SYMPOSIUM ON CRIMINOLOGY

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TWO PROBLEMS OF CONFIDENTIALITY IN PROBATION

A probation officer is likely to possess information about his clients which would be regarded as confidential. For example, a probation officer may have investigated the family background and emotional state which ultimately produced an offence and brought that probationer before the courts. The possession of the kind of information instanced can give rise to legal and ethical problems where there is pressure of any kind to disclose the confidential information. These are problems of confidentiality. "Confidentiality", for the purpose of this article, means the legal and ethical restraints placed on the disclosure of information about a client by a professional adviser (in this instance a probation officer). This information may have been received from the client in the context of the counselling relationship or it may come from some kind of external source. Usually the disclosure restrained will be disclosure to a third party of some kind but, occasionally, the professional adviser will have information about his client unknown to the client himself. The question whether such knowledge should be passed on to that client is also a problem of confidentiality.

In probation questions of confidentiality arise at a number of points. One much discussed instance is the disclosure or non-disclosure to the offender of the Pre-Sentence Report prepared by the probation service to assist the court in sentencing the offender[2]. This article focuses attention on two other problems in probation. The first occurs in the day-to-day supervision of offenders and concerns the decision whether or not to report to the supervising court a particular breach of the conditions of probation. It will be argued that not all breaches should be brought back to the court and considerations which may be usefully taken into account in hadling this kind of situation will be suggested.

The second issue is whether a probation officer who is called as a witness in court proceedings other than those of the supervising court has any claim to privilege. It will be argued that such a privilege does exist.

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1. This article is based on two chapters of a thesis submitted as part of the requirements of the degree of LL.B.(Hons.).

2. Waterman, "Disclosure of Social Psychological Reports at Dispositions" (1970) 7 Osgoode Hall Law Journal 213; Roche, "The Position for Confidentiality of Presentence Investigation Report" (1965) 29 Albany Law Review 206; Higgins, "In Response to Roche" (1965) 29 Albany Law Review 225; Rezneck, "The New Federal Rules of Criminal Procedure" 54 Georgetown Law Review 1276; Hincks, "In Opposition to Rule 34(c) (2) Proposed Federal Rules of Criminal Procedure" (1944) Federal Probation (Oct.), Parker, "Use of the Presentence Report" (1964) 42 Canadian Bar Review 628; Thomson, "The Confidentiality of the Presentence Report" (1964) Federal Probation 8 (Mar.).

1. The discretion of the probation officer

(A) THE PROBATION OFFICER'S AUTHORITY

It is universally conceded that the idea of probation involves the exercise of some discretion by the probation officer[3]. When he is satisfied that a violation of the probation order has occurred the officer is confronted with two decisions. Should he report the matter to the supervising court? If he decides to bring proceedings, what recommendations will he make? These two questions are inter-related and they concern the extent of the supervisory powers of the probation officer. Dr. Nigel Walker has summed up the attitude of the probation service in England:

> "The probation officer is usually the person who has to decide whether to persevere with (the probationer's) supervision or to tell the court that he is failing. Most probation officers would regard the latter as a last resort, and would point to cases in which they had eventually been successful with offenders who were extremely troublesome during their first few months on probation"[4].

This crucial decision, it is submitted, is one of the most important questions in the administration of society's corrective measures. Paradoxically it is one on which very little has been written. If the use of probation continues to increase at its present rate[5] the issue is destined to become more important still.

It is essential to be aware of the framework in which the decision whether to bring breach proceedings is made. Revocation of a supervision order requires decisions on at least two levels. Firstly, the decision to institute breach proceedings is made within the probation service in consultation with a senior probation officer. Secondly, when the violator comes before the supervising court the judge or magistrate has the option of continuing the order or imposing, say, a term of imprisonment.

It is the first of these decisions which is to be made by the probation officer, and with which we are concerned here. Nevertheless, the likely outcome of the breach proceedings is a related factor. Consider, for example, the case of a probationer who, despite repeated warnings, only occasionally attended his appointments with the probation officer. It may be that the probation officer, while feeling that imprisonment would be pointless, considers that a stern reprimand by a magistrate would be effective. If the probation officer thinks that the magistrate would take up his suggestion to continue supervision after a warning this may be a factor in his decision to institute breach proceedings[6].

Once it is established that a wide discretion is exercised in practice the purpose of our inquiry becomes twofold. First, the legality under the present

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3. Dawson, *Sentencing—The Decision as to Type, Length and Conditions of Sentence* (Little Brown and Co., 1969), 151 *et seq.*; Walker, *Sentencing in a Rational Society* (Allen Lane, The Penguin Press, 1969), 79.
4. Walker, *supra* n.3, at 79.
5. South Australia, Annual Report of the Adult Probation Service. For the year ended 30th June, 1968, Table 3 shows the Annual Mean Average Increase as 14.3 per cent.
6. Dawson, *supra* n.3, 166 n.79.

law of such action must be considered. Secondly, an attempt will be made to suggest principles to guide decisions in particular cases which would be suitable for approval by legal authority. As will emerge from the ensuing discussion it is probably impossible at present to state the law with precision. In this situation the distinction between what the law is and what the law ought to be becomes extremely shadowy.

(B) THE INTERPRETATION OF PROBATION STATUTES

In order to determine how much discretion is conceded by the law to the probation officer in the matter of instituting breach proceedings, we must first look at the statutes which set up probation. In general, the Australian probation Acts are peculiarly silent on the point. The Victorian and South Australian Acts illustrate the degrees of hiatus of authoritative guidelines. Under s.9 of the Offenders Probation Act 1913-1971 (S.A.) "if the probative court or any court of summary jurisdiction is satisfied by information on oath that a probationer has failed to observe any of the conditions of his recognizance" the court may either issue a summons or a warrant. At what point must a probation officer turn informer on his probationer? Regulation 7 under the Act reads "when the conduct (of a probationer) is unsatisfactory and he fails to observe one or more of the conditions of his recognizance it shall be his duty to swear on information pursuant to s. 9, to report to the court . . . respecting the matter and to furnish a special report on the case to the Chief Probation Officer"[7].

Two difficulties arise from the wording of Regulation 7. First, when is the conduct of the probationer unsatisfactory, on what criteria is this to be decided. Secondly, are unsatisfactory conduct and breach of condition separate requirements both of which must be met, or is breach of condition merely explanatory of unsatisfactory behaviour? The former alternative, it is submitted, is the more grammatical reading and the one which is more suitable for the techniques required for the operation of probation. The first question relating to the criteria for judging whether conduct is satisfactory will also be discussed in greater detail.

The Victorian legislation is less explicit than the South Australian Act. Sections 516 (i) and 517 (i)[8] of the Crimes Act 1958 provide for a summons or a warrant to be issued if it appears on information to a justice of the peace that a probationer has breached a condition of the probation order or has received a further conviction. This is parallel to section 9 of the South Australian Act. Regulation 23[9] provides "A Probation Officer shall not take action under or for the purposes of s.512 or s.517 of the Crimes Act unless he has first obtained the written authority of the Chief Probation Officer". For the

7. Regulations made in Executive Council 26th February, 1914.
8. S.516(1) concerns breaches of probation order otherwise than by a fresh conviction. S.517(1) is to the same effect where there is a fresh conviction during the period of the probation order.
9. Regulations under Social Welfare Act 1960 (Vic.) August 3rd 1962, Division VI, Regulation 23. The Victorian Probation Service is a department of the Social Welfare Department.

reasons set out below[10] it is submitted that "s.512 or s.517" should be read *falsa demonstratio* as "s.516 or s.517".

Thus it seems clear then that the chief probation officer has a discretion to proceed against a probationer for breach. This leaves two questions yet to be answered. First, what is the position of the supervising probation officer? Secondly, on what criteria should the chief probation officer exercise his discretion?

Valerie Douglas[11], a former Victorian probation officer, has suggested that the case worker in consultation with a senior probation officer is left with the discretion *not* to proceed. In principle it would seem right that the person actually working with the probationer and with whom, if anyone, the relationship of trust and confidence would exist should take the initiating steps to bring breach proceedings even if the decision is subject to review by the chief probation officer. In practice such a situation seems inevitable in a large probation service.

From the foregoing discussion it has emerged that under both the South Australian legislation and the Victorian the probation officer actually supervising the client is implicitly ascribed a discretion whether to initiate proceedings. In Victoria, this is subjected to the review of the Chief Probation officer by statute and in South Australia the same system operates in practice. The answers to a questionnaire circulated to some probation officers in all States of Australia showed that they had at least some discretion both in deciding to proceed for the breach of condition of a probation order and for new conviction[12]. It now seems possible to conclude that in law the probation officer acting in consultation with the probation service hierachy has at least some discretion not to proceed against a client who has committed a breach of the condition of the order. This conclusion, however, gives no clue as to the extent of the discretion except what can be derived from common sense and the general notion of probation as a correctional measure.

(C) CRIMINAL LIABILITIES FOR NON-DISCLOSURE

In the course of his duties, a probation officer is likely to obtain information about the commission of offences which, under the general law relating to the discovery of crime, he has a duty to disclose to the authorities. The relationship in law between these ordinary obligations of a citizen and the special duties of a probation officer is far from clear.

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10. S.517 deals with action consequent upon a further conviction. S.516 deals with action consequent upon a breach of a condition of the probation order and s.512 deals merely with the procedures to change the supervising court where the probationer moves his place of residence. It seems most unlikely that the chief probation officer should have to be troubled with the purely administrative question in s.512 and yet should not be directed to supervise the decisions to bring proceedings under s.516. This conclusion is supported strongly by Regulation 4(9) under the same division which provides that it shall be the duty of the Chief Probation Officer to determine when action is to be taken under s.516 and s.517. See also s.507(5).
11. Valerie Douglas "Terminating Probation" (1968) 2 Aust. & N.Z. Jnl. of Criminology, 113. The author is the Chief Medical Social Worker, Royal Women's Hospital, Melbourne, and was formerly a probation and parole officer. The writer acknowledges a general debt to this paper.
12. Question (1) and (2) Appendix A. (A questionnaire annexed to the original thesis.)

The offence of compounding a felony requires an agreement for reward not to prosecute a felon[13]. This seems to involve a corrupt intention in receiving the benefit and, it is submitted, would be as applicable to a probation officer as to any other citizen. The same is true of the crime of being an accessory after the fact which needs some act of assistance to the principal felon in escaping apprehension or punishment[14]. Such an act would be totally out of character with the probation officer's position.

This misdemeanour of misprision of felony is more difficult. All the elements of misprision are present when it is proved that a person has actual knowledge, or what a reasonable man would regard as such, of a felony which has been committed and that he has failed to report to the authorities all material facts in his possession within a reasonable time, given reasonable opportunity[15]. It seems quite possible that a probation officer might come within this definition despite the fact that he receives the information as a counsellor and withholds a disclosure acting in good faith and in the belief that it is his duty to do so.

There is, however, an exemption which may well protect the probation officer. Lord Denning, who gave the leading speech in the House of Lords in *Sykes* v. *D.P.P.*, remarked in commenting on the suggestion that misprision was "impossibly wide" that

> "non disclosure may sometimes be justified on the ground of privilege. For instance, if a lawyer is told by his client that he has committed a felony it would be no misprision in the lawyer not to report it to the police for he might in good faith claim that he was under a duty to keep it confidential"[16].

Lord Denning then indicated that this would apply to doctor and patient, clergyman and parishioner, master and servant and to master of a college and student. It was not suggested that the list was exhaustive: "There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it"[17]. It is submitted that such "claim of right" applies *a fortiori* in the case of the probation officer—probationer relationship where there is a considerable public interest in encouraging full disclosure of all criminal intentions to the supervising probation officer.

Sir Carleton Allen has criticised the offence of misprision as based on the obsolete distinction between felony and misdemeanour[18]. The cogency of the criticism on this ground has been recognised in England by the passing of the Criminal Law Act 1967 which abolishes the distinction altogether. Instead it substitutes a statutory offence similar to compounding[19]. If, contrary to the present writer's submission, the offence of misprision is held to apply to proba-

13. *Sykes* v. *D.P.P.* [1962] A.C. 528, at 562 *per* Lord Denning.
14. *R.* v. *Tevendale* [1955] V.L.R. 95.
15. *Sykes* v. *D.P.P.* [1962] A.C. 528, at 563 *per* Lord Denning; at 569 *per* Lord Goddard; *R.* v. *Crimmins* [1959] V.R. 270.
16. *Id.*, at 564.
17. *Id.*, at 564.
18. C. K. Allen, "Misprisions" (1962) 78 L.Q.R. 40, at 80.
19. S.5(1) Criminal Law Act (U.K.) 1967.

tion officers the technicalities of the distinction between felony and misdemeanour make his difficult position very much worse.

(D) SOME GUIDELINES FOR THE EXERCISE OF DISCRETION BY PROBATION OFFICERS

An attempt will now be made to formulate an approach to the exercise of discretion by a probation officer in deciding whether to bring breach proceedings and, where this is done, what recommendations to make to the supervising court.

The notion that probation is a species of case work seems to be an appropriate point of departure. The Morison Report took this view when it described probation "as the submission of an offender while at liberty to a specified period of supervision by a social case worker who is an officer of the court"[20]. Closely akin to this is the idea that probation is a form of treatment. In the words of the United States National Conference of Law Observance report:

> "Probation is a process of treatment prescribed by the court for persons convicted of offences during which the individual probationer lives in the community and regulates his own life under conditions imposed by the court and subject to the supervision of the probation officer"[21].

Almost all the answers given by probation officers to the writer's questionnaire conformed to this view of the nature of probation[22].

Approaching a particular breach on the basis that probation is a form of treatment aimed at achieving the rehabilitation of the offender alters the level upon which the probationer's conduct is evaluated. Valerie Douglas has written that it changes:

> "the conception of what constitutes a breach of probation for it means that the focus of attention will not be so much upon the outward behaviour as the motivation of the probationer. For if probation is treatment then the probation officer will view the charge of unlawful behaviour which brought the probationer before the court only as a symptom, and will endeavour to deal with the problem on a deeper level . . . For while the provisions for imposing probation are inclusive, the administration of probation if it is to be successful must be exclusive. Each individual is unique and a treatment plan must be based upon diagnosis, upon a knowledge of the individual's own circumstances, goals, levels of aspiration and motivation"[23].

On this approach each of the alternatives available to the probation officer will be examined in turn to see which is the most appropriate for the advancement of that particular offender's rehabilitation. In some cases this will mean breach proceedings with a recommendation for revocation and psychiatric

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20. Departmental Committee on the Probation Service (U.K.), Report, Cmd. 1650, para. 9.
21. National Conference of Law Observance and Enforcement, Report on Probation and Parole (U.S. Government Printing Office 1931), quoted by Meeker, "Probation is Casework" (1948) 12 Federal Probation (No. 2), 51.
22. Question 3, Part II, Appendix A. (A questionnaire annexed to the original thesis.)
23. Valerie Douglas, "Terminating Probation", *supra* n.11.

treatment while in prison. In other cases, a sternly delivered warning from the probation officer may be sufficient. In other cases still a warning from a judge might be the most effective treatment. In this situation a probation officer would be justified in choosing a member of the bench with whom he could communicate easily in order to achieve the maximum effect of the "revocation" hearing.

Breach proceedings with a recommendation for revocation will normally be considered only "as a last resort"[24] as this nearly always reduces the chances of an early rehabilitation by use of community contacts, such as a steady employment and the support of a family, which are the case worker's most powerful resources. While the interests of recovery and rehabilitation should be followed whenever possible, nothing in what has been said should be taken to suggest any licence to tolerate substantial breaches of the criminal law. Thus where imprisonment is necessary to protect the public from further criminal activity by the offender there should be no hesitation to bring breach proceedings[25]. Similarly, where failure to bring proceedings would unduly depreciate the seriousness of the violation there is very little question.

On the other hand it is submitted that except in the two classes of cases mentioned there should be no presumption that a violation of the conditions of a probation order should be followed by breach proceedings with a recommendation for revocation. Such an approach would unduly limit the work of rehabilitation when alternatives to revocation (for example, a change in the conditions of the order) would be equally effective. The suggested *modus operandi* would be applied alike to violations of the conditions of the order and to breaches of the law which could not be described as serious[26].

The foregoing discussion, it is submitted, justifies the following guidelines for the exercise of discretion by probation officers confronted by a clear breach of the probation order.

(i) All the alternative courses of action open to the probation officer should be considered and the one which best promotes the rehabilitation of the probationer selected. Institution of breach proceedings with a request for revocation should be considered only as a last resort.

(ii) Except where:

(a) imprisonment is necessary to protect the public from further criminal activity by the probationer, or

(b) it would unduly depreciate the seriousness of the violation if probation were not revoked

there should be no presumption that breach of the probation order automatically demands revocation of probation.

(iii) The same conduct in different probationers need not be dealt with in the same way.

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24. Walker, *Sentencing in a Rational Society*, 79.
25. *Cf.* American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Probation*, at 56 *et seq.*
26. Very much the same attitude is taken by Dawson, *supra* n.3, 152 n.79, in his discussion of probation revocation following conviction.

(iv) Community links should be preserved and strengthened as much as possible in the circumstances.

(v) The probationer's improvement over the period of supervision should be considered when deciding whether to take proceedings.

(vi) The possible effect of the breach hearing on the probationer is a factor to be taken into account when deciding whether to institute proceedings.

(E) THE RELATIONSHIP BETWEEN THE PROBATION SERVICE AND THE COURT

The application of the foregoing principles may be thought to usurp the function of the sentencing court. It is submitted, however, that this is not the case. As usual, the Acts provide little guidance. In Western Australia[27] and Victoria[28] each probation officer is expressed to be "in relation to a probation order subject to direction by the court that made the order, but otherwise the Chief Probation Officer is under the control of the Minister". Queensland[29] and Tasmania[30] have similar provisions. The South Australian Act is unique in severing the link between the court and the probation service by placing each probation officer under the control of the Minister without even mentioning the court[31].

At this point, the tension between old and new views of penology is clearly visible. The court in sentencing the offender must weigh up its responsibilities. On the one hand it may mete out punishment with the aim, first, of protecting society and, secondly, of doing justice according to the offender's desert. Against this must be balanced the possibility of allowing the crime to go unpunished by traditional means in the hope that a more lasting method of protecting society by individual treatment may be found. Thus a court may only release an offender on probation where it believes that the short-term risk of re-offending (which could be eliminated by incarceration) is balanced by the long-term prospects of a complete rehabilitation. Once the two alternatives are disengaged, the question becomes clearer. Thus immediately a court has committed itself to taking the short-term risk for the possible long-term benefit, it must support its own decision by giving the probation officer all the powers and discretions he requires to carry out his task of treatment, subject to the need to protect society during the period of probation from the immediate danger of the probationer committing further serious crimes.

It is submitted that the legislative decrees that the probation officer shall be under the direction of the court should be interpreted in this light. Once the decision to award probation has been taken, the court, of necessity, delegates much of its correctional responsibility to the probation officer. Subject to the need to protect society the nature of the authority delegated is a paternal one. The present writer respectfully adopts the words of Valerie Douglas:

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27. Offenders Probation and Parole Act 1963-1969 (W.A.), s.7(1).
28. Crimes Act 1958 (Vic.), s.507(5).
29. Offenders Probation and Parole Act 1959-1960 (Qld.), s.5(1).
30. Probation of Offenders Act 1934 (Tas.), s.7(2).
31. Offenders Probation Act 1913-1971 (S.A.), s.6(2).

"There are clearly two specialities involved and two different functions. The probation officer administers treatment, and brings to the court the findings of the social sciences regarding human behaviour. The court views these findings in the light of its responsibility to protect society. The exercise of discretion by the probation officer is not an usurpation of the court's function but rather the outcome of a progressive specialization in society's methods of law enforcement"[32].

2. *A probation officer's claim to privilege*

Consider the following case:

Mr. A, aged 31, is convicted of indecent assault on a nine-year-old girl and put on probation for three years. His pre-sentence report reveals that the offence occurred at the time of a crisis in Mr. A's relationship with his wife. Fifteen months after the imposition of the bond, Mr. A's supervising officer is subpoenaed to testify in the divorce proceedings brought by the probationer's wife. Counsel for the wife seeks to question the probation officer on confessions of adultery made to him by the probationer and on certain events which he witnessed while visiting Mr. A. at home and which are alleged to constitute cruelty.

What is the position of the probation officer in this situation? Can he claim a privilege not to testify or may he refuse to answer some questions but not all?

It is proposed first to examine the efficacy of the claim for privilege as a matter of policy in court proceedings other than those in the supervising court. Secondly an outline will be made of the features a privilege for probation officers should possess. Thirdly the present legal position will be examined and two arguments upon which privilege for probation officers could be granted will be suggested.

(A) THE CLAIM FOR PRIVILEGE AS A MATTER OF POLICY

There are three kinds of argument on which the extension of a privilege to probation officers in proceedings other than those in the supervising court are based. First, the comparison of the policies on which the privilege accorded to other relationships is justified. Secondly, an overlap of functions between these relationships to which the law does concede privilege and that of the probation officer and client will be used to support the claim for this legal protection. Thirdly, there are the arguments which arise from the special position of the probation relationship as a corrective measure taken by the legislature itself.

(i) The Policy Justifications for Other Privileges

R. M. Fisher in an article entitled "The Psychotherapeutic Professions and the Law of Privileged Communications"[33] has advocated a functional approach to the granting of privilege to the counselling professions. In his argument he included both marriage guidance counsellors and social case workers[34]. This

32. Valerie Douglas "Terminating Probation", *supra* n.11.
33. (1964) 10 Wayne Law Review 609.
34. *Id.*, at 615-616.

approach highlights the similarity between the probation relationship and other psychotherapeutic and counselling services available. Thus it is possible roughly to equate for example the psychotherapist's relation with his client and that of probation officer and probationer. The similarity in function is the important element because it is undoubted that in both cases clients feel able to unbosom some of their deepest feelings. That there is a great difference in training between the two kinds of counsellors is admitted but this should not be overstressed. What the probation relationship lacks in depth it makes up in breadth. It is the probation officer, not the psychiatrist, who sees the client in his everyday situation and it is he who acts as a general adviser. Nor should it be forgotten that probation officers are very often trained social workers and that Australian probation services also supply "inservice" training.

It is against this background that the kind of confidences placed in the probation officer should be examined. Being made to confront the reasons and motives for certain conduct is a form of treatment offered to the probationer in his attempts to achieve social adjustment[35]. Such a process of becoming conscious inevitably involves the expression of feelings, wishes and frustrations the revelation of which can be nothing but embarrassing to the patient or client. It is submitted that in this aspect the probation relationship compares more than favourably with that of lawyer/client and social welfare officer/client while it is at least on a par with that of marriage guidance counsellor and spouse yet these three relationships all enjoy an established privilege under our law[36].

The importance of the free and frank disclosure is another major consideration. Absence of deterrence from open discussion of all problems is more important in the case of the probation relationship than in some of those to which our law grants privilege. In the first place, a patient or client in these more fortunate relationships must often seek out their counsellor of their own accord. The opposite is true of probation. The probationer has the probation officer imposed upon him in a sense that does not occur in the other relationships. It may be that at the time of sentence an offender is so thankful to "get off on a bond" that he will agree to anything. This attitude may not be a lasting one and the period after it has worn off will be the important one in the purpose for which probation has been instituted. If frank disclosure is deterred by absence of privilege in voluntary relationships it seems likely that it will be at least equally true of involuntary ones.

In the second place, the probation officer must supervise the whole of the probationer's conduct. Thus the importance of inducements of full disclosure are more important than where the client approaches the counsellor with a specific problem. In both these respects it is suggested that the probation relationship fares as well or better than those privileged ones already mentioned so far as the policy considerations used to justify them are concerned.

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35. Clarke, "Counselling", an unpublished paper. Mr. Clarke is a Senior Probation Officer with the S.A. Probation Department.

36. (1) As to lawyer and client privilege: Cross, *Evidence* (3rd ed., 1967), 240.
(2) As to social welfare officer and client: s.180a Social Welfare Act (S.A.) 1926-1965.
(3) As to marriage guidance officer and client: s.12 Matrimonial Causes Act (Cth.) 1959-1966.

A third factor to be discussed in what Fisher calls the "danger of dissension"[37] within the relationship. The risk of disrupting relations between probation officer and probationer by disclosure on the part of supervising officer is appreciably higher than in, say the lawyer/client situation. This is because a relationship in which treatment is being administered is likely to be more sensitive than one in which legal advice is given. Pecuniary damages in many cases will give the lawyer's client an adequate remedy whereas the kind of injury caused by a wrongful disclosure by a probation officer will be more subtle and less easily repaired. Furthermore, hopefully a reliable lawyer can always be found to replace his less ethical colleague but the destruction of one probation relationship by ill-advised revelations may cause total and permanent loss of confidence by that probationer in probation as a means of achieving stability.

(ii) The Overlap of Functions Between Privileged and Non-privileged Relationships.

It is probable that breach of confidence by a probation officer will have very much the same effect on his probationer's attitude as would the same conduct in the case of a marriage guidance counsellor or social welfare officer. Here the overlap of functions and general similarity of the counselling relationships can be invoked. If these relationships can be protected why must the probation relationship remain naked of safeguards?

There are other arguments which also depend on the view that overlap and similarity of functions suggest equal protection. The first of these is the inducement to commit perjury which must remain while a probation officer has no privilege in proceedings disconnected with probation. Many conscientious probation officers would feel themselves to be in an agonizing dilemma. Either they testify and risk destroying their work with the probationer or else they avoid the issue by telling such "white lies" as "he didn't mention it to me". Secondly, in light of the preceding argument the reliability of evidence received from probation officers in a conflict of duties situation must be less than would be normally accorded that person as a witness. It would be impossible, even unconsciously not to curtail one's answers a little. To this it might be added that evidence of what the probationer said, for example, about his inner feelings and thoughts may not be the most reliable type of evidence. Thirdly, it had been suggested previously[38] that privilege in the probation officer not to reveal expressions of intention as to future crimes may encourage such confessions to the probation officer and hence help to prevent crime.

(iii) The purpose of probation

Lastly there is perhaps the most fundamental argument of all. It has been pointed out above[39] that probation is the creature of statute and that the courts have delegated the responsibility of administering supervision to an administrative agency—the probation service[40]. Such a delegation of responsi-

37. Fisher, *supra* n.33, 625.
38. *Cf.* Fisher *supra* n.33, 631; and Bentham, *Rationale of Judicial Evidence* (Hunt & Clarke, London, 1827), 586-92.
39. See text to footnotes 27 to 32.
40. See also Dawson, *supra* n.3, 68.

bility must not be unduly restricted. Thus if a privilege is reasonably necessary for its proper functioning (which, on the arguments already outlined it is submitted is the case), then it behoves the courts and the legislature to support its initial intention that probation should aid rehabilitation by allowing to probation officers the appropriate privilege[41].

(B) THE KIND OF PRIVILEGE SUGGESTED

What kind of privilege, then, is appropriate to the probation relationship? It is suggested that a privilege in the witness box should be granted and should have the following features:

(i) Privilege should be accorded only in proceedings other than those in the supervising court.

(ii) In respect of information in relation to a client coming to the probation officer from the client himself or from a collateral source the client may waive privilege subject to para (iii)[42].

(iii) In respect of information in relation to a client, consisting of facts or diagnostic opinion which fall in the class of information revelation of which may psychologically harm the probationer or inhibit rehabilitation, the right to claim privilege should be vested in the probation officer. In any case where this kind of privilege is claimed the judge or magistrate must allow examination on the *voir dire* but should take steps to exclude from the court room the probationer and members of the public. If the judge or magistrate is satisfied that the probation officer's opinion could not reasonably be held then he should disallow the claim and the evidence should be given if the probationer has consented to the giving of other evidence by the probation officer.

(iv) Secondary evidence of the facts which the probation officer would be privileged to withhold should be admissible provided it does not consist of confidential communications made by any means to the probation officer or to diagnostic opinion formed by him.

(C) THE PRESENT LEGAL POSITION

It has been pointed out before that discussions of the question of privilege are prone to begin with the assumption that a probation officer has no privilege in the witness box by virtue of his office. It is submitted that to begin with any such assumption is an unrealistic approach and should be rejected in favour of an unbiased appraisal of the various arguments which can be made.

It has long been a rule of English law that relevant evidence must be excluded if its reception would be contrary to State interest[43]. Whether this doctrine can be used to protect the probation relationship depends on the ambit of the phrase "state interest". In the last two decades it seems that

41. *Cf.* the immunities conferred on administrative tribunals to enable them to carry out their functions. De Smith, *Judicial Review of Administrative Action* (Stevens and Sons, 1968), 78.

42. *Cf.* Fisher, *supra* n.33, 645 (s.1(v) of Fisher's Model Statute).

43. Cross, *Evidence* (3rd ed., 1967), 252.

the courts have given an increasingly expansive interpretation to these words. Thus in *Broome* v. *Broome*[44], the Crown claimed privilege exempting an officer of the S.S.A.F.A., a service welfare organization, from giving evidence in a divorce suit. The respondent in the case had been a soldier in Hong Kong where he was joined by his wife. The S.S.A.F.A. officer had there acted as a mediator when differences arose between the spouses.

Counsel for the Crown relied on the maintenance of morale of the armed forces as the head of public interest justifying the privilege. Sachs J. held that though it was "within the competence of a Minister of the Crown to prevent a witness giving evidence on some set of facts or class of facts it was surely wrong to adopt a procedure which would prevent the witness giving any evidence whatsoever of any sort"[45]. Although the claim to privilege failed on the procedure adopted by the Crown, Sachs J. commented on the question of heads of public interest and whether they were open to development:

> "One cannot help noting that the steps which would extend the heads of public interests from 'maintaining the morale of the forces' to 'maintaining general public morale' and thence to 'maintaining the faith of the public in specific institutions serving it' are neither very large nor unduly illogical"[46].

Courts in South Australia seem to have taken the cue. *Lock* v. *Lock*[47] was, like *Broome* v. *Broome*, a case dealing with a matrimonial cause. The husband sought a variation in an order for maintenance against him. His counsel tried to put in evidence a welfare officer's report made at the direction of the Supreme Court in earlier proceedings in respect of the custody of the children. He also wished to examine the welfare officer on her conversations with the parties during the preparation of the report. The Full Court (Napier C.J., Chamberlain J., and Walter A.J.) upheld the claim that the report was privileged from production. It was also held that physical facts observed but not what was said in the conversations held during preparation of the report could be the subject of questions which the welfare officer was bound as a witness to answer.

In discussing the question of State interest the Full Court said:

> "What a party may have told the Court Welfare officer about her financial situation is not a 'state secret' or an 'official communication' but the objection to its disclosure is based on obvious public interest. No authority is needed for the proposition that any state has a vital interest in the well-being of children and of good domestic relations, including the proper settlements of disputes as to custody . . . This public interest is clearly recognised by the provisions of the Matrimonial Causes Act as to the appointment of welfare officers and their functions"[48].

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44. [1955] P. 155.
45. *Id.*, at 199.
46. *Id.*, at 200.
47. [1966] S.A.S.R. 246.
48. *Id.*, at 249-50.

An even more recent South Australian case in this area is directly in point. In *Bell* v. *Bell*[49], another matrimonial suit, a probation officer was called on behalf of the petitioner to give evidence of her dealings and conversations with parties while acting as probation officer of their child who had been voluntarily placed under her supervision. The case turned on the interpretation of s.180a of the Social Welfare Act 1926-1965 the enacting provisions of which give privilege to officers of the Social Welfare Department in relation to "any matter in connection with which any officer of the department has given advice or been consulted". The crucial clause is the third exception which reads "except where such evidence relates to any matter which has come to his knowledge by reason of his duties as a probation officer". Walters J. held, in effect, that that "matter which has come to his knowledge" must be read in light of the distinction made in *Lock* v. *Lock* between facts observed and conversations. Thus the probation officer in the case before him was denied privilege because her evidence fell within the class "of physical facts or overt acts".

Although the probation officer in *Bell* v. *Bell* was not acting in her capacity as a probation officer under the Probation Offender's Act 1953-1971, it is submitted that the reasoning of Walters J. in his application of *Lock* v. *Lock* applies with equal force in relation to probation officers working under that Act. The argument is made stronger by the fact that the *Lock* v. *Lock* doctrine was used in effect to read down the wide drafting of s.180a(c). Thus it seems that the Crown privilege doctrine as applied to probation officers will allow a privilege to be claimed in respect of conversations between probationer and probation officer but not in respect of facts observed in the course of duty.

The Crown privilege approach produces a privilege with a number of the features recommended for that appropriate to the probation relationship. It is clear, for example, that it vests in the probation officer not the probationer (though partial power to waive was recommended). Secondly, the question of secondary evidence of the information excluded by privilege is determined under the crown privilege doctrine in the way suggested to be suitable for needs of probation. On the other hand, the distinction made in *Lock* v. *Lock* between facts observed and confidential communications is not so appropriate. In the first place it is difficult to tell the difference between these two classes of facts in many instances. In which category, for example, do the evaluations based both on facts and communications fall? Secondly, it may be that disclosure of facts observed about a probationer or his circumstances might be as equally damaging as the release of communications.

49. [1970] South Australian Law Society Judgment Scheme 167 (5th May, 1970).