process. Adherence to the "without prejudice" privilege as a basis for confidentiality in matrimonial mediation will discourage courts from addressing the needs of the process and from developing a body of law which will

---

[1] John P McCrory, "Confidentiality in Mediation of Matrimonial Disputes" (1988) 51 MLR 442 at pp 454-455.

[2] P Rice, "Mediation and Arbitration as a Civil Alternative to the Criminal Justice System - An Overview and Legal Analysis" (1979) American Univ Law Rev 17 at pp 75-76; E Friedman, "Protection of Confidentiality in Mediation of Minor Disputes" (1981) 11 Capital U L Rev 181, 202. (Professor McCrory's footnote).

best serve its use for resolution of matrimonial disputes."

5.51 Professor McCrory regards immunity from disclosure by the mediator as essential to the proper functioning of matrimonial mediation:[1]

> "A clear reputation for confidentiality is of crucial importance to mediators, the parties and the mediation process. A mediator must be able to tell the parties, with assurance, that he/she will not divulge statements made or information obtained during mediation. This is important to the mediator, because it will affect the vigour and thoroughness with which he/she probes the underlying causes of a dispute, the objectives of the parties and potential areas for agreement. It is important to the parties because it will influence how candid they are with each other and with the mediator. The implications for the process are obvious. It will function more effectively if mediators are free to use the full range of mediation skills and techniques, without fear of learning too much and having to divulge what was said at a later date, and the parties can participate without fear that they will be disadvantaged because of their openness. For substantially these reasons, the Booth Committee expressed the view that "absolute privilege" should attach to matrimonial conciliation.[2]
>
> "Mediators may be distracted from their primary function by the lack of adequate confidentiality protection and may react in ways that undermine the purpose and effectiveness of mediations.[3] A statement made in a case concerning section 49 of the Police Act of 1964 is, by analogy, applicable here. At issue was immunity from disclosure of information obtained during an inquiry into alleged police

---

[1] Ibid, p 461.

[2] Booth Committee Report para 4.60.

[3] See the quoted text in para 5.50 above.

misconduct. Oliver, L J said: 'An inquiry cannot be properly or fully conducted if the investigating police officer has constantly to be keeping an eye on the possible consequences of public disclosure in civil proceedings.'[1]

"A matrimonial mediator's function is obstructed in the same way when he/she cannot be assured of immunity from disclosure."

5.52 In jurisdictions where there are exclusionary rules[2] the mediator is protected from compulsory disclosure of information because the rule provides that the information is inadmissible. In other jurisdictions the mediator is not compellable to give evidence of specified matters.[3] A privilege for the mediator was proposed in an amendment which was moved but withdrawn by Lord Morton of Shuna during the progress of the Law Reform (Miscellaneous Provisions) (Scotland) Bill. The amendment would have added to section 2 of the Divorce (Scotland) Act 1976 a subsection in the following terms:

"(5) Where the parties in an action for divorce engage in any conciliation procedure designated by act of sederunt, anything communicated to a conciliator in connection with such procedures shall be privileged information and not admissible as evidence in any proceedings under this Act except with the consent of both parties and the consent of the conciliator."

His Lordship pointed out that the amendment was in line with the Practice Direction (Family Division):

---

[1] Neilson v Laugharne [1981] QB 736 at p 754.

[2] See para 4.2 above.

[3] eg Kansas: see para 4.34.

Conciliation Procedure)[1] and observed that it was "important that the people engaged in the conciliation exercise should be free from any risk that they will be cited to attend court and give evidence about what was said during the conciliation process".[2]

5.53 On the other hand the view has been expressed that it would be wrong to confer any privilege on mediators. In 1967 that was the conclusion of the Law Reform Committee, who were of the view that the current law derived from the "without prejudice" rule was adequate.[3] In 1980, in our Memorandum entitled Law of Evidence we proposed that no privilege should be conferred on mediators, and those respondents who expressed views on the matter were virtually unanimous in their agreement with us.[4] Last year the English Law Commission in their Report Family Law: The Ground for Divorce recommended that a statutory privilege in favour of statements made during the mediation process should attach to the parties rather than to the mediator "consistently with the privilege for 'without prejudice' negotiations and reconciliation attempts upon which it is based".[5]

5.54 We find this a difficult matter. We appreciate the cogency of the arguments of Professor McCrory

---

[1] [1982] 1 WLR 1420. See para 3.16 above.

[2] HL Deb, vol 518, cols 909-910.

[3] Sixteenth Report (cit supra) paras 40, 55(6).

[4] See para 5.10 above.

[5] Law Com No 192, para 5.45.

and others with practical experience of mediation, and we would not necessarily support views expressed by the Law Reform Committee and by our predecessors and their respondents before the development of the mediation movement in the 1980s. We are inclined to doubt the appositeness of the analogy with the privilege for "without prejudice" negotiations for settlement. Although any privilege in favour of mediation would be founded, like the "without prejudice" privilege, on the public interest in the settlement of disputes, it seems necessary to acknowledge that the interposition of the mediator between the parties is an important ground of distinction. On the other hand it must be observed that if the mediator were to have a privilege he would be more securely protected than a doctor or a clergyman, neither of whom has ever been authoritatively declared to have a privilege, and than a legal adviser whose client waives his privilege and thereby obliges him to testify.[1] Indeed the extent of the mediator's protection would be almost unique: leaving aside the questionable old rules in favour of spouses,[2] the only recipient of information who is not required to disclose it under the present law is the person responsible for a publication, and his position is significantly qualified by the four heads of public interest identified in section 10 of the Contempt of Court Act 1981.[3] The question seems to be whether the interest of the mediator in non-disclosure for the protection of the effectiveness and reputation of himself and his service should be

---

[1] See paras 2.12, 2.20, 2.21 above.

[2] See para 2.8 above.

[3] See para 2.18 above.

allowed to prevail over the joint wish of the parties that he or she should give evidence in order that the court may do justice between them. At present we are not convinced that it should. We do not believe that the effectiveness and reputation of lawyers and the legal profession have suffered because a lawyer is bound to testify if his client waives his privilege. And before a mediator could be obliged to testify, both clients would have to waive their joint privilege. Applying the strict test of necessity,[1] we do not consider that the position of the mediator and mediation services is so special that the administration of justice should be put at risk by permitting the mediator to withhold relevant evidence which both parties wish him or her to give. Nevertheless we have not reached a concluded view and would therefore welcome responses to the following questions:

24. (a) Should the privilege be conferred on the parties only? or

(b) Should there also be conferred on the mediator a privilege, independent of the parties' privilege, which would entitle him or her, regardless of the parties' wishes, to refuse to disclose information acquired in the course of mediation between them?

(8) In what proceedings should the privilege be claimable?

5.55 In many of the jurisdictions in which a privilege or exclusionary rule has been enacted in favour of family mediation, evidence of the

---

[1] See para 5.47 above.

protected information is declared to be inadmissible in any proceedings whatever, without exception.[1] In some of these jurisdictions the privilege is qualified with regard to such matters as child abuse or crime.[2] In other jurisdictions, however, the rule is restricted to evidence in particular categories of proceedings: in Delaware, to evidence against a participant in subsequent proceedings in the Family Court; and in Minnesota, to evidence in any action for marriage dissolution and related proceedings on any issue in controversy in the dissolution.[3] There is accordingly a variety of ways in which the extent of the privilege might be limited: by restricting the categories of proceedings in which it may be claimed, or by making exceptions in relation to particular matters such as child abuse or crime, or by a combination of these two limitations.

5.56 We consider first the proposition that the privilege should apply in all categories of proceedings. This proposition could be supported by reference to the rules in the jurisdictions cited above[4] and to the view of the Booth Committee[5] and the Law Commission[6] that there should be an absolute privilege in England and Wales. Such views are consistent with the opinion that it is of far

---

[1] See paras 4.7, 4.11, 4.14, 4.20-4.24, 4.28, 4.33, 4.36 above.

[2] See paras 4.34, 4.36, 4.38 above.

[3] See para 4.33 above.

[4] Para 5.55 above, first footnote.

[5] See para 3.23 above.

[6] See para 3.26 above.

greater importance that there should be frank and open discussion in mediation that can lead to agreed arrangements in the interests of children than that some information may be lost to a court in a subsequent proceeding.[1] The Law Commission recommends that statements made during the course of any mediation process which indicate a risk of harm to a child should be privileged in all categories of proceedings, but not confidential.[2] Accordingly, a mediator who believed that a child needed to be protected would be at liberty to inform the appropriate authorities but could not be compelled to give evidence in subsequent proceedings unless both parties to the mediation process waived their privilege.

5.57 Having considered carefully the arguments in support of a privilege in favour of family mediation which would be applicable in all categories of proceedings, we are inclined to hesitate before proposing the adoption of such a privilege in Scotland. Suppose that in Scotland a party to the mediation process admits to the mediator that he or she has done some harm to a child and that the mediator, after due consideration,[3] advises the police or the procurator fiscal or the social work department or

---

[1] Porter v Porter (1983) 40 OR (2d) 417, quoted in para 4.19 above.

[2] Law Com No 192, para 5.48. Their reasoning is set out in full in para 3.26 above.

[3] We are aware that mediators give painstaking consideration to the question whether to disclose information to the authorities (see paras 4.13, 5.4 above), and we do not suggest that disclosure is always necessary or desirable. We discuss this later: see paras 5.82-5.85.

the reporter to the children's panel. Court proceedings might then be contemplated. The procurator fiscal might wish to prosecute. Or the reporter might decide to refer the case to a children's hearing, and if the grounds of referral were not understood by the child or not accepted by the parent the reporter would apply to the sheriff for a finding, a proceeding which involves the hearing of evidence by the sheriff. The English Commission, having in view English practice, say:

> "In practice, once the information is passed to the authorities, an investigation will take place and it is upon that rather than the initial referral that any subsequent proceedings will be based."

In Scotland, also, an investigation would take place upon receipt of the mediator's information. Criminal proceedings could not be brought in the absence of corroboration, and we believe that in practice a reporter would seek corroborative evidence before proceeding to a hearing before the sheriff. We also think that in general a prosecutor or a reporter would be very slow to call a mediator to give evidence. We refer to the views of Lord Justice-Clerk Ross on the asking of mediators to divulge confidential information in court:[1]

> "All this really depends upon the good sense of counsel and solicitors. They must by now be well aware of the importance of keeping conciliation proceedings confidential, and I should like to think that responsible counsel and solicitors would not seek to have that confidentiality broken."

5.58 Accordingly, whether a mediator is to be called to give evidence depends on the exercise of

---

[1] Lord Ross, "Family Conciliation" (1991) 36 JLS 20 at p 21.

a wise discretion by the party who is considering whether the mediator should be called. It is not for us to say how the Crown should exercise its discretion in the calling of witnesses, but our knowledge of how the Crown exercises that discretion in practice encourages us to believe that the Crown would call a mediator only as a last resort. It is nevertheless possible to envisage cases in which the mediator's evidence would be necessary. For example, where the accused had made a voluntary and unequivocal confession to the mediator, and there was other evidence that the crime had been committed, very little corroborative evidence would be required: proof of facts and circumstances which confirmed the contents of the confession might be sufficient.[1] It would be a serious matter to fetter the Crown's discretion to call the mediator in such a case by extending a privilege to the confession. We are not satisfied that the public interest in the success of mediation outweighs the public interest in the prosecution of a serious crime against a child.

5.59 Many more cases involving children are brought before the courts by the reporters to the children's panels than by the Crown. Children's cases may be referred to a hearing and thence to the sheriff on a variety of grounds;[2] and unless the ground is that the child has committed an offence the reporter only has to discharge the

---

[1] McLeod v Nicol 1970 JC 58; McAvoy v HM Advocate 1983 SLT 16. See Encyclopaedia, vol 10, para 770.

[2] Social Work (Scotland) Act 1968, s 32(2).

burden of proof on a balance of probabilities.[1] Accordingly, although we consider that the cases in which a mediator would be called as a witness would always be exceptional, it seems that there might be more opportunities for calling a mediator at a hearing before the sheriff than in a criminal court. While we think that reporters would wish to follow the example of the Crown in the exercise of their discretion, we again consider that to fetter that discretion by the operation of a privilege could not be justified. The child is referred to the hearing because it appears to the reporter that he or she is in need of compulsory measures of care.[2] To allow the exercise of a privilege to obstruct the judicial consideration of the alleged conditions establishing that such measures are necessary would be to place the public interest in mediation above the welfare of the child.

5.60 Accordingly, our preliminary view is that the privilege should not apply in all categories of proceedings. It is clear, however, that this is a matter on which opinions may reasonably differ. We therefore invite comments on the following:

25. Should the privilege in favour of family mediation apply in all categories of proceedings?

5.61 If it is considered that there should be some limit to the range of proceedings in which the privilege should be applicable, what should that limit be? Here again we suggest that the test

---

[1] Ibid, s 42(6); Central Region Reporter v F "The Scotsman", 7 November 1990.

[2] Ibid, s 39(3).

should be that of necessity.[1] It is clear that the privilege could only be claimed in proceedings in which (a) a participant in the mediation process was a party or a witness, and (b) evidence of something said, done or observed in the course of the mediation process was relevant to an issue before the court. The typical proceedings in which such conditions were met would be proceedings relative to the dispute with which the mediation process had been concerned. For example, evidence of what occurred during mediation over a custody dispute between the parties is most likely to be relevant in custody proceedings between them.

5.62 We therefore suggest for consideration that the privilege should be claimable only in civil proceedings where the subject-matter of the proceedings includes one or more of the issues with which the mediation process was concerned. We have discussed above the types of dispute to which the privilege should relate, and have suggested that it should relate to any dispute as to parental rights and any dispute between spouses or cohabitants as to any matter which is or may be the subject of civil proceedings to which either or both of them may be parties.[2] We think that current concern over the absence of a privilege could be properly met if the law were to enable participants to enter into mediation over any such dispute or disputes in the knowledge that if the parties had to fight out their differences in court, evidence of any information obtained in the course of the mediation which might be relevant to the issue or issues

---

[1] See para 5.42 above.

[2] See paras 5.26-5.31 above.

before the court could be withheld by an assertion of the privilege.[1]

5.63 Another possible view is that the privilege should be available in civil proceedings generally, although not in criminal proceedings. We doubt whether it is necessary that the privilege should apply in all civil proceedings, but we invite views as to the range of proceedings in which the privilege might be claimed. We therefore invite comments on the following.

26. Should the privilege in favour of family mediation apply -

(a) only in civil proceedings where the subject-matter of the proceedings includes any of the issues with which the mediation process was concerned; or

(b) in civil proceedings generally; or

(c) in any other categories of proceedings?

(9) Some possible exceptions

5.64 We have noted above[2] two ways in which the privilege might be limited. We have now considered the first of these, which is the extent to which it might be limited by reference to the nature of the proceedings in which it might be claimed. The second mode of limitation is to create exceptions to the range of information which might be protected, such as information relative to child

---

[1] The matters to which we have referred above as "the subject-matter of the proceedings" or "the issue or issues before the court" would be readily ascertainable from the written pleadings.

[2] See para 5.55 above.

abuse or crime.[1] We have already noted in paragraphs 5.32-5.46 above the general nature of the information to which the privilege should attach. We have suggested, amongst other things, that it should attach to any information acquired in the course of, and for the purposes of, the mediation process, but should not attach to the fact that the process has taken place or to the terms of any agreement or to the fact that no agreement has been reached. We now consider whether there are any matters the disclosure of which might be regarded as more important than the preservation of the secrecy of the information. As we have already mentioned, even where secrecy might be necessary to enable the mediation to succeed, there may be circumstances in which some overriding consideration of public policy might require that certain information be disclosed.

5.65 The definition of these circumstances is an acutely difficult matter. The difficulty is to some degree alleviated if the category of proceedings in which the privilege may be claimed is limited to some extent. If, for example, the privilege cannot be claimed in criminal proceedings, it is unnecessary to formulate any specific exceptions to cover trials for particular types of criminal conduct such as offences against children or perjury or attempting to pervert the course of justice. Thus, some of the suggestions which we make in the following paragraphs may be superfluous, depending on the view taken as to whether the privilege should be available in particular classes of proceedings.

---

[1] See paras 4.34, 4.36, 4.38 above.

5.66 A further consideration is that any excepted classes of information should be few and well-defined. Precise definition is advisable because it is important, particularly to mediators and their clients, that the law should operate in a consistent and predictable way. It is also important that the categories should be few in number. A mediation service in advising potential clients about the confidentiality of its facilities would require to point out these exceptions. It may be reasonable to assume that few potential clients would ever face proceedings relative to child abuse or any other exception, and that even fewer would have information disclosed in mediation used against them in such proceedings. It is nevertheless desirable that the terms of a service's necessary formal advice about the limits to confidentiality should not cause potential clients to fear public disclosures to the extent that they decide not to go ahead with mediation or, if they do, the necessary atmosphere of trust and candour between them and the mediator cannot be established. Further, a mediator who felt that he or she might have to make disclosures in court about a wide variety of excepted matters might feel inhibited from seeking information from the clients.[1]

5.67 The definition of exceptions therefore requires careful thought. The views which are expressed in the following paragraphs are only preliminary and tentative, and comments on our propositions and questions for consideration in this area would be particularly welcome. At this

---

[1] See McCrory quoted in para 5.45 above.

stage it appears to us that there may be three categories of interests which may require to be protected and accordingly be permitted to qualify the privilege for reasons of public policy. These are:

(a) the interests of children;

(b) the interests of justice; and

(c) the interests of the mediator.

We now discuss each of these in turn.

(a) The interests of children

5.68 We have already expressed the opinion that there should be an exception in order to protect the interests of a child.[1] There appears to be considerable support for the view that the interests of children must be taken into account in some way. As we have already noted, the Conciliation Project Unit found clear and strong support for the proposition that confidentiality and privilege must yield where there is evidence of child abuse.[2] The services operating in Scotland regard their obligations of confidentiality as qualified to some extent. Marriage Counselling Scotland recognised the need to protect a third party, including a child who is believed to be at risk. The Scottish Catholic Marriage Advisory Council contemplate disclosure only in cases of extreme danger to the client or another person. The conciliation services of SAFCOS are strictly confidential "except in the case of a criminal offence against a child being alleged". In England the FMA treat mediation as confidential except where a member of the family is said to be, or

---

[1] See paras 5.8, 5.59 above.

[2] See para 3.23 above.

appears to be, at risk of serious harm.[1] We have also noted American rules which make an exception to take account of child abuse.[2]

5.69 It is difficult, however, to formulate an exception in favour of the interests of children in terms which would be appropriate for a qualification of a privilege in favour of family mediation. Various statutes provide lists of matters relative to the welfare of children which a court may be required to take into account in different categories of proceedings. The Social Work (Scotland) Act 1968 provides in section 16(2), as amended, a list of circumstances which would justify a local authority's assumption of parental rights. Section 32(2), as amended, gives a list of the circumstances in which a child may be referred to a hearing on the ground that he or she is in need of compulsory measures of care. Section 16(2) of the Adoption (Scotland) Act 1978 contains a list of the grounds on which the court may be satisfied that the agreement of a parent or guardian to the making of an adoption order, or an order declaring the child free for adoption, may be dispensed with. All these lists include matters which would have a bearing on the interests of any child, but it appears to us that none of these lists is so appropriate for our purposes that it could simply be adopted without alteration. It seems to us to be necessary to select a few matters which can only be regarded as serious and which might be disclosed during mediation through some physical sign being

---

[1] For references and quotations see para 5.4 above.

[2] Kansas (para 4.36), Los Angeles (para 4.38, exception 2).

observed or some admission being made. It is also important to keep any list as short and simple as possible.

5.70 With some hesitation we suggest that the privilege should not apply in any proceedings where there is an issue as to whether any person -

(a) is of such habits or mode of life as to be unfit to have the care of a child;[1]

(b) has neglected a child;[2]

(c) has persistently or seriously ill-treated a child;[3]

(d) has committed a sexual offence against a child;[4]

(e) has committed an offence involving bodily injury to a child.[5]

It may be that a provision on such lines would cover with sufficient brevity and clarity what many people would regard as the kinds of danger to a child which ought to be the ground of an exception to the privilege. This, however, is a matter on which we are particularly anxious to obtain views.

---

[1] Social Work (Scotland) Act 1968, s 16(2)(d). Note Wright J's example of the addict in Cronkwright (para 4.19 above).

[2] Adoption (Scotland) Act 1978, s 16(2)(d). "Neglect" might have to be defined: see Children and Young Persons (Scotland) Act 1937, s 12; Clark v HMA 1986 JC 53; Kennedy v S 1986 SLT 679. Cf R v Sheppard [1981] AC 394.

[3] Ibid, s 16(2)(e) and (f).

[4] Paras (a), (aa) and (e) of Sched 1 to the Criminal Procedure (Scotland) Act 1975, referred to in s 32(1)(d) of the Social Work (Scotland) Act 1968. "Sexual offence" would require to be further defined.

[5] Ibid, para (d).

5.71 We therefore invite comments on the following questions:

27. Should the privilege be inapplicable to information relative to an issue as to whether any person -

(a) is of such habits or mode of life as to be unfit to have the care of a child;

(b) has neglected a child;

(c) has persistently or seriously ill-treated a child;

(d) has committed a sexual offence against a child;

(e) has committed an offence involving bodily injury to a child?

28. Are there any other circumstances relevant to the interests of children in which the privilege should not apply?

(b) The interests of justice

5.72 Under the heading of "The interests of justice" we have in mind (i) the protection of the regularity of any proceedings to which the mediation may be related; (ii) the proof of any threat to commit a crime; and (iii) the proof of any crime committed during mediation.

5.73 It seems important to ensure that a party should not abuse the confidentiality of the mediation process by saying something in court which is essentially different from what he has said in mediation, in the knowledge that what he said in mediation cannot be proved against him. For example, in a custody dispute he might say in court that if awarded custody he intends to keep the

children in Scotland, having told the mediator that he intends to take them abroad. Or in a dispute about financial provision he might try to defeat his wife's claim by pleading poverty in court, although he had admitted to the mediator that he had substantial assets. We think that the mediation process and the courts should be protected against conduct of this kind. We suggest that it should be possible to prove, in the proceedings between the parties, that he has made a previous statement inconsistent with his evidence; and in any subsequent criminal proceedings to prove that he had been guilty of perjury[1] or an attempt to pervert the course of justice. It seems hardly necessary to consider the protection of the mediation process in such cases, because where such matters are in issue the mediation almost certainly will have failed. It should be noted that the part of the suggestion relative to criminal proceedings will be redundant if the view is taken that the privilege should not be available in criminal proceedings. We therefore invite views on the following question:

29. Should the privilege be inapplicable to information relevant to an allegation that a party to the mediation has, in proceedings between the parties, -

(a) made a previous statement inconsistent with his evidence;

(b) committed perjury;

(c) attempted to pervert the course of justice?

---

[1] The Iowa Code contains an exception for perjury: see para 4.34 above.

5.74 There is also a question whether, where an abuse of process has taken place, the privilege should be permitted to inhibit the discretion of the court in awarding expenses. We have referred in Part IV to the provision of the Australian Family Law Rules with regard to costs.[1] The rule that evidence of anything said or of any admission made in the course of a pre-trial conference before a registrar of the family court is not admissible in any court does not prevent the admission of such evidence upon the hearing of an application for costs arising out of the conference. We now raise the question whether there should be any similar rule in Scotland relative to court-referred conciliation. Suppose that after the court has referred the parties to a conciliation service one of them abuses that procedure, perhaps in one of the ways envisaged in paragraph 5.43 above, and thereby causes unnecessary delay and expense. If such conduct could be brought to the notice of the court, the court might mark its disapproval by making an appropriate award of expenses.[2] Should the court be prevented from exercising its discretion in that way because of a claim to privilege by the party who has abused the procedure? We are inclined to think that that might be regarded as another example of abuse of the privilege.[3] We invite views.

30. Should the privilege be inapplicable where it is alleged that a party's conduct during a mediation process to

---

[1] See para 4.10 above.

[2] Macphail, Sheriff Court Practice, paras 19-10 to 19-12.

[3] For other examples see para 5.73 above.

which the parties have been referred by the court has been such as should be reflected in an award of expenses?

5.75 Our next proposed exception in the interests of justice is designed to enable evidence to be led of threats made at mediation to commit a crime in the future. We have in mind a situation in which a party makes such a threat, for example to abduct a child, or to injure the other party or some third party. It is not unknown for one of the parties to a family dispute to threaten the other, or for one party, jealous or resentful of some third person who seems to imperil the relationship between the parties, to say that he intends to commit a crime against that person. We accept that in mediation parties under stress may say things which on reflection they do not mean. But in the event of a threatened crime being committed, the fact that such a threat was uttered may be relevant at the trial. If so, it may be thought that evidence of the threat should not be withheld through the assertion of a claim to privilege. The threat very probably would not be covered by a privilege which extended only to information communicated for the purposes of the mediation process, but an explicit provision may be considered to be desirable. We have noted that in Kansas the divorce mediation statute denies a privilege as to a communication relevant to "an expressed intent to commit a crime in the future"[1] and that there is an exception for such threats in the Los Angeles County Superior

[1] See para 4.36 above.

Court Local Rule.[1] This exception may not be of great practical importance, but in view of the experience of these jurisdictions we put it forward for consideration. Again, it will be unnecessary if the privilege is not to apply in criminal proceedings.

31. Should the privilege be inapplicable to information relevant to an expressed intent to commit a crime in the future?

5.76 Next, we think that the privilege should not apply where a crime is committed during the mediation process. It is to be hoped that such occurrences would be very rare, but if it ever happened it would be absurd if evidence about the crime could not be led. This matter is covered by the Australian Family Law Rules,[2] the Kansas Mediation Statute[3] and the Los Angeles County Superior Court Local Rule.[4] Again, information about the crime would not have been acquired for the purposes of the mediation process, and a specific exception will be unnecessary if the privilege is not to be available in criminal trials. We therefore ask:

32. Should the privilege be inapplicable to information relevant to a crime allegedly committed during the mediation process?

---

[1] See para 4.38 above, exception 3, which is concerned with disclosure of the threat to the intended target.

[2] Ord 24, r 1(9)(a): see para 4.10 above.

[3] See para 4.36 above.

[4] See para 4.38 above, exception 1.

5.77 We doubt whether it would be appropriate to propose any other exceptions in the interests of justice. We nevertheless invite views on the following question:

33. Should any other exceptions be made in the interests of justice?

(c) The interests of the mediator

5.78 It may be desirable to protect the interests of the mediator by disapplying the privilege where the mediator is charged with crime or is sued. We have referred to the provisions in Utah and New Jersey whereby there is no privilege where the mediator is a defendant in any civil, criminal or disciplinary action arising from the mediation process.[1] It is scarcely necessary to say that we have no reason whatever to suppose that a mediator has ever been liable to be concerned in such proceedings. It is possible, however, to envisage circumstances in which a mediator might be sued,[2] and it is interesting that these jurisdictions have found such a provision desirable. It is obvious that in the event of any such proceedings the privilege could not be allowed to obstruct the ascertainment of the truth. We invite views on whether such a provision is necessary. It would of course be unnecessary for such a provision to refer to criminal proceedings if the privilege could not be claimed there.

34. Should it be provided that the privilege does not apply where the mediator is accused in criminal proceedings, or is the defender in civil or disciplinary

---

[1] See para 4.34 above.

[2] See paras 1.23-1.25 above.

proceedings, which arise from the mediation process?

(d) Other exceptions

5.79 We wish to emphasise that although we have thought it necessary to discuss at some length the subject of exceptions to any new privilege, we consider that it is likely that in practice it will only be on rare occasions that a mediator will think it appropriate to pass information to the authorities, and that the occasions on which a mediator will be required to give evidence in court will be even rarer. We have no doubt that as a general rule the confidentiality of the mediation process should not be broken and the mediator should not be called as a witness to divulge information acquired in the course of it. We seek views, however, on the question whether there should be any other exceptions.

35. Are there any other circumstances in which the privilege should not apply?

(10) Subsidiary rules of evidence and procedure

5.80 In court a privilege normally cannot receive effect unless it is claimed by the person entitled to it, whether that person is a witness or a party. If called as a witness, he or she cannot refuse to give evidence at all because of the possibility that he or she may be asked questions about matters to which the privilege may apply:[1] he or she must enter the witness box and claim the privilege only if such a question is asked. There are a number of questions about what should happen in court. Should the judge tell the witness that he or she need not

---

[1] Don v Don (1848) 10 D 1046.

answer a question the answer to which might contain privileged information?[1] Should the asking of such a question be forbidden?[2] If a witness who is not a party states a claim to privilege which is wrongly rejected,[3] or states an invalid claim which is wrongly upheld,[4] should a party be entitled to appeal? Should there be a rule that no adverse inference may be drawn if a privilege is claimed?[5] What if the witness divulges such privileged

---

[1] The judge is obliged to tell a witness that he or she need not answer a question the reply to which may be incriminating (Dickson, para 1789) and, in certain circumstances, to give an appropriate warning to an accused's spouse (Criminal Procedure (Scotland) Act 1975, ss 143(1)(b), 348(1)(b)); but there appears to be no settled practice in relation to other privileges.

[2] There are provisions to that effect in the Evidence Further Amendment (Scotland) Act 1874, s 2, and the Criminal Procedure (Scotland) Act 1975, ss 141(1)(f) and 346(1)(f); but in practice it is impossible for anyone to prevent the question from being asked.

[3] There is English authority to the effect that the party cannot appeal (R v Kinglake (1870) 22 LT 335) which is consistent with the dicta of L P Inglis in Kirkwood v Kirkwood (1875) 3 R 235 at p 236.

[4] An English case indicates that the party may appeal: Doe d. Egremont v Date (1842) 3 QB 609. See Cross, p 417; A Keane, The Modern Law of Evidence (2nd ed, 1989) pp 404-405; Phipson on Evidence (14th ed, 1990) para 20-10; Wilkinson, p 88.

[5] It is sometimes said that a person may feel constrained to waive a privilege on the ground that if he did not do so he might be thought to have something to hide (H McIsaac, "Confidentiality: An Exploration of Issues" (1985) 8 Mediation Quarterly 57 at p 64) but there is authority that no adverse inference may be drawn: Wentworth v Lloyd (1864) 10 HL Cas 589 (HL(E)) at pp 590-592 per Lord Chelmsford.

information where no claim to privilege has been made through ignorance?[1]

5.81 We doubt whether it is necessary to make any special provision for such matters. None of the modern statutes enacting new privileges has done so and there seems to be no reason why special rules should be devised in relation to a privilege in favour of family mediation. Admittedly the questions listed in the preceding paragraph raise some interesting issues, as we have indicated in the footnotes, but we think it unlikely that they would cause insuperable difficulties if they were to arise in practice. Indeed we are inclined to think that they would very seldom arise. We would expect that in general any participant in family mediation who was entitled to a privilege would be advised of that fact before he or she entered the witness box. We therefore seek views on the following:

36. It is unnecessary to make any provision as to -

(a) the warning of the witness by the judge;

(b) the prohibition of the asking of questions calculated to elicit privileged information;

(c) appeals against decisions on claims to privilege;

(d) the prohibition of the drawing of inferences from the claiming of a privilege;

---

[1] According to R v Coote (1873) L R 4 PC 599 the evidence is admissible.

(e) the admissibility of evidence adduced after failure to claim a privilege.

(11) Defence in proceedings for breach of confidence

5.82 It is clear that at least some of the information which we have considered under the headings of our suggested exceptions would be unlikely to be disclosed in court unless the mediator had previously disclosed the information to the relevant authorities. For example, it is unlikely that a mediator would be asked in court to describe physical signs of injury on a child which he or she had observed, or to state the terms of an incriminating statement which he or she had heard, during the mediation process unless the mediator had passed the information to the social work department or the police.[1] We understand that the question whether to make any disclosure to the authorities is one which seldom arises in practice, but may cause serious difficulty for the mediator when it does. Mediators are understandably reluctant to breach confidentiality, not only on the general ground of prejudicing the credibility of their service but also because disclosure may make successful mediation impossible in the particular case. They are unwilling, again understandably, to compromise their impartiality by becoming involved in legal proceedings and giving evidence against one of the parties. Further, a mediator who is considering whether to disclose particular information may not know whether it would be of interest to the authorities. For

---

[1] The mediator could also make a report to the procurator fiscal or the reporter.

example, the disclosure of a parent's unspecific remark that he or she often loses his or her temper with a child or leaves the child alone in the house for long periods may turn out to have been quite useless if the authorities are unable to find any other evidence of abuse or neglect, but may be helpful if there is such other evidence. Again, a parent may admit to a drug or alcohol problem which may or may not affect his or her parenting.[1]

5.83 Mediators are not the only professionals who may be faced with the question whether to disclose information to the authorities. We believe that doctors and social workers encounter similar difficulties. These are matters which in this country can only be resolved by the exercise of discretion by the professional concerned or by his following any relevant rules and practices of his profession. In certain other jurisdictions there are mandatory reporting laws: in the United States, for example, all the States have passed "child abuse reporting laws" which require medical and mental health professionals to report to a child welfare agency any child whom they know or suspect to be abused or neglected.[2]

5.84 It would be unnecessary and inappropriate for us to consider the merits of such legislation in this Paper. Our concern here is only to see whether any difficulties for mediators in this area might be alleviated to some extent in the context of a

---

[1] Weisberg and Wald, pp 197-198.

[2] Ibid, p 144. See also the Australian state laws mentioned in para 4.9 above, the Ontario rule in para 4.21 above and the Kansas rule in para 4.34 (note 4) above.

new privilege rule. We have noted the problem that a breach of the promise of confidentiality might be regarded as a breach of a professional, contractual, moral or ethical obligation.[1] We think that any new rule might be able to assist only in so far as any disclosure might appear to be a breach of any legal obligation of confidence, whether that obligation is contractual or otherwise. In our Report on Breach of Confidence[2] we discussed whether legislation on breach of confidence would be desirable and made certain recommendations for enactment if it were to be decided that there should be such legislation. In the event it was decided that no such legislation was required. One of our recommendations, however, is relevant to the present discussion. That was that certain specific defences should be available in civil proceedings for breach of confidence. One of these defences was that the use or disclosure of the information was in the public interest.[3]

5.85 We suggest that in proceedings for breach of confidence arising from the disclosure of information acquired during family mediation it should be a defence that the use or disclosure of the information was in the public interest. If any new privilege rule in favour of family mediation is enacted, the justification for any exceptions which are provided will be that the disclosure of the excepted matters is in the public interest. We therefore suggest a further provision to the effect that the disclosure of any of the excepted matters

---

[1] See paras 1.3, 2.25 above.

[2] (1984) Scot Law Com No 90.

[3] Ibid, paras 4.58-4.86, Recommendation 25.

should be deemed to have been in the public interest. Provisions on these lines would have the effect that a mediator would not be restricted by the terms of any promise to or contract with his or her clients, or by any other legal obligation of confidence, from disclosing any of the excepted matters to the authorities. We therefore suggest that:

37. **It should be provided that in any civil proceedings in which a breach of confidence is alleged in respect of the disclosure of information acquired during family mediation, it should be a defence to that allegation, without prejudice to any other defence available, that the use or disclosure of the information was in the public interest.**

38. **It should be further provided that in such proceedings the use or disclosure of any information to which the privilege does not attach should be deemed to have been in the public interest.**

PART VI - SUMMARY OF PROPOSITIONS AND QUESTIONS FOR CONSIDERATION

1. In principle, some degree of privilege should attach to information acquired in the course of family mediation.

(Paragraph 5.11)

2. The scope of the privilege should be defined by legislation in conventional terms.

(Paragraph 5.16)

3. Should any new statutory privilege apply:
   - (a) only to mediation provided by a service to which parties have been referred in terms of a rule of court; or
   - (b) only to mediation provided by a service affiliated to SAFCOS in relation to a dispute over custody or access; or
   - (c) to mediation provided by any person (an organisation or an individual) who either
     - (i) is officially approved by the Lord Advocate; or
     - (ii) has given notice to an appropriate court office that he is available to provide mediation services?

4. Should any new statutory privilege extend to mediation provided informally by an individual outside the structure of any organisation or any system of official approval or notice?

(Paragraph 5.24)

5. The statutory provisions should include a definition of the nature of the mediation process during which the information protected by the privilege is acquired.

(Paragraph 5.25)

6. The privilege should relate to -

(a) any dispute as to parental rights; and

(b) any dispute between spouses or cohabitants as to any matter which is or may be the subject of civil proceedings to which either or both of them may be parties.

7. Should the privilege extend to disputes of any other kind, and if so, to what categories of dispute?

(Paragraph 5.31)

8. Should the privilege attach to any information acquired in the course of, and for the purposes of, the mediation process?

9. Alternatively, should the privilege attach only to specific categories of such information, and if so, should it attach to any of the following -

(a) oral communications between either of the parties and the mediator;

(b) written communications between either of the parties and the mediator;

(c) records of such oral and written communications;

(d) evidence of behaviour or conduct by either of the parties or the mediator;

(e) evidence of the demeanour of either of the parties or the mediator;
(f) information acquired by the mediator from a third party?

10. Should the privilege attach to information acquired by a person to whom a party has been referred by the mediator for medical or other professional consultation?

(Paragraph 5.36)

11. The privilege should attach to information which has been -
(a) overheard by a third party;
(b) intercepted by a third party;
(c) illegally or improperly obtained by a third party.

12. The privilege should attach to secondary evidence of information in any of the categories mentioned in propositions 8-11 above.

(Paragraph 5.37)

13. No privilege should attach to the fact that a mediation meeting has taken place, the time and place of the meeting, or the identities of the participants.

(Paragraph 5.38)

14. No privilege should attach to the fact that agreement was reached as the result of mediation, or to the terms of any written agreement.

15. Should any privilege attach to oral agreements which have not been recorded in a document?

(Paragraph 5.40)

16. Information acquired in the course of family mediation should remain privileged irrespective of whether the mediation results in any agreement between the parties.

(Paragraph 5.41)

17. Should the privilege be inapplicable where there is a dispute as to whether an agreement has been reached?

(Paragraph 5.42)

18. Where the parties have been referred to a mediation service by a court, no privilege should attach to the fact that they have failed to reach agreement.

19. Where the parties have been referred to a mediation service by a court and have failed to reach agreement, should any privilege attach to the circumstances in which they have failed to reach agreement?

(Paragraph 5.43)

20. Where mediation has taken place without a reference by a court and no agreement has been reached, no privilege should attach to the fact of failure to reach agreement.

21. Should any privilege attach to the circumstances in which no agreement was

reached in mediation which has taken place without a reference by a court?

(Paragraph 5.44)

22. Should any privilege attach to information acquired by a mediator from a potential client or clients?

(Paragraph 5.45)

23. Are there any other matters to which the privilege should attach, or should be declared not to attach?

(Paragraph 5.46)

24. (a) Should the privilege be conferred on the parties only? or

(b) Should there also be conferred on the mediator a privilege, independent of the parties' privilege, which would entitle him or her, regardless of the parties' wishes, to refuse to disclose information acquired in the course of mediation between them?

(Paragraph 5.54)

25. Should the privilege in favour of family mediation apply in all categories of proceedings?

(Paragraph 5.60)

26. Should the privilege in favour of family mediation apply -

(a) only in civil proceedings where the subject-matter of the proceedings includes any of the issues with which the mediation process was concerned; or

(b) in civil proceedings generally; or
(c) in any other categories of proceedings?

(Paragraph 5.63)

27. Should the privilege be inapplicable to information relative to an issue as to whether any person -
(a) is of such habits or mode of life as to be unfit to have the care of a child;
(b) has neglected a child;
(c) has persistently or seriously ill-treated a child;
(d) has committed a sexual offence against a child;
(e) has committed an offence involving bodily injury to a child?

28. Are there any other circumstances relevant to the interests of children in which the privilege should not apply?

(Paragraph 5.71)

29. Should the privilege be inapplicable to information relevant to an allegation that a party to the mediation has, in proceedings between the parties, -
(a) made a previous statement inconsistent with his evidence;
(b) committed perjury;
(c) attempted to pervert the course of justice?

(Paragraph 5.73)

30. Should the privilege be inapplicable where it is alleged that a party's conduct during a mediation process to which the parties have

been referred by the court has been such as should be reflected in an award of expenses?

(Paragraph 5.74)

31. Should the privilege be inapplicable to information relevant to an expressed intent to commit a crime in the future?

(Paragraph 5.75)

32. Should the privilege be inapplicable to information relevant to a crime allegedly committed during the mediation process?

(Paragraph 5.76)

33. Should any other exceptions be made in the interests of justice?

(Paragraph 5.77)

34. Should it be provided that the privilege does not apply where the mediator is accused in criminal proceedings, or is the defender in civil or disciplinary proceedings, which arise from the mediation process?

(Paragraph 5.78)

35. Are there any other circumstances in which the privilege should not apply?

(Paragraph 5.79)

36. It is unnecessary to make any provision as to -

(a) the warning of the witness by the judge;

(b) the prohibition of the asking of questions calculated to elicit privileged information;

(c) appeals against decisions on claims to privilege;

(d) the prohibition of the drawing of inferences from the claiming of a privilege;

(e) the admissibility of evidence adduced after failure to claim a privilege.

(Paragraph 5.81)

37. It should be provided that in any civil proceedings in which a breach of confidence is alleged in respect of the disclosure of information acquired during family mediation, it should be a defence to that allegation, without prejudice to any other defence available, that the use or disclosure of the information was in the public interest.

38. It should be further provided that in such proceedings the use or disclosure of any information to which the privilege does not attach should be deemed to have been in the public interest.

(Paragraph 5.85)

Printed in Scotland by HMSO Reprographic Unit, Edinburgh
700 3/91 (080701) (CRC Supplied)