SUPREME COURT OF VICTORIA

COURT OF APPEAL

No. 8917 of 2004

ROYAL WOMEN'S HOSPITAL — Appellant

v.

MEDICAL PRACTITIONERS BOARD OF VICTORIA — Respondent

JUDGES:	WARREN, C.J., MAXWELL, P., and CHARLES, J.A.
WHERE HELD:	MELBOURNE
DATES OF HEARING:	27-28 October 2005
DATE OF JUDGMENT:	20 April 2006
CITATION:	(2006) 15 VR 22; [2006] VSCA 85

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr O.P. Holdenson, Q.C. with Dr S.B. McNicol and Mr E.M. Kingston	Middletons
For the Respondent	Mr T.J. Ginnane, S.C. with Mr S.P. Donaghue	Minter Ellison

WARREN, C.J.:

BACKGROUND

The Patient

1 In January 2000, a woman – who will henceforth be referred to as Ms X[1] – attended the emergency department of the Royal Women's Hospital (the "Hospital"), the appellant in this matter. Ms X requested that her pregnancy be terminated. At the time, Ms X was carrying a 32-week old foetus. Ms X had been informed, as a result of an ultrasound performed prior to her attendance at the Hospital's emergency department, that her foetus may have skeletal dysplasia, a condition commonly known as "dwarfism". The appellant referred Ms X for counselling and a further ultrasound was taken which confirmed the diagnosis of skeletal dysplasia. Ms X requested that her pregnancy be terminated.

According to the judge below:

> "Mrs X [sic] became hysterical and suicidal and demanded that her pregnancy be terminated. She was referred to a psychiatrist for counselling and assessment and it appears that the psychiatrist some days later recommended termination of the pregnancy to preserve the psychiatric health and life of Mrs X. Various medical practitioners within the hospital were consulted and after consultation they concurred with the recommendation and in early February 2000 a foetal reduction procedure was undertaken and Mrs X delivered a female by stillbirth."[2]

Call for an Investigation

2 On 8 May 2001, Senator Julian McGauran, a Senator for the State of Victoria, wrote to the Medical Practitioners Board of Victoria (the "Board"), the respondent in this matter, making allegations regarding the treatment of Ms X and the termination of her pregnancy at the Hospital. Senator McGauran alleged that the diagnosis was

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1 On 8 December 2004, Master Wheeler made an order pursuant to s.18 of the *Supreme Court Act* 1986 suppressing the publication of the names of Ms X and any treating medical practitioners involved in the complaint to the Board. A further such order was made by Maxwell P. and Harper A.J.A. in this Court on 12 August 2005.

2 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2005] VSC 225 at [6].

a misdiagnosis and requested that the Board conduct an investigation into the matter. Further, on 8 February 2002, Senator McGauran provided information to the Board identifying the medical practitioners involved in the termination of the pregnancy and requested that the Board conduct an investigation into the professional conduct of those medical practitioners. Subsequently, on 18 April 2002, the Board determined to conduct a preliminary investigation into the professional conduct of the medical practitioners so identified and delegated its power to conduct a preliminary investigation to a sub-committee.

3 The parties to this matter agree, by way of their Summary of Facts filed in this Court on 20 October 2005, that:

> "To further the Respondent's investigation, the Respondent sought to access the patient's medical record. By letter dated 24 May 2002 the patient, through her solicitors, Grubissa White, advised the Respondent that she did not consent to the release of her medical records to the Respondent… [and that] on the basis of the patient's refusal to provide her consent to the release of her medical records to the Respondent, the Appellant and the medical practitioners involved in her treatment declined the Respondent's requests for information in relation to the patient's treatment and the Appellant declined the Respondent's requests for access to the patient's medical records."

Search Warrant

4 The sub-committee of the Board carried out a preliminary investigation but was hampered by the lack of medical records concerning the treatment provided to Ms X. Consequently, on 26 June 2003, the Board obtained a search warrant from the Magistrates' Court of Victoria. This search warrant was executed and the requisite documents seized from the Hospital were lodged with that court. Upon application by the Hospital, an order was made by consent on 31 July 2003 that the documents be returned. However, on 28 October 2003, the Board applied for a further search warrant. This warrant was declined, although eventually, on 13 November 2003, a search warrant was issued by the Magistrates' Court and was executed on 18 November 2003. Upon the execution of this warrant, the Hospital applied to the Magistrates' Court seeking an order that the documents that were seized be

returned.

Magistrates' Court Hearing

5 The matter was heard in the Magistrates' Court from 15 March 2004 to 19 March 2004. The principal issues raised by the Hospital related to statutory privilege and public interest immunity. The Magistrate published her reasons on 8 October 2004 and found against the Hospital in respect of all the issues which it had raised.

6 Her Honour found that s.28(2) of the *Evidence Act 1958* (Vic) and s.141(2) of the *Health Services Act 1988* (Vic) did not apply to the facts of the case. Her Honour also concluded that the doctrine of public interest immunity did not apply. Specifically, the Magistrate ordered:

> 1. That the documents seized pursuant to the search warrant be released to the Board;
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> 2. That there be a stay of 30 days on the release of the documents; and
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> 3. That the Hospital pay the Board's costs.

Appeal to the Supreme Court

7 On 4 November 2004, the Hospital filed a Notice of Appeal under s.109 of the *Magistrates' Court Act 1989* (Vic). The Notice of Appeal appealed the whole of the Magistrate's judgment. The appeal was heard before a judge of the Trial Division.

8 As paraphrased by his Honour, the three grounds of appeal were:

> "[T]hat the learned Magistrate was in error in failing to determine that the documents were subject to the protection of s.28(2) of the *Evidence Act* and s.141(2) of the *Health Services Act* 1988 and was also in error in failing to find that the documents were excluded from production by the principle of public interest immunity".[3]

9 His Honour further described the questions of law raised by the Hospital as being:

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3 *Ibid* at [16].

"(i) whether the documents the subject of the search warrant were subject to the protection of s.28(2) of the *Evidence Act* 1958;

(ii) whether the documents the subject of the search warrant were subject to the protection of s.141(2) of the *Health Services Act* 1988; and

(iii) whether the principle of public interest immunity applied to the documents the subject of the search warrant as a class of documents, resulting in those documents not being required to be produced".[4]

10 On 29 June 2005, his Honour handed down his judgment and dismissed the appeal on all three grounds. His Honour ordered that:

1. The appeal be dismissed;

2. The appellant pay the respondent's costs of the appeal including any reserved costs; and

3. The Orders of the Magistrate be stayed until 4:30pm on 22 July 2005.

Application to Appeal to the Court of Appeal

11 On 12 July 2005, the Hospital filed a summons in the Court of Appeal seeking leave to appeal the decision of the Trial Division. The proposed notice of appeal attached to the appellant's affidavit of 13 July 2005 supporting the leave to appeal application contained the following two grounds of appeal:

"(a) That the [learned judge] erred in determining that the patient's medical records did not attract protection under Section 28(2) of the *Evidence Act* 1958; and

(b) That the [learned judge] erred in determining that the patient's medical records were not protected by a public interest immunity."

12 The application was heard by Maxwell P. and Harper A.J.A. on 12 August 2005. The Court granted the Hospital leave to appeal on its second ground only, namely, that the learned judge erred in failing to find that the documents that were the

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4 *Ibid* at [15].

subject of the search warrant should not be produced, since they should be regarded as being protected by the principle of public interest immunity.[5]

13 On 6 October 2005, the Board filed a Notice of Contention in which it asserted that:

> "(a) that public interest immunity operates to safeguard the proper functioning of the executive arm of government and the public service, and cannot prevent the disclosure of the medical records of a particular patient because the production of those records would not damage an interest that is governmental in character;
>
> (b) that the law does not recognise the class of documents that the Appellant claims is immune from production on public interest immunity grounds (in any of the various ways in which the Appellant has formulated that class), meaning that it was not necessary for the Court to engage in any balancing of competing public interests in order to reject the public interest immunity claim; and
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> (c) that the Appellant did not demonstrate the existence of a public interest in the non-disclosure of medical records to the Respondent which will keep the records confidential and use them only for the purpose of regulating the medical profession and not disclose them to the world at large".

THE ISSUE ON APPEAL

Public Interest Immunity

14 As outlined, the sole ground to be determined in this appeal is whether or not the judge below erred in finding that Ms X's medical records did not attract the protection offered by the common law principle of public interest immunity.

15 The learned judge below was not convinced that a claim for public interest immunity was applicable in this case. However, his Honour nevertheless found that the Magistrate who issued the search warrant allowing Ms X's medical records to be seized from the appellant was wrong in failing to perform the requisite balancing

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5 *Royal Women's Hospital v Medical Practitioners Board of Victoria*, Application for Leave to Appeal (Unreported, Victorian Supreme Court of Appeal, Maxwell P. and Harper A.J.A., 12 August 2005).

exercise in assessing the presence of a public interest immunity, should such an immunity exist.[6] His Honour further determined that it was appropriate for him to perform the balancing exercise on appeal.[7]

16 The principles relevant to the conduct of the balancing exercise were identified by his Honour as those that were enunciated by Gibbs A.C.J. in *Sankey v Whitlam*, namely:[8]

> "The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v Rimmer* as follows:
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> > 'There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.'
>
> It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies." [footnotes omitted]

17 However, while this seminal passage from Gibbs A.C.J. provides guidance as to how any judicial balancing exercise ought be performed, it also highlights a threshold problem for the appellant in this matter, that is, whether or not a public interest immunity can be claimed outside of the context of a "matter of state"[9] or "the conduct of governmental functions".[10] I shall return to this question shortly.

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6 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2005] VSC 225 at [101].

7 *Ibid* at [89]-[102].

8 (1978) 142 CLR 1 at 38; as cited in *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2005] VSC 225 at [106].

9 See, eg, s.130(1) of the uniform Evidence Acts.

10 *R v Young* (1999) 46 NSWLR 681 at 693 (Spigelman C.J.).

18 As far as any balancing exercise in this case was concerned, the judge below stated the critical question at issue as follows:[11]

> "[D]oes the public interest in the proper investigation and determination of complaints made against registered medical practitioners outweigh the public interest in the confidentiality of the documents identified as a class, namely the medical records of women patients in public hospitals seeking advice and treatment about women's health and reproduction, and in particular obstetrics and gynaecological advice?"

19 His Honour found that it did. He further rejected the appellant's submission that:

> "[T]he breakdown of the confidential relationship will have adverse effects upon pregnant women approaching public hospitals or they will fail to look after their own interests when obtaining treatment from a public hospital because of non-disclosure of, or providing misleading, information".[12]

20 Central to his Honour's rejection of the appellant's argument was his view that:

> "Pregnant women will seek treatment if it becomes necessary, they will approach a public hospital if necessary, and will reveal all that is necessary to enable their treatment to be properly and carefully performed. The exigencies of the occasion will ensure this is so. Further, I am not persuaded that the disclosure of confidential information by the Hospital will adversely affect, hinder or interfere with the Hospital or any other hospital performing its functions whether statutory or otherwise".[13]

21 I do not share his Honour's optimism that the "exigencies of the occasion" will always ensure that pregnant women "will reveal all that is necessary to enable their treatment to be properly and carefully performed". Nevertheless, even if pregnant women are dissuaded from approaching public hospitals for treatment because they lack confidence that the confidentiality of their medical records will be protected, I do not believe that this fact, of itself, necessarily establishes the existence

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11 *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2005] VSC 225 at [128].

12 *Ibid* at [134].

13 *Ibid.*

of a public interest immunity with respect to the class of documents which the appellant argues should attract such an immunity.

22 It has been said – and I would agree, notwithstanding the further stipulations that follow in these reasons – that the categories of public interest immunity should not be regarded as intractably closed. For example, in *D v National Society for the Prevention of Cruelty to Children*,[14] the House of Lords recognised a category of public interest with respect to the reporting of confidential information on child abuse; while in *Aboriginal Sacred Sites Protection Authority v Maurice*,[15] Bowen C.J. and Woodward J. held that a public interest immunity could be recognised with respect to secret and sacred Aboriginal information and beliefs.[16]

23 Further, in *Australian National Airlines Commission v Commonwealth,* Mason J. said:[17]

> "[I]t would be an error to regard the categories of documents which attract privilege as necessarily closed. As time passes it is inevitable that new classes of documents important to the working of government will come into existence and that detriment to the public interest may occur in circumstances which cannot presently be foreseen."

24 The doctrine of public interest immunity is usually and most properly invoked to protect the functioning of government. So much is echoed by Mason J.'s above remarks, which also allude to the confusion that has sometimes been attached to concurrent discussions of "privilege" and "public interest immunity". Traditionally, public interest immunity was referred to as "Crown privilege". However, equating the two concepts is now considered imprecise. As Lord Pearson observed in *Rogers v Home Secretary*:[18]

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14 [1978] AC 171.

15 (1986) 10 FCR 104.

16 The third member of the Court, Toohey J., held that the immunity did not attach to the documents claimed by the Aboriginal Sacred Sites Protection Authority, and in any event, on the facts of the case, Bowen C.J. and Woodward J. both determined that there was a greater public interest in disclosure of the relevant material.

17 (1975) 132 CLR 582 at 591.

18 [1973] AC 388 at 406.

> "The expression "Crown privilege" is not accurate, though sometimes convenient. The Crown has no privilege in the matter. The appropriate Minister has the function of deciding, with the assistance of the Attorney-General, whether or not the public interest on the administrative or executive side requires that he should object to the disclosure of the document or information, but a negative decision cannot properly be described as a waiver of a privilege."

25 It is true that, on the English authorities at least, the common law doctrine of public interest immunity may not be restricted to claims for the protection of government and its functions. Instead, as Lord Hailsham describes it, there may be construed a more "flexible" approach and "a willingness to extend established principles by analogy and legitimate extrapolation".[19] Conversely, the Australian approach to claims of public interest immunity appears more confined. For example, in *State of Victoria v Seal Rocks Pty Ltd*, Ormiston J.A. (with whom Phillips and Buchanan JJ.A. agreed), while suggesting that the immunity was broader than the Executive, nevertheless found as follows:[20]

> "In my opinion, therefore, public interest immunity in a document or other communication is a right by way of an immunity or a privilege which enures in the body politic and indeed in the nation (or relevant polity) as a whole, and not merely in the executive, *being designed to protect the operation of the instruments of government at the highest level and for the benefit of the public in general*, subject only to a court's reaching a conclusion to the contrary on sound grounds that no other public interest, especially in the administration of justice, should prevail in the particular circumstances." [emphasis added].

26 When Ormiston J.A. refers here to the expression, "for the benefit of the public in general", I understand his Honour to be inextricably linking that to the preceding exhortation, namely, "to protect the operation of the instruments of government at the highest level".

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19 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 226.

20 (2001) 3 VR 1 at 6-7.

27 It is difficult to see how the appellant can establish that the class of documents for which it invokes the immunity relate to the operation of government and its protection.

28 Analogous arguments were put before the New South Wales Court of Criminal Appeal in *R v Young*.[21] On that occasion, that Court, by a majority of four to one,[22] refused to accept that the sexual assault counselling records of a patient at a public hospital were protected by a public interest immunity. In *R v Young*, Spigelman C.J. said:[23]

> "The Court should not recognise a new category of privilege unless it represents a definite principle which the community as a whole has plainly adopted, for a significantly lengthy period to suggest permanence."

29 Abadee and Barr JJ.A. agreed.[24] Their Honours cited Gaudron and McHugh JJ., in *Breen v Williams*, who held as follows:[25]

> "Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must "fit" within the body of accepted rules and principles. The judges of Australia cannot, so to speak, "make it up" as they go along. It is a serious constitutional mistake to think that the common law courts have authority to "provide a solvent" for every social, political or economic problem. The role of the common law courts is a far more modest one.
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> In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has

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21 (1999) 46 NSWLR 681.

22 Spigelman C.J., Abadee, James and Barr JJ.A. agreeing; Beazley J.A. dissenting.

23 *Ibid* at 700.

24 *Ibid* at 722.

25 (1996) 186 CLR 71 at 115.

been derived logically or analogically from other legal principles, rules and institutions." [footnotes omitted]

30 On the facts in *R v Young*, Abadee and Barr JJ.A. further said that:

> "In our view, to establish the public interest immunity privilege contended for would be effectively to perform a legislative function and achieve what parliament has not on the true construction of the legislation achieved."

31 While the construct of legislation is not at issue in this appeal, there is, nevertheless, little legislative guidance to support the recognition of the category of public interest immunity sought by the appellant. On the contrary, current developments in legislative reform would suggest that the immunity is to be construed narrowly. For example, in their recent report, *Uniform Evidence Law*, the Australian, New South Wales and Victorian Law Reform Commissions state that:[26]

> "Claims for public interest immunity are most commonly made by the government in relation to Cabinet deliberations, high level advice to government, communications or negotiations between governments, national security, police investigation methods, and in relation to the activities of Australian Security and Intelligence Organisation (ASIO) officers, police informers, and other types of informers or covert operatives."

32 The Report further noted that s.130 of the uniform Evidence Acts applies the public interest immunity to "matters of state",[27] stating that:[28]

> "The 'public interest' in s.130 has been defined as requiring 'a dimension that is governmental in character' (*R v Young* (1999) 46 NSWLR 681, 693). In *New South Wales v Ryan* ((1998) 101 LGERA 246), the Full Federal Court held that there was no relevant difference, in relation to a public interest immunity claim for Cabinet papers, between the common law, as determined in *Sankey v Whitlam*, and the provisions of s 130."

33 This narrow interpretation of the immunity was comprehensively analysed by Spigelman C.J. in *R v Young*, where he said:[29]

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26 Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, *Uniform Evidence Law Report* (December 2005) at [15.154].

27 *Ibid.*

28 *Ibid* at [15.157].

29 (1999) 46 NSWLR 681 at 693.

> "Public interest immunity" is concerned with, and the terminology should be confined to, the conduct of governmental functions" …
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> "The "public interest", to which this immunity refers, requires a dimension that is governmental in character. The references to "public interest" in the frequently cited passages from the case law, should be so understood: eg, *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39; *Alister v The Queen* (1984) 154 CLR 404 at 412. These passages did not intend to encompass every situation in which it could be said that some form of public policy could be served by non- disclosure. In my opinion, it is not correct to treat public interest immunity as if it were a "residual category" of circumstances in which courts limit access to information on the basis of weighing the public interest in disclosure against any factor that can be described as a "public interest"."

His Honour continued:[30]

> "Public interest immunity arises because of "the need to safeguard the proper functioning of *the executive arm of government and of the public service*" (emphasis added), to use the formulation which Stephen J. in *Sankey v Whitlam* (at 56) described as "the reasons customarily given" for the immunity. This formulation was adopted by Mason C.J., Brennan J., Deane J., Dawson J., Gaudron J. and McHugh J. in *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 619, and described by their Honours as "the ordinary reasons supporting a claim for public service immunity"."
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> "The dividing line between private and public interests is not always easy to draw. Public institutions — relevantly, in the present case, hospitals — provide private services, indistinguishable from the same services provided by private institutions."

34 I agree with the analysis of Spigelman C.J.. In the context of the common law doctrine of public interest immunity, it is not appropriate for courts to arbitrarily speculate about what the benefit (or for that matter the disbenefit) of the public may or may not be, outside of the established categories as they apply to the proper functioning of government.

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30 *Ibid* at 693-4.

35 The appellant made five specific submissions with respect to the public interest immunity. All five submissions relate to failings that the appellant submits were made by the judge below while engaging in the requisite balancing exercise. However, as I have already stated, the appellant must pass an initial hurdle first, that is, to establish that the class of documents in question (and consequently the medical records of Ms X), are governmental in character. This is where the appellant's argument fails. By its own admission, the appellant invites the Court to recognise a "fresh category" of public interest immunity. However, I cannot find any proper basis upon which to do so.

36 Insofar as there were concerns about the confidentiality of the documents and the position of the Board, I agree with the observations of Maxwell, P. as to the role of the *Health Records Act* 2001 and the need for legislation.

37 I consider the appeal should be dismissed. It is unnecessary to consider the Notice of Contention.

MAXWELL, P.:

38 I have had the advantage of reading in draft the reasons for judgment of the Chief Justice and of Charles, J.A. I gratefully adopt their Honours' summaries of the facts and the proceedings, and their analyses of the authorities.

39 Like the Chief Justice, I consider that the Hospital's claim for public interest immunity ("PII") fails at the threshold. That is, the class of documents the subject of the claim is not capable, as a matter of law, of attracting PII. No occasion therefore arises to engage in a "balancing exercise". My reasons are as follows.

Public interest immunity

40 PII, where it exists, is a powerful shield. The immunity protects the relevant documents (or information) from compulsory production in any forum. The

immunity applies both in court proceedings – to relieve the holder from the usual obligation to produce relevant documents, whether on discovery or in answer to a subpoena – and in administrative investigations such as the present, where coercive powers are conferred on a statutory authority to obtain information in the public interest.

41 It is axiomatic that decisions – whether by courts or by public authorities – are more likely to be correct when all relevant information is available to the decision-maker. Hence PII can be seen to be inimical to sound decision-making in the public interest. Like a claim of privilege, a claim of PII operates "as a fetter on the discovery of truth"[31]. The conferral of such immunity necessarily limits the ability of a court to do justice between parties. Of course, like the cognate common law privileges – legal professional privilege and the privilege against self-incrimination – the immunity exists because other dimensions of the public interest are seen to override the public interest in full disclosure.

42 It follows, in my view, that the limits of PII must continue to be very strictly drawn. Given the far-reaching protection which it confers, the immunity should be given no greater scope than is demonstrably necessary. It may be accepted that the categories of PII are never closed, but a court should be very slow to entertain a claim – such as that made by the Hospital in this case – for the recognition of a new class of PII.

43 This is especially so, in my view, since PII is an immunity conferred by judges, not by the legislature. Prima facie, it should be for the legislature, not the courts, to decide when an overriding public interest warrants exempting a class of information from the usual rigours of public disclosure.

44 As an example of such legislation, the *Trade Practices Act* 1974 (Cth) contains its own statutory form of PII. Sub-section 155(7A) provides that the obligation imposed by s.155(5) – to comply with a notice from the Australian Competition and

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31 *R. v. Young* (1999) 46 NSWLR 681 at 696 [72] per Spigelman, C.J.

Consumer Commission requiring the furnishing of information or the protection of documents – does not require a person –

> "(a) to give information or evidence that would disclose the contents of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or
>
> (b) to produce or permit inspection of a document prepared for the purposes of a meeting of the Cabinet of a State or Territory; or
>
> (c) to give information or evidence, or to produce or permit inspection of a document, that would disclose the deliberations of the Cabinet of a State or Territory."

45 In the case of the privilege against self-incrimination, Parliaments have increasingly asserted their prerogative to decide when - and to what extent - the privilege must give way to the needs of administrative investigators for full disclosure.[32] Parliaments have intervened rather less often to limit the scope of legal professional privilege. One relevant example of such a limitation is s.19D(1) of the *Evidence Act* 1958 (Vic), which excludes legal professional privilege as a lawful excuse for non-compliance with a requirement by a Royal Commission for the provision of information or the production of a document[33].

46 Freedom of information ("FOI") legislation is now in force in Victoria and nationally. This is significant for two reasons. First, the FOI legislation[34] is a perfect illustration of how Parliament itself, having conferred a public right of access to government documents,[35] defines the scope and limits of the various heads of immunity (exemptions) which limit public access. These are properly matters of policy for Parliament to decide.

47 Secondly, the advent of FOI legislation in Australia postdated almost all of the key decisions of the House of Lords and of the High Court in which PII was

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32 See, for example, *Trade Practices Act* 1974 (C'th) s.155(7); *Gambling Regulation Act* 2003 (Vic) s.10.5.19; *Occupational Health and Safety Act* 2004 (Vic) s.154; *Prostitution Control Act* 1994 (Vic) s.46E.

33 See also *Australian Securities and Investments Commission Act* 2001 (Cth) s.69.

34 *Freedom of Information Act* 1992 (C'th); *Freedom of Information Act* 1982 (Vic.) ("FOI Act").

35 *FOI* Act (Vic) s.13.

recognised and defined. The passage of that legislation was an unprecedented affirmation of the public interest in access to government documents. That emphatic declaration of legislative policy, unquestioned a quarter of a century later, must inevitably weaken any argument that a court should create a new category of documents to which access cannot be had.

48 The FOI legislation was passed in the face of vociferous arguments – of precisely the kind mounted to justify claims for PII – to the effect that –

> " … proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published might affect the frankness and candour of those preparing them …"[36]

In the event, the concerns about "lack of candour" resulting from the threat of future disclosure were accommodated by enacting FOI exemptions for Cabinet documents[37] and for "internal working documents"[38]. Once again, these were properly matters for the legislature to resolve.

Content, not source

49 In my view, an analysis of the authorities reveals that what determines whether a document (or class of documents) attracts PII is the character of the information contained in the document(s), not the character of the agency which creates, or holds, the document(s).

50 Take, for example, the so-called "police informer immunity", now a recognised category of PII. What explains the successive extensions of the informer immunity[39] is the recognition that the very function which an informer performs

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36 *Sankey v. Whitlam* (1978) 142 CLR 1 at 40 per Gibbs, A.C.J.

37 *FOI Act (Vic.)* s.28.

38 Ibid s.30. For a consideration of those issues by the Commonwealth Parliament, see the 1979 report of the Senate Standing Committee on Constitutional and Legal Affairs, Chapters 18 and 19. (Legal and Constitutional Committee, Commonwealth Senate, *Freedom of Information*, 1979).

39 See paras [102]-[107] below.

means that information about the informer's identity and whereabouts will almost always need to be immune from disclosure, in order both to protect the individual and to encourage the provision of such information in the future. This remains true whether the informer is assisting police, or a child protection agency, or the Gaming Board. The same exigencies have been held to override the requirements of natural justice, or to rob them of content, where adverse information has been provided to a decision-maker by an informer[40].

51 In the foundational category of PII – that which concerns government documents – the touchstone once again is the character of the information. This is so whether the claim for PII is a class claim or a contents claim. Thus, Lord Scarman said that PII was –

> "restricted to what must be kept secret for the protection of government at the highest levels and in the truly sensitive areas of executive responsibility".[41]

52 In *Sankey v. Whitlam*[42] Gibbs, C.J. said that:

> " … the law recognises that there is a class of documents which in the public interest should be immune from disclosure. The class includes … any documents which relate to the framing of government policy at a high level … . According to Lord Reid [in *Conway v. Rimmer*][43], the class would extend to 'all documents concerned with policymaking within departments … ".[44]

53 This category – the principal category – of PII applies to protect information of that special character, concerning decision-making by the instruments of government at the highest level. Only then is the case for secrecy seen to be so compelling that the exceptional course of conferring immunity can be justified. I respectfully adopt what was said by this Court[45] in *State of Victoria v. Seal Rocks Pty.*

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40 See Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (3rd Ed. 2004) at pp.510-11.

41 *Science Research Council v. Nasse* [1980] A.C. 1028 at 1088.

42 (1978) 142 CLR 1.

43 [1968] A.C. 910.

44 At 39.

45 Ormiston, J.A. with whom Phillips and Buchanan, JJ.A. agreed.

Ltd.[46], as follows:

> " … [P]ublic interest immunity in a document or other communication is a right by way of an immunity or a privilege which enures in the body politic and indeed in the nation (or relevant polity) as a whole, and mot merely in the executive, *being designed to protect the operation of the instruments of government at the highest level and for the benefit of the public in general,* subject only to a court's reaching a conclusion to the contrary on sound grounds that no other public interest, especially in the administration of justice, should prevail in the particular circumstances." (emphasis added)[47].

54 Once it is recognised that what matters is the character of the information for which protection is sought, not the nature of the agency which holds the information, it can be seen that the question whether the agency in question – in this case, the Hospital – is or is not 'governmental' is of little or no relevance. This is just as well since, as demonstrated by the recent decision of this Court in *Central Bayside Division of General Practice v. Commissioner of State Revenue*[48], such classification decisions involve multiple criteria, whose application in any given case raises difficult questions of fact and degree.

55 It will be apparent from what I have said that I consider the Hospital's claim for PII to have been misconceived from the outset. On no reasonable view could information of this kind have satisfied the stringent criteria for such immunity. The information was wholly unrelated to decision-making "at the highest levels of government". Indeed, disclosure of the information would reveal nothing about the Hospital's decision-making or its internal deliberations, even assuming (contrary to my view) that such information could attract PII.

Personal health information should be kept confidential

56 Properly characterised, the class of information which defines the Hospital's class claim is information of a purely personal nature. In this particular case, the

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46 (2001) 3 V.R.1 at 6-7.

47 See also *Zarro v. Australian Securities Commission* (1992) 36 FCR 40.

48 [2005] VSCA 168.

information relates to the acute medical crisis in which the patient found herself. Using the language of s.33(1) of the *FOI Act*, what the documents contained was "information relating to the personal affairs" of the patient. The concern of the Hospital, as fully set out in the affidavit of Dr. Bayly,[49] is that disclosure of this patient's records to the Board would discourage other women in need of similar critical medical assistance from seeking such assistance, or from speaking frankly to a doctor about their circumstances. At worst, Dr. Bayly says, the consequence might be that women in such need would seek other, unsafe, means of obtaining a termination.

57 These are grave considerations indeed. I have no reason to doubt Dr. Bayly's assessment. Like the Chief Justice and Charles, J.A., I do not share the view of the learned trial judge that the "exigencies of the occasion" will ensure that pregnant women "will reveal all that is necessary to enable their treatment to be properly and carefully performed". But my own views are of no consequence, since this is not a matter on which, in my view, a judge is equipped to express any opinion at all – at least not in the face of uncontested expert evidence from someone of Dr. Bayly's specialist experience.

58 What matters for present purposes, however, is that these are concerns about the importance of maintaining the confidentiality of the patient-doctor relationship. This is a matter of high public importance. The preservation of medical privacy is of concern to the whole community. Appropriately, therefore, as Charles, J.A. has pointed out[50], the Victorian Parliament has legislated to provide wide – though not unqualified – protection of that confidentiality.

59 The balancing of the public interest in medical privacy against other, competing, public interests is properly a matter for Parliament. In this regard, I note that one of the stated objects of the *Health Records Act* 2001 (Vic) is –

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49 See paras [126]-[129] below.

50 See paras [132]-[134] below.

" …5 (b) to balance the public interest in protecting the privacy of health information with the public interest in the legitimate use of that information."

Protection of confidential information in the hands of the Board

60 The problem of confidentiality which this case throws up would seem to be inherent in the Board's discharge of its statutory function of regulating the medical profession in Victoria. In very many – perhaps most – cases where a complaint is made against a doctor, and in particular where (as here) the complainant is a third party, the patient will not want any public disclosure of the fact that she/he has consulted the doctor in question, less still that a complaint has been lodged.

61 Concerns about confidentiality are not, of course, confined to the medical field. A taxpayer whose affairs are being investigated by the Commissioner of Taxation will typically not wish that fact - less still the nature of the investigation - to be made public. The understandable desire for privacy is not, however, met by denying the Commissioner the right to obtain information by compulsory process[51], but rather by the imposition of stringent secrecy provisions prohibiting disclosure of any information so obtained[52].

62 To remove any misapprehension in this regard, the Board has declared from the outset that it will do whatever is necessary to ensure that the information is kept confidential. It is vitally important that this be done. Once it is appreciated that there will not be – indeed, was never proposed to be – any public disclosure of the information, the adverse consequences foreshadowed by the Hospital seem far less likely to occur.

63 Given that confidentiality issues of this kind inevitably arise when the Board is conducting investigations, I would have expected the *Medical Practice Act* - which gives the Board its investigatory duties and functions - to have imposed a strict

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51 *Income Tax Assessment Act* 1936 (Cth) ss. 263, 264.

52 Ibid s.16.

secrecy regime[53]. Surprisingly, the Act is silent on this subject. This omission should be corrected as a matter of urgency. The inclusion of a secrecy provision in the Act would in turn render such documents exempt from access under the FOI Act[54].

64 At the same time, the Board is subject to the strict privacy regime imposed with respect to "health information" by the *Health Records Act* 2001 (Vic). Clearly, that Act applies to the Board[55] and, equally clearly, the information contained in these documents is "health information", being:

> "information or an opinion about the physical, mental or psychological health … of an individual".[56]

That being so, s.21 of the Act prohibits the Board from interfering with the patient's privacy, that is, from breaching a "Health Privacy Principle" in relation to her health information.[57]

65 Although it is unnecessary to decide this question on the appeal, the relevant Health Privacy Principle would appear to be Principle 2.2, which provides that:

> "An organisation must not use or disclose health information about an individual for a purpose other than the primary purpose for which the information was collected."

That principle is subject to a number of exceptions, none of which would appear to be applicable to the present case. That being so, the Board is prohibited from disclosing the patient's health information except to the extent necessary for the conduct of its investigation (that being the primary purpose for which the information was collected). On the material before the court, there is nothing to suggest that the Board's investigation itself would justify, let alone require, any public disclosure of the patient's health information.

66 Any freedom of information request for the documents would be dealt with,

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53 Cf. *Accident Compensation Act* 1985 (Vic) s.155; *Transport Accident Act* 1986 (Vic) s.131; *Prostitution Control Act* 1994 (Vic) s.87.

54 See FOI Act (Vic.) s.38.

55 S.10(1)(f).

56 S.3.

57 S.18(a).

presumably, by the Board invoking the "personal affairs" exemption under s.33 of the FOI Act, to which I have already referred.

67 It follows from what I have said that I do not, with respect, agree with Charles, J.A. that the Board might have a valid claim for PII in respect of any requirement to produce patient information acquired by the Board in the course of an investigation. For the reasons already given, the information is not of the special character required to attract PII. That remains true wherever the information is held. The important task of protecting the confidentiality of that information in the hands of the Board must be effected under the legislation to which I have referred.

The utility of arguments based on international human rights law

68 As noted by Charles, J.A.[58], one of the grounds of appeal relied on by the Hospital was that, when engaging in the balancing exercise, the trial judge:

> "failed to have any regard whatsoever to the content of the relevant international conventions to which Australia is a party."

69 As I said at the outset, my conclusion that PII is not capable of applying to documents of this kind means that it is unnecessary to embark on the balancing exercise. Accordingly, it is unnecessary to consider what guidance ought to have been derived from the international human rights conventions in carrying out that exercise.

70 Nevertheless, I wish to say something about the value to the court of such arguments being advanced. At the conclusion of the hearing of the Hospital's application for leave to appeal, I informed counsel for both sides that the court would be assisted, on the hearing of the appeal, by submissions dealing with the relevance of international human rights conventions, and the associated jurisprudence, to the questions before the court. In the event, the breadth and quality of the submissions advanced on this topic, on both sides, was of the highest

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58 See paras [135]-[140] below.

order.

71 What has occurred illustrates several important points, which I wish to emphasise, as follows:

1. The Court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding.
2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.
3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will necessarily involve judges and practitioners working together to develop a common expertise.

72 That there is a proper place for human rights-based arguments in Australian law cannot be doubted. As the Hospital's well-researched submission pointed out, over the past two decades Australian courts have been prepared to consider the use of international human rights conventions in:

(a) exercising a sentencing discretion;[59]

(b) considering whether special circumstances existed which justified the grant of bail;[60]

(c) considering whether a restraint of trade was reasonable;[61] and

(d) exercising a discretion to exclude confessional evidence.[62]

73 In *John Fairfax Publications Pty Ltd v Doe,*[63] Gleeson CJ (as Chief Justice of New

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59 *R v Togias* (2001) 127 A Crim R 23 at 37[85] per Grove J; at 43[123] per Einfield AJ; *R v Hollingshed* (1993) 112 FLR 109 at 115, contra *Smith v R* (1998) 98 A Crim R 442 at 448.

60 *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70 at 75; see also *Re Rigoli* [2005] VSCA 325.

61 *Wickham v Canberra District Rugby League Football Club Ltd* (1998) ATPR 41 – 664 at [64]-[70]; *McKellar v Smith* [1982] 2 NSWLR 950 at 962F.

62 *McKellar v Smith* [1982] 2 NSWLR 950 at 962F.

63 (1995) 37 NSWLR 81 at 89D-F, 90B-C.

South Wales), in considering whether the means of protecting privacy of communication under Part VII of the *Telecommunications (Interceptions) Act* 1979 (Cth) lacked proportionality, referred to the international recognition of the need for stringent controls in the interests of privacy.

74 There are three important ways in which such instruments, and the associated learning, can influence the resolution of disputes under domestic law[64]. This is so notwithstanding that, unless an international convention has been incorporated into Australian municipal law by statute (as has occurred with the Commonwealth's *Racial Discrimination Act* 1975 and *Sex Discrimination Act* 1984), the convention cannot operate as a direct source of individual rights and obligations under Australian municipal law.

75 First, the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty.

76 Secondly, the provisions of an international convention to which Australia is a party – especially one which declares universal fundamental rights – may be used by the courts as a legitimate guide in developing the common law. The High Court has cautioned that the courts should act with due circumspection in this area, given that (ex hypothesi) the Commonwealth Parliament itself has not seen fit to incorporate the provisions of the relevant convention into domestic law.

77 Thirdly, the provisions of an international human rights convention to which Australia is a party can also serve as an indication of the value placed by Australia on the rights provided for in the convention and, therefore, as indicative of contemporary values.

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64 See generally, H. Charlesworth, M. Chiam, D. Hovell and G. Williams, "*Deep Anxieties: Australia and the International Legal Order*" (2003) 25 Syd.L.R. 423.

78 The leading case from which these propositions flow is the High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh.*[65] That case involved an application for permanent entry into Australia by a married man with children in Australia. The Convention on the Rights of the Child, to which Australia was a party, had been ratified by Australia but had not been incorporated by statute into Australian domestic law. The High Court, by majority, held that ratification of the Convention gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interests of the applicant's children as a primary consideration. The Minister had not done so, and the applicant had been denied procedural fairness in that he had not been afforded the opportunity to present a case against a decision inconsistent with that legitimate expectation.

79 The decision in *Teoh* has not gone unchallenged. Successive governments have attempted to override the effect of the decision – first by executive statements,[66] and subsequently by Bills which, in each case, lapsed before they had been voted on. More recently, in *Lam's case,*[67] some members of the High Court made remarks suggesting that, on the question of legitimate expectation, *Teoh* might well be decided differently by the present High Court. But the occasion for that re-examination of *Teoh* has not yet arrived, and the legitimate expectation test continues to be applied in the courts.

80 In any case, the question of legitimate expectation represents only one part of what was said in *Teoh.* The other propositions to which I have referred about the relevance of international human rights law are still good law, and continue to be applied.[68]

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65 (1995) 183 CLR 273.

66 Joint Statement by the Minister for Foreign Affairs and the Attorney-General, *International Treaties and the High Court Decision in Teoh* (10 May 1995); Joint Statement by the Minister for Foreign Affairs and the Attorney-General and Minister for Justice, *The Effect of Treaties in Administrative Decision-Making* (25 February 1997).

67 Re *Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.

68 See, for example, *AMS v AIF* (1999) 199 CLR 160 at 180 [50]; *Dow Jones & Co Inc v. Gutnick* (2002) 210 CLR 575 at 626 [116].

CHARLES, J.A.:

81 The question in this appeal is whether the Royal Women's Hospital ("the Hospital") may refuse production to the Medical Practitioners Board of Victoria ("the Board") of the medical records of a woman patient on the ground of public interest immunity. The Hospital claims that the public interest requires that all medical records of "women patients in public hospitals seeking advice and treatment concerning reproductive matters including obstetrics and gynaecological care" should be immune from compulsory production.

The Hospital

82 The Hospital, a body corporate, operates a public hospital in Carlton, specialising in maternity cases and the health of women. It enjoys a reputation as a centre of excellence. At all material times the hospital was required under the *Health Services Act* 1988 to have a board of directors, appointed by the Governor-in-Council on the recommendation of the Minister for Health. The Governor-in-Council, on the recommendation of the Minister, had power also to remove a director of the Board.

The Board

83 The Board is a body corporate established under s.65 of the *Medical Practice Act* 1994 ("the Act"). It is convenient at this point to set out in some detail the Board's jurisdiction and authority under the Act. One of the main purposes of the Act is said to be "to protect the public by providing for … investigations into the professional conduct, professional performance and ability to practise of registered medical practitioners … ".[69] The Board's functions include "to regulate the standards of medical practice in the public interest"[70]; and to "investigate the professional conduct, professional performance or ability to practice of registered

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69 Section 1(a).

70 Section 66(1)(ab).

medical practitioners".[71] For this purpose it has power under Part 3 of the Act to investigate the professional conduct of registered medical practitioners, to hold hearings into a complaint and to impose a punishment where appropriate. The Board *must* investigate a complaint if it concerns the professional conduct of a registered medical practitioner, provided, in effect, that the complaint is not frivolous or vexatious, and has not been dealt with by the Health Services Commission.[72] I shall return to the functions of the Board later.

The circumstances of the Board's investigation

84 In January 2000 Mrs X, a woman pregnant with a foetus at 32 weeks, went to the hospital with a request that her pregnancy be terminated. She had been informed, as a result of an ultrasound performed before she went to the Hospital's emergency department, that her foetus may have skeletal dysplasia, a condition commonly known as "dwarfism". She was referred for counselling and a further ultrasound was taken which confirmed the diagnosis of skeletal dysplasia. As the judge of the Trial Division of this Court put it[73] –

> "Mrs X became hysterical and suicidal and demanded that her pregnancy be terminated. She was referred to a psychiatrist for counselling and assessment and it appears that the psychiatrist some days later recommended termination of the pregnancy to preserve the psychiatric health and life of Mrs X. Various medical practitioners within the hospital were consulted and after consultation they concurred with the recommendation and in early February 2000 a foetal reduction procedure was undertaken and Mrs X delivered a female by stillbirth."

85 On 8 May 2001 Senator Julian McGauran made a complaint to the Board as to the propriety of the termination. The Senator alleged that there had been a misdiagnosis of the child's disability of dwarfism, and that the baby was found to be normal on delivery. Senator McGauran accordingly requested the Board to conduct an investigation into the matter. In April 2002 the Board determined to conduct a

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71 Section 66(1)(c).

72 Sections 22 and 25(1) of the Act.

73 Reasons for judgment, at [6].

preliminary investigation into the matter and delegated its power to do so to a sub-committee. Mrs X and her solicitors made it clear to the Board that she did not wish to have any involvement in the investigation and declined to waive her right to refuse access to her medical records. The parties to this appeal are agreed that –

> "To further the Respondent's [the Board's] investigation, the [Board] sought to access the patient's medical records. By letter dated 24 May 2002 the patient, through her solicitors, Grubissa White, advised the [Board] that she did not consent to the release of her medical records to the [Board] … [and that] on the basis of the patient's refusal to provide her consent to the release of her medical records to the [Board], the Appellant [the Hospital] and the medical practitioners involved in her treatment declined the [Board's] requests for information in relation to the patient's treatment and the [Hospital] declined the [Board's] requests for access to the patient's medical records."

The preliminary investigation by the Board's sub-committee

86 The Board's sub-committee carried out a preliminary investigation and considered it needed access to the medical records concerning the treatment provided to Mrs X in the Hospital. On 26 June 2003 the Board obtained from the Magistrates' Court under s.93A of the Act a search warrant which was executed and the documents seized from the Hospital were lodged with the Court. The Hospital thereupon made application for an order that the documents seized be returned and on 31 July an order was made by consent that the documents be returned. On 28 October 2003, the Board applied for a further search warrant which was declined, but eventually on 13 November 2003 the Magistrates' Court again issued a search warrant which was executed on 18 November 2003. The documents seized by the Board were lodged with the Court to be "dealt with according to law" and the Hospital again applied to the Magistrates' Court seeking an order that the documents seized be returned.

The hearing before the Magistrates' Court

87 The matter was heard in the Magistrates' Court from 15 to 19 March 2004. A number of issues were raised by the Hospital, the principal issues relating to statutory privilege and public interest immunity. The Hospital submitted, in particular, that the documents should not be delivered to the Board because –

(i) section 28(2) of the *Evidence Act* 1958 precluded the divulging of any information acquired by a medical practitioner in attending the patient without the consent of the patient;

(ii) the provisions of s.141(2) of the *Health Services Act* 1988 precluded the handing over of any information concerning a patient except in certain circumstances, and the exceptions did not apply to the document seized pursuant to the warrant;

(iii) the handing over of the documents would be contrary to the public interest and a public interest immunity existed in relation to the records and documents held by the Hospital in relation to Mrs X and accordingly they were immune from production.

The magistrate's reasons for decision were published on 8 October 2004. Her Honour[74] found that s.28(2) of the *Evidence Act* and s.141(2) of the *Health Services Act* did not apply to the facts of the case; and also concluded that the doctrine of public interest immunity did not apply. Accordingly, the magistrate ordered that the documents seized be released to the Board, but also that there be a stay of 30 days on the release of the documents.

Appeal to the Supreme Court

88 The Hospital then appealed to the Supreme Court under s.109 of the *Magistrates' Court Act* 1989 raising questions of law. The Hospital again relied on s.28(2) of the *Evidence Act* and s.141(2) of the *Health Services Act*. The principal claim

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74 Magistrates' Court Practice Direction No. 6 of 2004 (as of 6 September)

was, however, that the magistrate had been in error in failing to find that the documents were excluded from production by the principle of public interest immunity. On 29 June 2005 the judge dismissed the appeal on all three grounds, but stayed the orders of the magistrate until 22 July 2005.

The claim to public interest immunity before the magistrate

89 In the hearing before the magistrate the Hospital made a class claim for immunity in terms that "all medical records of public hospitals should be immune from production", but directed the claim specifically to "medical records of patients in public hospitals", rather than medical records generally. The magistrate accepted that there was a link between the government and public health. Her Honour said that there had however been no evidence provided in support of the class of the public interest claimed in the form of a review of expert literature or expert body of opinion. She said that the evidence in the affidavit of Dr Bayly was both wider and narrower than the class defined by the Hospital. Nor was any material put forward to establish why public hospital documents (as opposed to those of a private hospital) should be entitled to immunity. Her Honour said that unless there were distinctive features to lift the documents into an identifiable recognisable class, and since she was bound to exercise constraint in creating a new class of documents entitled to public interest immunity, the Hospital's claim failed.

The claim to immunity before the judge

90 Before the judge of this Court, the Hospital put forward a redefinition of the class of documents for which it claimed protection, in more restricted form in the manner set out in the first paragraph of these reasons. The judge agreed to consider this new definition of the class for which protection was claimed. His Honour then concluded that the magistrate had wrongly applied the decision of the Court of Appeal of New South Wales in *R. v. Young*[75] as requiring evidence of a review of

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75 (1999) 46 N.S.W.L.R. 681 at [114]-[115] per Spigelman, C.J.

expert literature or expert body of opinion. The judge also decided that the magistrate should have engaged in a balancing exercise, weighing the harm to the public interest that would be done by the production of the documents against the public interest which is vital to the proper investigation pursuant to a statutory obligation of a complaint against a medical practitioner and concluded that the magistrate had erred in failing to perform this balancing exercise. The judge also concluded that public interest immunity is not confined to government matters, and went on to consider the balancing exercise. Having done so his Honour ultimately concluded that the Hospital had failed to establish any of the bases for refusal of production.

The appeal to this court

91 The Hospital sought leave to appeal from two judges of this Court on 12 August 2005. The Court granted leave to appeal from the decision of the judge on the single ground that the judge erred in failing to find that the documents the subject of the search warrant should not be produced, they being protected by the principle of public interest immunity. Leave to appeal in relation to the claim that the documents were also subject to the protection of s.28(2) of the *Evidence Act* 1958 was refused.

The Board's notice of contention

92 The Board by notice dated 6 October 2005 claimed –

(a) public interest immunity operates to safeguard the proper functioning of the executive arm of government and the public service, and cannot prevent the disclosure of the medical records of a particular patient because the production of those records would not damage an interest that is governmental in character;

(b) the law does not recognise the class of documents that the Hospital claims is immune from production on public interest immunity grounds (in any of the various ways in which the Hospital has

formulated their class), meaning that it was not necessary for the Court to engage in any balancing of competing public interests in order to reject the public interest immunity claim;

(c) the Hospital did not demonstrate the existence of a public interest in the non-disclosure of medical records to the Board which will keep the records confidential and use them only for the purpose of regulating the medical profession and not disclose them to the world at large.

The Hospital's contentions in this Court

93 In argument on behalf of the Hospital, it was accepted that the claim for public interest immunity was a class claim (as opposed to a claim based on the contents of a particular document or documents), that the claim was novel in that such a claim had not been previously accepted by any court, and that a person asserting such a claim bore a heavy burden in establishing it.[76]

94 The first submission was that the judge had properly embarked on the balancing exercise, but that in doing so his Honour had failed to give any or proper weight to the particular circumstances of the public interest in the suppression of documents in this case. It was put that the judge had failed to give weight to the threat by Mrs X to leave the hospital and commit suicide, her continuing fragile mental state which was further threatened by the fear of her confidentiality being breached, the fact that she had refused her consent to the release of the documents, and the fact that the complaint (made by Senator McGauran) was not made by the patient or a member of the patient's family. It was submitted that the unique importance of this case and the weight that should have been given to the public interest were demonstrated by the contents of the affidavit of Dr Christine Bayly, the Associate Director of Women's Services at the Hospital. I shall return to the contents

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[76] *Rogers v. Home Secretary* [1973] A.C. 388 at 400, 412; *Sankey v. Whitlam* (1978) 142 C.L.R. 1 at 62; *Commonwealth v. Northern Land Council* (1993) 176 C.L.R. 604 at 616; *R. v. Young* (1999) 46 N.S.W.L.R. 687 at 721, 722-3.

of Dr Bayly's affidavit later. It was argued that there was an inextricable link between confidentiality and public health and that the failure to recognise the public interest in the confidentiality of medical records posed a threat to public health because of the risk that people might be deterred from seeking medical assistance. Next it was argued that the patient, having provided information to the Hospital on a confidential basis, might well seek alternative, inferior treatment (as might other women) if disclosure of the information she had provided would result; and the Hospital would be unable to perform its functions properly and effectively if such confidential information were liable to be disclosed. It was argued that the nature and extent of the harm far outweighed the desirability of the evidence being given to the Board.

95 Secondly, it was argued that having embarked on the requisite balancing exercise, the judge had failed to inspect the documents in question and, implicitly, that it was essential that his Honour do so.

96 Thirdly, it was submitted that it had not been open to the judge to reject the proposition that "the breakdown of the confidential relationship will have adverse effects upon pregnant women approaching hospitals or they will fail to look after their own interests when obtaining treatment from a public hospital" because they may not make adequate disclosure or provide misleading information. The judge had taken the view that pregnant women would seek treatment if it became necessary and would reveal all that was necessary to enable their treatment to be properly and carefully performed, and it was argued that his Honour was not entitled to come to this conclusion.

97 Fourthly, it was argued that the judge had failed to give proper weight to the particular circumstances of the public interest in the production of the documents in this case. It was submitted that the documents were not crucial to the Board's investigation because the Board already had the majority of the documents in its possession.

98 A fifth argument was that in the balancing exercise the judge should have considered and given weight to applicable provisions of international human rights conventions to which Australia is a party as a guide to contemporary values and to conceptions of the public interest. It was submitted that the judge had erred in failing to have any regard whatsoever to the content of the relevant international conventions. I shall come to them later.

The principal issues before this Court

99 The Hospital's arguments, taken with the issues raised by the Board in its Notice of Contention, lead to three principal questions for this Court –

1. Is the protection from production given by the principle of public interest immunity to a class of documents limited to "the need to safeguard the proper functioning of the executive arm of government and of the public service"?[77]
2. Has the Hospital demonstrated the existence of an interest which is governmental in character, or which is otherwise of such a nature as to entitle the Hospital to claim public interest immunity?
3. In the balancing exercise, did the harm to the public interest that would be caused by the production of documents outweigh the public interest in the proper investigation of a complaint against a medical practitioner pursuant to the Board's statutory obligation?

I shall take these issues in order.

The necessity for a "governmental" interest?

100 Public interest immunity was at first referred to as "Crown privilege", although it would be incorrect and misleading to treat the immunity under the rubric of privilege.[78] In *Sankey v. Whitlam*[79], Gibbs, A.C.J. said that a claim for public

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77 *Sankey v. Whitlam* (1978) 142 C.L.R. 1 at 56; *R. v. Young* (1999) 46 N.S.W.L.R. 681 at 694.

78 *Rogers v. Home Secretary* [1973] A.C. 388 at 400 per Lord Reid.

79 142 C.L.R. 1 at 39-40.

interest immunity in relation to documents would only arise –

> "because of the class to which they belong. Speaking generally, such a claim will be upheld only if it is really necessary for the proper functioning of the public service to withhold documents of that class from production. However it has been repeatedly asserted that there are certain documents which by their nature fall in a class which ought not to be disclosed no matter what the documents individually contain; in other words that the law recognises that there is a class of documents which in the public interest should be immune from disclosure. The class includes Cabinet minutes and minutes of discussions between heads of departments … papers brought into existence for the purpose of preparing a submission to Cabinet … and indeed any documents which relate to the framing of government policy at a high level … According to Lord Reid, the class would extend to 'all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence without side bodies'; …
>
> One reason that is traditionally given for the protection of documents of this class is that proper decisions can be made at high levels of government only if there is complete freedom and candour in stating facts, tendering advice and exchanging views and opinions, and the possibility that documents might ultimately be published [that] might affect the frankness and candour of those preparing them …
>
> Of course, the object of the protection is to ensure the proper working of government, and not to protect Ministers and other servants of the Crown from criticism, however intemperate and unfairly based. Nevertheless, it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy. No minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public. The public interest therefore requires that some protection be afforded by the law to documents of that kind. It does not follow that all such documents should be absolutely protected from disclosure, irrespective of the subject matter with which they deal."

101 The necessity for a claim for public interest immunity of a class of documents to relate to the functioning of government and the public service has been repeatedly stressed by Australian courts. For example, in *Australian National Airlines Commission v. Commonwealth*[80], Mason, J. stated –

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80 (1975) 132 C.L.R. 582 at 591.

> "… it would be an error to regard the categories of documents which attract privilege as necessarily closed. As time passes it is inevitable that new classes of documents important to the working of government will come into existence and that detriment to the public interest may occur in circumstances which cannot presently be foreseen."

In *Australian Securities Commission v. Zarro*[81], Lockhart, J. said –

> "Although objection may in some cases be taken to production of documents because they belong to a class of documents which in the public interest ought not to be produced and although the class is not closed, it must only be in rare cases of documents at high levels of government involving matters of national importance that the class doctrine can apply."

In the same case Gummow, J. said[82] that the need to discharge a "heavy burden" in maintaining a class claim was now accepted. Similar statements can be found in *R. v. Young*[83] by the Court of Appeal of New South Wales, and by the Court of Appeal of Victoria in *State of Victoria v. Seal Rocks Pty Ltd*[84].

102 Public interest immunity is similarly invoked when objection is made by the Director of Public Prosecutions or police officers to the production of documents or the giving of evidence which will reveal the identity of a police informer. The identity of an informer has been protected against disclosure in order to prevent damage to the administration of criminal justice since Eyre, C.J. laid down the rule in *Thomas Hardy's case*[85] in 1794. The rule was reaffirmed in 1846 in *Attorney-General v. Briant*[86]. In *D v. NSPCC,* Lord Diplock[87] said that by the time of *Marks v. Dreyfus*[88] this had "hardened into a rule of law. "

103 In *Attorney-General for N.S.W. v. Stuart*[89], Hunt, C.J. at C.L. gave the rationale

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81 (1992) 36 F.C.R. 40 at 46.

82 At 60.

83 46 N.S.W.L.R. 681 at 695 [68] per Spigelman, C.J.

84 (2001) 3 V.R. 1 at 6-7 [17] per Ormiston, J.A.

85 24 St. Tr. 200 at 816.

86 15 M. & W. 169 at 184-5 per Pollock, C.B.

87 [1978] A.C. 170 at 218.

88 (1890) 25 Q.B.D. 494 at 498, 500.

89 (1994) 34 N.S.W.L.R. 667 at 674-5.

for the rule as being that if the identity of the informer were liable to be disclosed in a court of law, sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime; this being part of a broader public interest, the maintenance of social peace and order; and it also being essential that nothing used by police in their pursuit of criminals should be disclosed which might give any useful information concerning continuing enquiries to those who organise criminal activities, or which might impede or frustrate the police in that pursuit.[90]

104 The right to immunity from disclosure for police informers was said to be limited to public prosecutions (carried on by the Director of Public Prosecutions) in *Briant's case*[91], and also in *Marks v. Dreyfus*[92]. In *Rogers v. Home Secretary*[93] the immunity was extended to a situation where a person who had been refused a certificate from the Gaming Board sought production of a letter written about him to the Board by the Assistant Chief Constable of the County. The House of Lords[94] said that the same considerations as applied to police informers must apply to those who volunteer information to the Board.

105 Then in *D v. National Society for the Prevention of Cruelty to Children*[95], the rule was extended by direct analogy to the relationship between the Society and ordinary persons volunteering information and lodging complaints with the Society. A false report had been made by a person to the Society alleging that D had been guilty of cruelty to her 14 month old daughter. An inspector of the Society called at D's home to inspect the child. The mother claimed to have suffered severe and continuing nervous shock and brought action against the Society claiming damages for negligence. She sought to obtain the identity of the informant in order to join that

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90 See also for Victoria *Signorotto v. Nicholson* [1982] V.R. 413 at 418-423 per Fullagar, J.

91 15 M. & W. 169 at 185.

92 25 Q.B.D. 494 at 498, 500.

93 [1973] A.C. 388.

94 At 401 per Lord Reid.

95 [1978] A.C. 171.

person to the action against the Society. The House of Lords held that an immunity from disclosure similar to that which the law allowed police informers should be extended to those who gave information about neglect or ill-treatment of children to the Society.

106 The mother's counsel sought to argue (as the Board also did in the present appeal) that public interest immunity was based on central government interest, or that of the organs of central government appointed by statute, such as the Gaming Board. The House of Lords, however, rejected the view that public interest as a ground for non-disclosure of documents or information was confined to the effective functioning of departments or organs of central government.[96] But their Lordships also rejected a submission made by D's counsel that whenever there is a public interest to be served by withholding information from disclosure in legal proceedings, the Court has a duty to weigh that interest against the public interest in the administration of justice.[97]

107 The Society was one of three categories of persons authorised by statute to bring care proceedings in respect of neglected or ill-treated children, the other two being local authorities and police officers, and there was evidence that the public were more ready to bring information to the Society than to the police or the welfare services. Their Lordships stressed that the public interest to be protected was the effective functioning of an organisation authorised under Act of Parliament to bring legal proceedings for the welfare of children.[98] Lord Hailsham of St Marylebone[99] said that the welfare of children, particularly young children at risk of maltreatment by adults, had been "from the earliest days, a concern of the Crown as *parens patriae*, and the subject of a whole series of Acts of Parliament". In this context, the immunity preventing disclosure of an informer's identity is, in one sense, very much

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96 Lord Diplock at 220, Lord Hailsham of St Marylebone at 226, with the agreement of Lord Kilbrandon at 242, Lord Simon of Glaisdale at 235-236, and Lord Edmund-Davies at 243, 245.

97 Lord Diplock at 219-220, Lord Hailsham at 224-226, Lord Simon at 239-240 and Lord Edmund-Davies at 243.

98 Lord Diplock at 220-221, Lord Hailsham at 228-230, and Lord Simon at 236.

99 At 228.

related to a central government function. The relevance, in this respect, of the administration of justice was discussed by Lord Simon of Glaisdale[100], pointing out that the administration of justice is a crucially important aspect of the maintenance of social peace and order, and saying[101] -

> "Then the law proceeds to recognise that the public interest in the administration of justice is one facet only of a larger public interest – namely, the maintenance of the Queen's peace. Another facet is effective policing. But the police can function effectively only if they receive a flow of intelligence about planned crime or its perpetrators. Such intelligence will not be forthcoming unless informants are assured that their identity will not be divulged: … The law therefore recognises here another class of relevant evidence which may – indeed, must – be withheld from forensic investigation – namely, sources of police information; …".

108 The Supreme Court of this State, constitutionally the third arm of government, has a vital interest, and a critical role to play in government. To the extent therefore that the release of an informer's identity or other like information might damage the administration of justice, or the maintenance of the Queen's peace, it can be seen that the immunity acknowledged in *Marks v. Dreyfus*, and accepted in *D v. NSPCC* as having[102] "by the time of *Marks v. Dreyfus* … already hardened into a rule of law", is, therefore an element in the public interest intrinsically involved in government.

109 The courts in England appear to have taken the decision in *D v. NSPCC* as establishing a broad scope for the operation of public interest immunity. The decision was followed in *Re M (a Minor)*[103] by the Court of Appeal which held that social work records and analogous records kept by a local authority were the subject of a special immunity. In *London and County Securities Ltd. & Ors v. Nicholson & Ors*[104], Browne-Wilkinson, J. accepted that *D v. NSPCC* established a broad scope for

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100 At 230-232.

101 At 232.

102 Lord Diplock at 218.

103 [1990] 2 F.L.R. 36.

104 [1980] 3 All E.R. 861 at 868.

the operation of public interest immunity. See also *Medway v. Doublecock Ltd. & Anor*[105]. In *Buckley v. Law Society (No. 2)*[106] Sir Robert Megarry, V.C. held that public interest immunity applied to the Law Society's exercise of its statutory functions. These authorities give some support to the view that in the United Kingdom public interest immunity has a broad application particularly in relation to local authorities performing a regulatory function.

110 In this case, the judge (as I have said) took the view that public interest immunity was not tied to government information and documents, nor was it confined to government matters. In so doing his Honour relied on what had been said by the House of Lords in *D v. NSPCC*[107] as well as similar statements in *Bell v. University of Auckland*[108]. The judge also referred to the decision of the House of Lords in *Science Research Council v. Nassé*[109], which involved discretionary powers conferred on industrial tribunals to order discovery and inspection of documents in cases of alleged discrimination in the employment field, where the claimants sought access to confidential assessments and other documents relating to fellow employees. The House of Lords rejected the proposition that public interest immunity applied to such documents. In applying the decision of *D v. NSPCC*, it was made plain by at least three members of the House[110] that public interest immunity, although not confined strictly to government departments or other organs of central government, was nevertheless confined the immunity to bodies exercising statutory duties or functions, and in situations analogous to the police informer immunity. In particular, Lord Scarman said[111] –

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105 [1978] 1 All E.R. 1261 at 1265.

106 [1984] 3 All E.R. 313 at 318-319.

107 Especially per Lord Diplock [1978] A.C. 170 at 220.

108 [1969] N.Z.L.R. 1029.

109 [1980] A.C. 1028.

110 Per Lord Salmon at 1072; Lord Edmund-Davies, at 1073-1074, quoting Browne, L.J. in the Court of Appeal, [1979] Q.B. 144 at 180-181, and Lord Scarman at 1088.

111 At 1088.

> "I do not see the process of decision as a balancing act. If the document is necessary for fairly disposing of the case, it must be produced, notwithstanding its confidentiality. Only if the document should be protected by public interest immunity, will there be a balancing act. And then the balance will not be between 'ethical or social' values of a confidential relationship involving the public interest and the document's relevance in the litigation, but between the public interest represented by the State and its public service, i.e., the executive government, and the public interest in the administration of justice: see Lord Reid.[112] Thus my emphasis would be different from that of my noble and learned friends. 'Public interest immunity' is, in my judgment, restricted to what must be kept secret for the protection of government at the highest levels and in the truly sensitive areas of executive responsibility."

111 Counsel for the Hospital supported the view taken by the judge and their argument generally by reference to *British Steel Corporation v. Granada Television Ltd*[113]. In this case the House of Lords recognised a public interest in the free flow of information and accepted that in some instances revealing a source would hamper that flow of information, all in the context of a discretionary remedy being sought. However their Lordships held that public interest immunity did *not* apply to journalists' sources. For example, Lord Wilberforce said[114] -

> "I start with the proposition that the media of information, and journalists … have no immunity based on public interest which protects them from the obligation to disclose in a court of law their sources of information, when such disclosure is necessary in the interests of justice …
>
> All these authorities…came down firmly against immunity for the press or for journalists. To contend that in principle, journalists enjoy immunity from the obligation to disclose which may however be withheld in exceptional cases is, in my opinion, a complete reversal of the rule so strongly affirmed."

See also per Viscount Dilhorne[115] and Lord Russell of Killowen[116]. Lord Fraser of Tullybelton referred to *D v. NSPCC* and said that if disclosure of documents or information was essential, disclosure would be ordered and was subject to exception

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112 The reference is to Lord Reid's speech in *Conway v. Rimmer* [1968] A.C. 910 at 939-940.

113 [1981] A.C. 1096.

114 At 1169 – 1170.

115 At 1181.

116 At 1203.

in a very few cases of public interest immunity. Of these, his Lordship said[117] –

> "These exceptions include disclosure of information affecting the security of the state, and information as to the identity of police informers and of informers to the NSPCC but they do not include information imparted in confidence by patients to their doctors or penitents to their priests or informers to journalists and the news media."

Granada in my view certainly did not establish a broad basis for the operation of public interest immunity, as was contended by counsel for the Hospital.

112 In *R. v. Young*[118] the appellant (who was accused of sexually assaulting the complainant) sought access to the medical records of the complainant in relation to her psychological examination at Tamworth Base Hospital. The Department of Health, responsible for administering community health in rural areas, objected to production of the records. One issue was whether the documents were subject to public interest immunity or privilege. The Court of Appeal of New South Wales held that public interest immunity did not apply to sexual assault counselling. Spigelman, C.J.[119] said that public interest immunity does not extend beyond matters that are governmental. His Honour said[120] -

> "'Public interest immunity' is concerned with, and the terminology should be confined to, the conduct of governmental functions. …
>
> The 'public interest', to which this immunity refers, requires a dimension that is governmental in character. The references to 'public interest' in the frequently cited passages from the case law, should be so understood … These passages did not intend to encompass every situation in which it could be said that some form of public policy could be served by non-disclosure. In my opinion, it is not correct to treat public interest immunity as if it were a 'residual category' of circumstances in which courts limit access to information on the basis of weighing the public interest in disclosure against any factor that can be described as a 'public interest'."

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117 At 1196.

118 46 N.S.W.L.R. 681.

119 With whom Abadee, James and Barr, JJ. agreed, Beazley, J.A. dissenting.

120 At 693-694, [54]-[55].

Spigelman, C.J. considered whether medical services provided by a government department constituted a governmental function. His Honour said[121] -

> "The 'business of the Department of Health' to which reference is made, consists of the provision of sexual counselling services to individuals. This is not governmental in character, even if it is supplied by a public institution. …
>
> The only governmental public interest suggested by Dr MacGregor was that sexual assault victims may be discouraged 'possibly from reporting sexual assaults'. The mechanism for this link was not specified with any precision. The use of the qualification 'possibly' deprives the argument of force, even if Dr MacGregor's opinion on such matters were entitled to weight. There is no evidence before the Court which suggests that this effect, if any, is of sufficient significance to warrant its acceptance as an impediment to the administration of justice."

The decision in *D v. NSPCC* was distinguished by the Chief Justice on the basis that that case stands for the proposition that the police informer principle may apply to a private body where that body performs a public regulatory function. His Honour added[122] -

> "An example of the application of this proposition is that professional disciplinary bodies have been found to fall within the scope of public interest immunity. This is because these private bodies, in the relevant respect, perform a governmental – indeed generally statutory – function."

113 The decision in *Young* was applied by the New South Wales Court of Appeal in *Mok v. N.S.W. Crime Commission*[123], which involved an application by the claimant seeking access to certain records held by prison medical authorities that were produced under subpoena. Access was refused on the ground of public interest immunity. Mason, P. expressed some reservation as to what had been said by Spigelman, C.J. in *Young* saying[124] -

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121 At [65] and [67].

122 At [62].

123 [2002] N.S.W.C.A. 53.

124 At [19], Stein, J.A. and Matthews, A.J.A. agreeing.

> "I must say, with the profoundest respect to their Honours in the majority, that I have difficulty in appreciating the basis for any such governmental function restriction. Nevertheless, I would be bound to follow this considered statement of principle in any case that arose concerning the common law of public interest immunity. This said, *D v. NSPCC* [1978] A.C. 170 demonstrates, at the very least, that the notion of governmental function is very broad in nature (see also the professional discipline cases cited in *Young* at 694-695)."

114 I should also mention *Clifford v. Victorian Institute of Forensic Health*[125] which was strongly relied on by counsel for the Hospital. The plaintiff, Detective Clifford, was seeking the hospital file of an accused in a criminal matter, because it was believed that the file might contain admissions of guilt made in a mental health interview. The defendant submitted that the file was protected by public interest immunity, and this submission was upheld by Cummins, J. The judge found that, unlike *Young*, there was a governmental function involved in the case, because the psychiatric examination had been compulsory, required by statute, and part of the administration of the prison system. In *Mok*, Mason, P. said[126] of the decision in *Clifford*, that it was, in effect, consistent with the decision of the Court of Appeal in *Young* in that –

> "I incline to the view that the common law of Australia would uphold a claim of public interest immunity in the factual situation addressed in *Clifford*, including (in particular) any clearly established situation involving compulsion to submit to medical tests under section 29 of the *Corrections Act* 1986 Vic. or any interstate counterpart. But *Clifford* involved a unique concatenation of facts … and the situation is (to me) much less clear once one moves away from them.
>
> To the extent that the common law insists upon the presence of a governmental interest (N.B. *Young*), that interest is present in such a context because the medical and psychiatric assessment of a prisoner upon reception into the prison system is a vital step in proper prison administration. It goes well beyond the private interest of the prisoner. Likewise with medical tests *directed* by the principal medical officer.

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125 [1999] V.S.C. 359.

126 [2002] N.S.W.C.A. 53 at [29]-[32].

> But it is not nearly so clear in relation to the voluntary, ongoing medical treatment of a serving prisoner or to the result of a psychiatric assessment initiated by the prisoner for his or her own purposes. The affidavit that grounded the decision in *Clifford* and the affidavit read in the present application show a tenable basis for a public interest in confidentiality, but it is far from clear that such interest outweighs the public interest in getting at the truth in litigation. Medical confidences involving non-incarcerated patients do not form a class of public interest immunity (see *Young* at 699 [89]) and it is difficult to see why the patient's status as a prisoner should alter this in the general run of cases.
>
> There may be particular situations where such a claim would be attracted, but it is not clear why it should be attracted in relation to every or even most aspects of prison medical treatment. It is easy to conceive of situations where the public interest in upholding the claim is so tenuous as to be non-existent (for example, criminal proceedings against an assailant who assaulted a fellow prisoner). *Young* explains the caution that should attend the discovery of new categories of public interest immunity."

115 Notwithstanding the reservation expressed by Mason, P. in *Mok* as to what had been said by Spigelman, C.J. in *Young*, the conclusion of the latter has the formidable support of Cross on Evidence[127]. The editors of Cross take the view that public interest immunity is concerned only with the conduct of governmental functions and does not arise merely as a result of weighing the public interest in disclosure against any factor that can be described as a "public interest", citing the dicta of Spigelman, C.J. in *R. v. Young*[128] in support of the proposition.[129]

116 Having regard to the authorities previously discussed, in my view public interest immunity is restricted to what must be kept secret for the protection of government at the highest levels and in sensitive areas of executive responsibility, governmental function in this context being defined to include the courts and bodies exercising statutory duties and functions in circumstances analogous to the police informer immunity. It follows that, with respect, I do not accept the judge's view,

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127 Australian ed., vol. 1, 27050.

128 46 N.S.W.L.R. 681 at 712.

129 The decision in *Young*, although entitled to great respect, does not relate to an issue on which uniformity of decision is required in accordance with *Australian Securities Commission v. Marlborough Goldmines Ltd* (1993) 177 C.L.R. 485 at 492.

that a governmental interest is not required. This difference of opinion is, however, of little consequence to the outcome of the appeal.

A governmental function?

117 Counsel for the Hospital argued that there had been established the requisite public interest which requires public interest immunity, being the effective functioning of an entity which has been authorised under an Act of Parliament to deliver health services to the public. Accordingly it was submitted that the Hospital is entitled to claim public interest immunity attaching to the medical records and other documents referred to in the search warrant the subject of this appeal. It was put that the public interest requiring protection is indistinguishable from the public interest which required protection and was held sufficient to attract public interest immunity in *D v. NSPCC.*

118 The circumstances which are said to result in the Hospital performing a governmental function were as follows. Three separate periods were referred to in evidence. The first, from 1 August 1995 to 30 June 2000 was as follows. The Hospital was said to be a "campus" of the Women's and Children's Health Care Network and a "metropolitan hospital" incorporated under the provisions of the *Health Services Act* 1988. Each "metropolitan hospital" was required to have a board of directors, by s.40D of the *Health Services Act*, now repealed. The board was appointed by the Governor in Council on the recommendation of the Minister for Health of Victoria. Section 40D(2) of the *Health Services Act* prescribed the functions of the board of directors of each "metropolitan hospital", and these functions included the development of strategies to ensure the provision of health services of the hospital. The Hospital was established pursuant to guidelines for the delivery of public hospital services to eligible persons in Victoria. The Governor in Council had power to remove a director of the board. The Chief General Manager pursuant to the *Health Services Act* could give directions in writing to the Hospital about the number and types of patients the Hospital should treat, the facilities which the Hospital should employ or refrain from employing, the manner in which and the extent to which the

admission of patients, patient care and treatment should be coordinated between hospitals, accounts and records to be kept by the Hospital and the inspection of them, and acts that should be "taken or avoided to enable the State to comply with the terms of any agreement made between it and the Commonwealth".

119 From 1 July 2000 to 30 June 2004, the Hospital continued to be a "campus" of women's and children's health and a "metropolitan health service" incorporated under the provisions of the *Health Services Act*. As before the Hospital as a "metropolitan health service" was required to have a board of directors, appointed by the Governor in Council on the recommendation of the Minister. The Governor in Council retained the power to remove a director of the board. Section 65S(2) of the *Health Services Act* prescribed the functions of the board of each "metropolitan health service" which plainly included the Hospital. These functions included the development of strategies to ensure the accountable and efficient provision of health services and the establishment and maintenance of effective systems to ensure that the health services provided met the needs of the community served by the "metropolitan health service". The government retained control over the Hospital under the *Health Services Act*, for example if the Minister were satisfied that the "metropolitan hospital service" was not performing to the appropriate standard, the Minister was entitled to exercise certain powers.

120 From 1 July 2004 to the present, the Hospital was established as a "public health service" as defined in the *Health Services Act* 1988. The objects of the Hospital included the object of providing high quality health services to the community, and the core object of the Hospital was to provide public health services in accordance with the principles established as guidelines for the delivery of public hospital services in Victoria. As before the *Health Services Act* required that the Hospital have a board of directors, appointed by the Governor in Council, who also had power to remove a director. The *Health Services Act* continued to prescribe the functions of the board of directors of the Hospital, and the Minister retained power to issue directions to the board on any matter which the Minister considered to be in the

public interest. The board was required to prepare a strategic plan for the operation of the "public health service". The Minister retained control to exercise powers under the *Health Services Act* if satisfied that the Hospital was not performing to the appropriate standard. The Hospital is required to prepare and submit an annual report.

121 The foregoing material clearly shows that the Hospital was at all relevant times a public hospital with a board of directors appointed by the Governor in Council, and from which any director could be removed, in each case on the recommendation of the Minister for Health. The Hospital delivers public hospital services to eligible persons (specifically women and children) free of charge in accordance with directions emanating from government covering the number and types of patients the Hospital should treat, the facilities the Hospital should employ, and the manner in which and extent to which the admission of patients and patient care should be coordinated between hospitals. The Hospital carries out these activities with public funding for which it is required to account under the *Financial Management Act* 1994.

122 It follows that the Hospital is, I think, clearly part of the public service and potentially within the reach of public interest immunity, if and insofar as that concept is limited to a "governmental function".[130] It does not necessarily follow, however, that in the provision of medical services the Hospital is involved in a relevant governmental function.

123 It is, I think, an issue of considerable difficulty whether the Hospital can be said, as was contended, to have demonstrated the requisite public interest requiring protection insofar as it provides advice and treatment to women patients concerning reproductive matters including obstetrics and gynaecological care. In so doing, the Hospital does, of course, provide such services in the very same manner as do a number of private hospitals – although that would not alone prevent the provision of

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130 Cf. *Central Bayside Division of General Practice v. Commissioner of State Revenue* [2005] VSCA 168 at [10] per Chernov, J.A.

such services by the Hospital being regarded as governmental in nature.[131] In this context, I note that in *British Steel Corporation v. Granada Television*[132] Lord Fraser of Tullybelton stated that public interest immunity did not protect information imparted in confidence by patients to their doctors. To like effect is the statement in *R. v. Young*[133] by Spigelman, C.J. (already quoted) that –

> "'The 'business of the Department of Health' to which reference is made, consists of the provision of sexual counselling services to individuals. This is not governmental in character, even if it is supplied by a public institution."

That medical confidences involving non-incarcerated patients do not form a class of public interest immunity was also the view of Mason, P. in *Lok v. N.S.W. Crime Commission*[134].

124 The claim of the Hospital to immunity is obviously not of the same nature as that of an individual patient (or doctor). In substance the Hospital claims that the whole public health system could be adversely affected if personal medical information could be seen as insecure and open to scrutiny. In the circumstances it is, I think, preferable to put to one side my substantial reservations as to whether the Hospital is entitled to claim immunity in the manner suggested, and turn to the balancing exercise.

The balancing exercise

125 The magistrate's decision was based in part on the failure of the Hospital to provide supportive evidence, relying on what had been said by Spigelman, C.J. in *Young*[135]. In the present case the judge said[136] that the magistrate had erred in taking

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131 Compare *Ambulance Services of N.S.W. v. Deputy Commissioner of Taxation* (2003) 130 F.C.R. 477 at 487; *Central Bayside Division of General Practice v. Commissioner of State Revenue* [2005] VSCA 168 at [9] per Chernov, J.A.

132 [1981] A.C. 1096 at 1196.

133 46 N.S.W.L.R. 681 at 60 at [65], see also at [89].

134 [2002] N.S.W.C.A. 53 at [31].

135 46 N.S.W.L.R. 681 at [114]-[115].

136 Reasons for Judgment at [101].

this view, and that the comments of Spigelman, C.J. related to the creation of a new category of privilege and were not concerned with the claim to public interest immunity. With great respect, I do not accept this as correct, since the Chief Justice went on expressly to incorporate by reference that part of his reasons into the section of the judgment dealing with public interest immunity.[137]

Dr Bayly's affidavit

126 Dr Bayly's affidavit set out in detail her concern that women patients may not approach the hospital or indeed may mislead the hospital in relation to sensitive matters concerning their health dealing with pregnancy and termination. The judge in his reasons for judgment in this matter treated Dr Bayly's statements of concern as applicable to all public hospitals in this State dealing with the care of pregnant women and termination of pregnancy. His Honour identified the matters relevant to non-disclosure in the public interest[138] as follows –

1. Public hospitals provide services to women patients of a gynaecological and obstetric nature which because of expense cannot always be performed in the private health system.

2. The provision of good health care for pregnant women depends upon a relationship of trust between patient and the provider of the health services.

3. Trust requires non-disclosure of personal information and treatment and the maintenance of the confidential relationships.

4. The patient knows of the privacy obligations and relies upon them.

5. The provision of proper and accurate information by a patient is

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137 See 46 N.S.W.L.R. 681 at 695 [68].

138 Reasons for judgment at [132].

necessary for the health professional to know to determine and carry out the necessary treatment.

6. The prospect of disclosure may discourage patients from seeking care or lead to them going from hospital to hospital or withholding information which is relevant to the treatment or giving misleading information resulting in delayed or adverse outcomes.

7. The withholding or misrepresentation of information may delay health services resulting in further and unnecessary expense.

8. Loss of trust could adversely affect the whole public health system because of the reluctance of pregnant women to seek treatment or failure to reveal accurately or at all, all relevant information.

9. Women patients expect privacy in sensitive areas relating to relationships, sexual behaviour, contraception, fertility, sexually transmitted diseases, and reproductive health and if a woman patient knows such information could be disclosed by compulsion of law, it could lead to non-disclosure of, or misleading, information.

10. Pregnancy termination is a major health issue and history prior to the Menhennitt ruling in 1969 shows that desperate pregnant women sometimes took desperate measures which are health and life-threatening. There is a concern that this could happen again if confidence was not maintained.

11. The fear of disclosure may discourage women from seeking safe care in a timely way in respect to termination of a pregnancy.

127 Counsel for the Hospital argued that this compilation failed to include

Dr Bayly's enumeration of examples and special requests for confidentiality which it was said showed the special sensitivity of the women's concerns and the frequency with which the Hospital's staff were asked for assurances as to confidentiality. Particular complaint was made that mention had not been made of Mrs X's anxiety and the risk to her fragile mental health due to the fear of her confidentiality being breached.

128 Counsel for the Hospital made the following submissions based principally on the evidence of Dr Bayly, in submitting that the judge had erred in the requisite balancing exercise. The first argument was that the judge failed to take into account the particular circumstances of this case. It was in evidence that Mrs X threatened to leave the Hospital and commit suicide if her pregnancy were not immediately terminated and that her mental state continued to be fragile and was further threatened by the fear of her confidentiality being breached. She had refused her consent to the release of the documents and reference was made to the fact that the complaint had not been made by the patient or any family member related to Mrs X. It was submitted that as in *Clifford v. Victorian Institute of Forensic Health*, where attention had been concentrated on the potential harm to the individual affected, this case involved a "unique concatenation of facts". The unique importance of this case and the weight which should be given to the public interest was said to be supported by the statement of Dr C that the patient had said that she would kill herself rather than have the baby, and that he was very concerned she would take her life unless her pregnancy was terminated. Dr Bayly had also deposed that she was concerned that the release of the medical records in this case could even in part see a return to the unsafe and illegal attempts to secure abortion where many women were damaged for life in the circumstances existing prior to the Menhennitt ruling. Dr Bayly had also deposed that if the medical records in this case were released, there is a likelihood that other women who had already been treated at the Hospital would be concerned about similar exposure. Accordingly it was contended that there is an inextricable link between confidentiality and public health and that the encouragement of patients to seek medical assistance is the first step in reaching the

goal of promoting public health and the effect of medical treatment of good quality. Preservation of confidentiality, it was argued, is the only way of securing public health. Drawing on what had been said by Bowen, C.J. in *Aboriginal Sacred Sites Protection Authority v. Morris & Ors.*[139] the factors claimed to be of critical importance in deciding whether public interest immunity should attach were said to be the confidentiality of the material, the fact that disclosure might dry up a source of information, the protection of informers against disclosure, and the question whether the information was necessary for the statutory body (in this case the Board) to perform its functions.

129 It was then argued that on the facts of this case it should be recognised that the patient provides information to the Hospital on a confidential basis. The patient may well seek alternative, inferior "confidential" treatment to their detriment if disclosure would result. Patients must be encouraged to seek necessary treatment and avoid inferior treatment and the Hospital could not perform its functions properly and effectively if confidential information of the relevant class were liable to be disclosed. Accordingly, the nature and extent of the harm outweighed the desirability of the evidence being given. In this case it was submitted that there was particular harm to the patient, physical, psychiatric and psychological, as well as general harm to the work of the Hospital, its reputation and the community at large.

130 I have already mentioned[140] the next four arguments made by the Hospital, that the judge should have inspected the documents, that his Honour reached conclusions to which he was not entitled, that the judge should have taken into account that the Board already had the majority of the relevant documents and finally that his Honour did not take into account applicable provisions of international human rights conventions.

131 I shall take first the last of these submissions, then the second, and finally the first, third and fourth together.

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139 (1986) 65 A.L.R. 247 at 251.

140 Paragraphs [95]-[98] above.

Relevant Victorian legislation

132 Before dealing with the international conventions relied on by the Hospital, it is convenient to mention relevant Victorian legislation. There is plainly a considerable public interest in the protection of medical confidentiality, which was not disputed by the Board. The Victorian Parliament has, however, dealt with questions of medical confidentiality in several pieces of legislation. First, s.28(2) of the *Evidence Act* 1958 provides that no physician or surgeon shall without the consent of his patient divulge in any civil suit, action or proceeding any information which he has acquired in attending the patient. Next, s.141(2) of the *Health Services Act* 1988 provides a further measure of protection to medical confidentiality, although the section does not prevent the disclosure of medical information to which the section applies if the person is "expressly authorised, permitted or required to give such information under this or any other Act". The sub-section is also subject to a lengthy list of exceptions set out in s.141(3). Furthermore, the *Health Records Act* 2001, to which the Health Privacy Principles are attached (by Schedule 1) also provides further protection to medical confidentiality, although similarly qualified. Health Privacy Principle 2.2(c) permits the use of health records where "the use or disclosure is required, authorised or permitted whether expressly or implicitly by or under law (other than a prescribed law)".

133 In the present matter the Board obtained a warrant to obtain records from the Hospital pursuant to s.93A of the *Medical Practice Act* 1994. The warrant was sought under s.93A(1)(b), namely for the purposes of investigating a complaint under the Act which if substantiated might provide grounds for suspension or cancellation of registration of a medical practitioner.

134 Reference to the legislation previously referred to shows that under the relevant legislative provisions, Parliament has taken the view that the public interest in medical confidentiality is not unqualified. In each case, Parliament has recognised that the public interest in the protection of medical confidentiality may be required to give way to a competing public interest. It is necessary to bear in mind, therefore,

when considering the Hospital's claim to public interest immunity for medical records, that Parliament has considered the question of the protection necessary for medical confidentiality in great detail in various pieces of legislation, and the fact such legislation permits the disclosure of medical records when a different public interest (such as a requirement for disclosure under other legislation) is considered to require it. As Abadee and Barr, JJ. observed in *R. v. Young*[141], the Court is in effect invited by the Hospital to prevent disclosure of the documents in such a way as to supplant the judgment of Parliament and thus to perform a legislative function, and this in circumstances where it has been said that "It is clear that both common law and statute law subordinate private confidence [in medical confidentiality] to the wider public interest."[142]

The international conventions relied on by the Hospital

135 The Hospital relied first on article 17 of the International Covenant on Civil and Political Rights (ICCPR) which provides –

> "1. No-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to protection of the law against such interference or attacks."

Australia is a party to the ICCPR although it has not been fully incorporated by statute into Australian municipal law. The Hospital argued, however, that Victorian statutes should be interpreted and applied, as far as their language permits, so as to be in conformity with Australia's obligations under an international convention, and put forward various authorities to demonstrate that Australian courts had been prepared to consider the use of international human rights conventions in considering the proper interpretation of legislation.[143]

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141 46 N.S.W.L.R. 681 at [220].

142 *R. v. Lowe* [1997] 2 V.R. 465 at 485.

143 See, for example, *John Fairfax Publications Pty Ltd v. Doe* (1995) 37 N.S.W.L.R. 81 at 89-90 per Gleeson, C.J, and 97-98 per Kirby, P.

136 In my view article 17 of the ICCPR does not assist the Hospital's argument. It could only have a bearing upon whether the Board had the power to seize medical records if that seizure could properly have been found to be "arbitrary or unlawful". In the circumstances of this case, it seems to me impossible to argue that the seizure of the documents under a warrant issued by the Magistrates' Court under s.93A of the Act could be said to be arbitrary or unlawful. The Board's attempts to obtain access to these medical records were made only after the Board had received a complaint, and had determined that the documents were required so that it could discharge its functions by investigating a medical procedure which was indisputably "at the extreme margins of current practice at the Hospital". The Board has a statutory duty to investigate notifications that it receives[144]. The Board was plainly entitled, indeed required, to investigate notifications that it had received, and if the complaint were substantiated it was possible that one or more medical practitioners involved could be found to have engaged in unprofessional conduct of a serious nature. When the Board sought to investigate these allegations, the non-coercive attempts first used to obtain the documents had been exhausted before the search warrant was obtained. It follows in my view that the application to the Court in these circumstances for the obtaining of a search warrant could not be described as "arbitrary".

137 The Hospital next sought to rely on article 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR) and article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 12 of the ICESCR provides –

> "1. The States Parties to the present covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:

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144 *Medical Practice Act* 1994 s.25.

(a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) the improvement of all aspects of environmental and industrial hygiene;

(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness."

Article 12 of the CEDAW provides:

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

138 Australia is a party both to the ICESCR and the CEDAW, although neither of these conventions also has been fully incorporated into Australian municipal law by statute.

139 The Hospital's argument under these two conventions was that although a lack of respect for the confidentiality of patient medical information would be likely to affect both men and women, it might in particular deter women from seeking advice and treatment in relation to matters such as reproductive health and sexual or physical violence, and consequently adversely affect women's health and well being. The argument ran that a lack of confidentiality concerning a patient's medical records would be likely to affect detrimentally the accessibility and acceptability of health services and consequently detrimentally affect the right to health recognised in article 12(1) of the ICESCR. Similarly, a lack of confidentiality concerning a female patient's medical records relating to reproductive health would be likely to have a heightened detrimental effect on the accessibility and acceptability to women of

reproductive health services which in turn would call into question whether health services would be available on a basis of equality between men and women as required by the ICESCR and the CEDAW.

140 The major premise of the Hospital's reliance on article 12 of both conventions was an asserted lack of confidentiality in relation to medical records. For this State, however, the legislation already referred to demonstrates that there is no such lack of confidentiality, as both the Health Privacy Principles and the *Health Services Act* 1988 demonstrate. On the contrary, Victorian law only permits the medical regulator, the Board, to obtain access to medical records in specific circumstances in order to assist in the discharge of its statutory duty. Insofar as the judge was required to give weight to these conventions in the interpretation of the Victorian legislation, the Hospital, in my view, gains no assistance from them. Insofar as the Hospital relied on the concept of discrimination, I think there was also no evidence to support the claim that the Board's actions were in any way discriminatory. For the reasons I have already given, I would reject the view that the seizure of the Hospital's documents under warrant obtained from the Magistrates' Court could be described as arbitrary or unlawful. I would therefore reject the fifth argument raised by the Hospital, in reliance on the international conventions.

The judge's failure to inspect the documents

141 The second argument made by the Hospital was that the judge was required in the balancing exercise to inspect the documents. There is, I think, nothing in this argument. Neither the magistrate nor the judge was asked to inspect the documents during the hearings below. There is no question of the power of the Court in these circumstances to inspect the documents privately[145]. The documents were produced to this Court. I have examined them. Having done so, I am not persuaded that inspection of the documents would have assisted the Hospital's arguments as to the balancing exercise, or affected its outcome.

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145 *Sankey v. Whitlam* (1978) 142 C.L.R. 1 at 46.

The remaining arguments as to the balancing exercise

142 It is convenient now to consider the first, third and fourth arguments advanced by the Hospital, weighing them against the arguments made for disclosure of the documents to the Board. It should, at once, be emphasized that one of the principal purposes of the *Medical Practice Act* is –

> "To protect the public by providing for the registration of medical practitioners and investigations into the professional conduct, professional performance and ability to practice of registered medical practitioners."[146]

The Board's jurisdiction and authority have already been discussed at the outset of these reasons.[147]

143 The Board's investigation, which commenced in April 2002, concerned the termination of a 32-week old foetus, in circumstances that were described by the general manager of the Hospital as at "the extreme margins of current practice at the Royal Women's Hospital". Mrs X's concern arose because she was told that the foetus showed signs of dwarfism. But there was also an assertion in the material that after termination the foetus had been found to be normal. The complaint obviously raised a number of questions as to the competence of various medical practitioners at the Hospital, and the appropriateness of the procedures undertaken.

144 The effect of upholding the Board's claim to disclosure of the documents was argued by the Hospital to be "minimal" on the ground that the Board already had most of the documents. This is, I think, no answer. It can only be a matter of speculation whether the Board's investigation would have been impeded by the absence of documents not disclosed by the Hospital. Having examined the documents myself, I think that their contents are at least relevant to the Board's investigation. In any event, the argument should be tested on the basis that the Hospital claims to be entitled to withhold all such documents, and accordingly, that at least all other public hospitals should do likewise.

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146 Section 1(a).

147 Paragraph [83] of these reasons.

145 If the Hospital's claim to immunity from production is accepted, it has a number of serious consequences. The Board would be unable to investigate properly - if at all - claims and complaints involving medical practitioners associated with the Hospital in relation to a very substantial and important area of the health services provided by the Hospital and all other public hospitals in Victoria. Similar concerns would of course arise in relation to like health services provided by private hospitals. It would substantially remove from the Board's scrutiny the quality of the health services and the activities of the practitioners in this area of medical practice in public hospitals. Given that the Board's function under the Act is first and foremost to protect the public, the Hospital inevitably shoulders a very significant burden in seeking to show that the harmful effects of disclosure of the documents would outweigh these very serious consequences.

146 I readily accept that there would be a very strong desire for confidentiality by women patients seeking advice and assistance in relation to the matters within the class claimed for public interest immunity and that women wish to be especially private about related matters, their relationships, sexual behaviour, contraception, fertility, sexually transmitted infections and reproductive health and, like the Chief Justice, I question the judge's conclusion that pregnant women would always be willing to "reveal all that is necessary to enable their treatment to be properly and carefully performed". The "exigencies of the occasion" may from time to time be insufficient to overcome the concerns of women as to the confidentiality of their medical records, and this may well cause women to give incomplete or misleading information to the staff of the Hospital. I also accept that Mrs X was at material times in a fragile mental state and wished no further contact with the Board or any investigation of the termination of her pregnancy. Dr Bayly in her affidavit expressed a concern that Mrs X's already fragile mental state is further threatened by the fear of her confidentiality being breached. We were told during the hearing that this statement was made after Dr Bayly had interviewed Mrs X.

The confidentiality of the documents in the Board's possession

147 Dr Bayly's concerns were based to a substantial extent upon the importance of the relationship of trust between patient and health professional, and the necessity for maintaining confidentiality in relation to communications by and information about the patient. This evidence, in turn, was based in part upon an assumption that the patient's medical records would become available to the public if they were produced to the Board. The Board contends that that assumption was unwarranted, and that there was no basis for the view that if the medical records were made available to the Board, that would be any more damaging to the public interest than the disclosure of the same documents to medical practitioners other than the treating practitioners during the Hospital's own investigation. There was evidence before the judge to show that in carrying out investigations and conducting formal and informal hearings, the Board acted to protect the confidentiality of patients and to protect the reputations of medical practitioners unless and until allegations of unprofessional conduct were proved and to protect the confidentiality of patients at all times. The evidence was that the Board has practices and procedures to protect the anonymity of patients during the course of its investigations and in all publicly available documentation. On the other hand, the Hospital submitted that these supposed procedures should be ignored either because they were not effectively controlled by the Board or because the Board could not absolutely guarantee that there would not be any further disclosure and it was argued that the Board did not even have the power to close a formal hearing under s.49(b) of the Act. The Hospital also challenged the confidentiality of the Board's proceedings given the potential for records to be released under s.33 of the *Freedom of Information Act* 1982.

148 I should now mention a matter raised during the hearing of this appeal, but involving an argument not advanced by the Board. The Board has, in my view, a strong claim to public interest immunity in relation to documents and information produced to it without the consent of the patient involved, in circumstances where the Board is investigating the activities of medical practitioners. This claim to public

interest immunity, akin to the right of police informers to immunity from disclosure of their identity, would be based on the same considerations as are urged by the Hospital in its class claim, to enable the Board to carry out effectively its investigations into the activities of medical practitioners. It seems to me that the Board undertakes an activity which is clearly governmental in character, involving the performance of statutory duties, being the authority established by the Act to protect the community and guide the medical profession in Victoria. There is a clear public interest in the Board obtaining documents of this kind, to ensure both that patients and others feel at complete liberty to make complaints anonymously to the Board to enable it to carry out its duties, and equally that when the medical records of patients such as Mrs X are provided under compulsion to the Board, patients can be assured that their confidentiality will be properly protected and that the readily understandable concerns articulated by Dr Bayly in her affidavit will be allayed as far as is reasonably possible. It follows that documents and information provided to the Board should be maintained in complete confidence, save where the patient consents to disclosure, for much the same reasons as were given by Hunt, C.J. at CL in *Attorney-General for N.S.W. v. Stuart*[148]. As Spigelman, C.J. noted in *Young*[149] -

> "An example of the application of this proposition is that professional disciplinary bodies have been found to fall within the scope of public interest immunity. This is because these private bodies, in the relevant respect, perform a governmental – indeed generally statutory – function: see *Borg v. Barnes* (1987) 10 N.S.W.L.R. 734; *Law Institute (Vic.) v. Irving* [1990] V.R. 429; *Legal Services Commission v. Trotter* (1990) 54 S.A.S.R. 74; *Finch v. Grieve* (1991) 22 N.S.W.L.R. 578."

149 The Board also submitted that Dr Bayly's argument was flawed in that she identified the damage that would arise from the disclosure of medical records to the Board in a manner that assumed that when patients approach their medical practitioners at present, they can be confident that their medical records will never be disclosed without their consent. It was submitted that the law has long recognised that in some cases medical records must be produced despite the

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148 (1994) 34 N.S.W.L.R. 667 at 674-675, discussed in paragraph [103] above.

149 46 N.S.W.L.R. 681 at [62].

potential undermining of the confidentiality of the doctor-patient relationship. Examples of this that were given included that court rules of procedure in personal injury cases commonly require the exchange of medical reports. Other circumstances included the reporting of infectious diseases and the mandatory reporting of abuse. It was submitted by the Board that these limitations on medical confidentiality have not caused the health system to collapse, nor patients to be unwilling to attend their doctors.

Conclusions as to the balancing exercise

150 It is now time to reach a conclusion on the arguments in the Hospital's submission that there was error in the balancing exercise carried out by the judge. Insofar as the first argument is concerned, which focused on the particular circumstances of this case, a precise examination of the emphasis on Mrs X and her situation shows that the Hospital's argument is not really a claim for confidentiality of documents or information, but rather a concern that the Board's investigation of the termination of Mrs X's pregnancy should cease. Mrs X's identity has always been known to the Board and, as the Hospital complains, a number (if not most) of the relevant documents are already in the Board's possession. In these circumstances Mrs X's concern, quite understandably, is for there to be no further investigation at all of her treatment and for her to have no further contact with the Board. But the termination of the Board's investigation is not, I think, something that she, or the Hospital, or the medical practitioners, are entitled to demand, nor, indeed, could the Board accept it. The Board is obliged by statute to carry out its investigation. The only real question is whether it is entitled to demand delivery up of the remaining few documents to ensure that it has all the relevant information in its possession before doing so. Insofar as the Hospital's concern is that in this (I would accept) extremely sensitive area, investigations by the Board may cause the most serious trepidation to its patients, surely that is an inevitable corollary of the Board's statutory obligation to investigate complaints or potential misconduct brought to its attention. Insofar as the Hospital's obligation under statutory warrant to deliver up

to the Board documents relevant to such investigations leads to such serious concerns, these documents and relevant information should be dealt with by the Board in confidence, and the Board should claim public interest immunity in response to any attempt to seek access to such documents or information, unless the patient consents to their disclosure. These considerations, I think, outweigh the concerns both of Mrs X and the Hospital, notwithstanding their importance.

151 As to the third argument I would reject that also for similar reasons. The judge took the view that disclosure to the Board would not have adverse effects on pregnant women approaching hospitals, or that women would seek such treatment in any case from public hospitals because of the exigencies of the occasion. I have already said that I share the Chief Justice's reservations as to the judge's view on this matter. The contrary concerns of Dr Bayly involve, in a sense, some speculation in that no research or other evidence (of the type discussed by Spigelman, C.J. in *Young*[150]) was produced to support them. Furthermore, a judge of fact is entitled to form an opinion contrary to expert evidence.[151] It seems to me in any case that the argument should be examined at a different level. I accept that the Hospital and women patients would not wish their confidentiality breached or the procedures they have undertaken to be examined by the Board. But the Hospital's argument amounts to this: that if patients became aware that the Board might investigate their treatment – or a termination of a pregnancy – in the Hospital, they might choose less safe or in effect, "backyard" operators for this purpose. I doubt if Mrs X would have been deterred by any such consideration from seeking medical assistance from the Hospital, so long as the Hospital was prepared to terminate the pregnancy, having regard to the way in which she put her demand to Dr C.[152] A woman in a distressed mental state coming to the Hospital and demanding the termination of a pregnancy may be faced with the warning that if such a procedure is undertaken, the termination may be investigated by the Board. The Hospital might, as the

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150 46 N.S.W.L.R. 681 at [68].

151 *R. v. Boyle* (1996) 87 A.Crim.R. 539 at 546 per Callaway, J.A.; *R. v. Fleming* [2006] VSCA 13 at [15].

152 Referred to in paragraph [128].

circumstances of this case show, be unable to say that complete confidentiality as to her identity in relation to the procedure could be maintained. I am inclined, as was the judge, to doubt that the possibility of any such investigation or possible breach of confidentiality would be sufficient to deter a woman from seeking the Hospital's assistance, or indeed to cause her to seek illegal or other means of obtaining a termination as opposed to giving misleading or incomplete information to the Hospital. To seek illegal treatment would risk police investigation and possible prosecution. But if the likelihood of any such an investigation by the Board was sufficient to cause so unfortunate an outcome, that seems to me to be a matter for Parliament to consider upon proper material, rather than for this Court to embark on an extension of the concept of public interest immunity.

152 It follows that the Hospital has not made good its argument that the judge was wrong in concluding, on the balancing exercise, that the Hospital had failed to establish any basis for refusal of production of the documents, although I arrive at this result by a path somewhat different from that taken by the judge.

153 I would accordingly dismiss the appeal.
