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ARE OUR ARCHIVES SAFE?

AN ECCLESIAL VIEW OF SEARCH WARRANTS

1. INTRODUCTION

To shred or not to shred - is that the question?

The statements contained in documents, and in some instances documents themselves, may be an important part of the evidence in both criminal and civil cases.

- They are often contemporaneous records of certain events.
- Reports, notes and statements may corroborate other evidence.
- They may provide an aid to memory.
- They may betray knowledge of events, suggest a certain state of mind or indicate an intention on the part of the document's author.
- Proof of delivery of the document may assist in establishing some aspect of the recipient's knowledge of certain events.
- Documents may name third parties, refer to other documents and provide a lead for further investigations.

Even if the content of the document involves hearsay, it may still be useful in the overall conduct of civil litigation or a criminal trial.

The problem we are considering is how to manage the creation and retention of documents by Church in the light of the possibility that these documents may be brought to notice in some way.

Why do we have a problem? After all, to suggest there might be a problem, would seem to imply that we have something to hide.

By way of introduction, I will give some examples of problems that either have or could arise.

I will then consider what the canon law says about retaining documents.

There are different ways in which documents can be required to be produced. The topic I was asked to address was search warrants, but it is worth extending our discussion to include subpoenas and other orders or requests for discovery or production of documents.

The law on each of these matters is weighty and complex and involves specific statute and case law. In Australia there are Commonwealth laws and laws in each State and Territory as well as court rules for each jurisdiction and type of court. The law is similar in New Zealand but some important differences will be noted.

I will give a brief outline of the general principles of law that apply and where appropriate, I will touch on some of the specifics.

The final section of the paper will deal with the responsibility of custodians of documents to respond to searches, subpoenas and orders or requests for discovery and production and I will suggest some ways in which documents should be maintained.

2. SOME PROBLEMS[1]

Marriage Tribunal

The wife plaintiff in a petition for the declaration of the nullity of her marriage discloses to the tribunal that her husband has paedophile tendencies. This may be relevant evidence to establish the grounds for an annulment. To test the veracity of the allegation, and in fairness, the respondent is asked about such matters and he makes an admission of behaviour that amounts to criminal conduct. Subsequently the police, in the course of an investigation of the respondent, become aware that he has been interviewed in connection with the plaintiff's petition and they suspect that he may have made an admission. The police approach the Tribunal with a search warrant seeking access to the written evidence of his statement.

The husband plaintiff in a petition for the declaration of the nullity of his marriage becomes aware that the Tribunal has arranged for his wife to have a psychiatric examination. Her history of mental illness is relevant evidence to establish the grounds for an annulment. He suspects that there may be material in the psychiatric evaluation that would assist him in proceedings in the Family Court relating to parenting arrangements and his claim that his former wife is not fit to take care of the children of the marriage. He serves a subpoena on the Tribunal for production of the psychiatric report to the Family Court.

Applications for Clerical or Religious Dispensations

In the course of the preparation of an application to the Congregation for the Sacraments and Divine Worship, for reduction to the lay state and a dispensation from the promise of celibacy, a priest provides answers to certain questions relating to the circumstances of his ordination and his ability to make a commitment to a life of celibacy. In the course of providing such answers he makes admissions relating to behaviour that could amount to a criminal offence. The police have received a number of complaints from people alleging that the priest has committed offences. The police suspect that there may be material in the priest's file incriminating him. The police contact the bishop's office seeking access to that file.

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1 For the purposes of the examples given in this section it is to be assumed that they are hypothetical. While they are drawn from particular cases the facts and circumstances have been altered to preserve the confidentiality of those involved.

Parish Correspondence

A person is injured on church premises due to a dangerous pathway that has uneven paving and is poorly lit. The person sues the corporate entity of the Diocese, as registered proprietor of the property, for damages for person injury. In the course of the preliminary proceedings before the Court the plaintiff seeks orders that correspondence relating to the property be produced. The plaintiff's lawyers suspect that there were previous letters complaining about the path and are seeking to prove negligence by relying on the inaction of the defendant with respect to those letters. There are such letters and some are held in a file in the parish office and others in the parish file in the Diocesan Chancery Office. The corporate entity argues before the court that it does not have the relevant correspondence in its custody or control. The plaintiff then seeks to subpoena files from the parish office and the Diocesan Chancery Office.

Diocesan Archives

A lay organisation within the Church has gone into liquidation leaving a number of unpaid creditors. The liquidator seeks to view copies of the annual reports and accounts of the organisation for every year since it was founded twenty years ago. He also seeks access to all correspondence, documents, reports, notes or memoranda relating to this organisation held by the Bishop, his staff or held in the Diocesan archives. He is seeking to find some evidence that the Bishop or his predecessors knew that the organisation was badly organised, had an incompetent leadership, and was incurring debts which it would not be able to pay. The liquidator on behalf of the creditors hopes to establish that the Bishop and/or his predecessors are in some way responsible for the debts of this organisation or were negligent in their supervision of this lay organisation and liable to pay damages for the loss to the creditors.

These cases are simply illustrations and one can easily imagine a wide variety of situations which could arise whereby documents in the care of some Church agency or official may be required to be made available in legal proceedings.

There are three general categories of possible cases:

1. Someone associated with the Church may hold material relevant to a crime committed by someone associated with the Church or a stranger. This may be direct evidence, such as an admission by the accused. It may be material that is useful as corroboration of other evidence.

2. Someone associated with the Church may hold material relevant to civil proceedings involving a Church related party.

3. Someone associated with the Church may hold material relevant to civil proceedings involving parties unrelated to the Church

The principles that apply to the production of the document will vary depending on the nature of the case, the type of document and the precise identity and relationship of the relevant parties.

One of the major problems in dealing with documents is knowing who has custody of them and who has authority to deal with them.

A subpoena purporting to be served on the Catholic Church Office may not be sufficiently precise to be valid. Who is the custodian of the documents of the Diocesan Marriage Tribunal - The Bishop? The Director of the Tribunal? The Chancellor? The Moderator of the Curia? The Bishop's Private Secretary? The Diocesan Financial Administrator? The Diocesan Corporate entity?

These ambiguities can be a short term deterrent to requests for documents to be produced. In my view it not good practice just to rely on these ambiguities. Eventually the lawyers will be able to uncover the identity of the correct party.

We need, therefore, to understand our obligations in canon law and civil law relating to the creation, retention, destruction and production of documents.

3. THE CANON LAW

The *Code of Canon Law* contains a number of canons relating to creation and retention of documents.

Irrespective of what the *Code* may require, however, the civil law in both Australia and New Zealand generally does not recognise and will not accede to such canonical requirements.

Nevertheless the requirements of the *Code* provide a useful starting point for considering the parameters of a document retention policy.

Canon 482 provides for the appointment of a Chancellor who is responsible for the acts of the curia, their drawing up and dispatch and their safe custody in the archive of the curia.

Canon 486 provides that all documents concerning the diocese or parishes must be kept with the greatest of care. In the curia there is to be established in a safe place a diocesan archive where documents concerning the spiritual and temporal affairs of the diocese are to be properly filed and kept under lock and key. This archive is to be catalogued, with a synopsis kept of each document.

The purpose of this canon is not so much to protect confidentiality but to preserve the documentation in good order so that the affairs of the Church will not be prejudiced through loss of necessary records. It is a matter for each particular office to work out a procedure relating to active and dormant files and a policy for archival storage.

Canon 487 provides that the Bishop and Chancellor are to have a key to the archive. Access to other persons requires the permission of the Bishop alone or in his absence of both the Moderator of the Curia and the Chancellor. Canon 487 #2 provides that persons concerned are entitled to have a copy of documents which of their nature are public and which concern their own personal status.

Canon 488 prohibits the removal of documents from the archive except with permission and for a short time. This is a simple measure to avoid the risk that documents will be borrowed and not returned.

Canon 489 requires a secret archive where documents to be kept under secrecy are to be most carefully guarded.

Other canons specify documents to be deposited in the secret archive

- Canon 1719 provides for the acts relating to a penal investigation to be deposited in this archive if a penal process does not follow the investigation.
- Canon 1133 deals with the register of marriages celebrated secretly.
- Canon 1082 deals with the register of dispensations granted from occult marriage impediments in the internal but non-sacramental forum.
- Canon 1339 deals with the retention of the documentary proof of canonical warnings or corrections where an offence has been committed, or there is scandalous behaviour or it is suspected that an offence may be about to be committed.

Canon 489 #2 provides for an annual review of the contents of the secret archive. Documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died or ten years have elapsed since a condemnatory sentence concluded the affair. The reason for the ten year limit is to cover the situation contemplated by Canon 1621 with respect to a plaint of nullity against a condemnatory judgement. All that is to be kept is a short summary of the facts together with the text of the definitive judgment. Once the party has died all material including the summary is to be destroyed.[2]

Canon 490 provides that only the Bishop is to have the key to the secret archive.

Canon 491 provides norms to enable the Bishop to organise the archives of parishes and other organisations. An historical archive is to be maintained.[3]

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2 Cf note to the commentary *The Canon Law - Letter and Spirit* , Canon Law Society of Great Britain and Ireland, p.272 citing Canon Law Digest 2 132.

3 For further reference to the historical archive note the Letter *Opera artis* of the Sacred Congregation for the Clergy, 11.04.71 AAS 63 [1971] 315-317, CLD 7 [1968-1972] 821-824.

There are a number of canons in the section of the *Code of Canon Law* dealing with trials which affect the retention of documents.

Canon 1472 stipulates that judicial acts must be in writing. A distinction is made between the procedural acts and the acts of the case. This has relevance when considering such matters as abatement (where only the procedural acts are extinguished - Canon 1522).

Canon 1475 requires that after the trial has been completed documents which belong to private individuals must be returned to them although a copy is to be retained. The documents are retained in the archive of the tribunal.

Canon 1475 #2 stipulates that without an order from the judge, notaries and the Chancellor are forbidden to hand over to anyone a copy of the judicial acts and documents obtained in the process.

However, this prohibition will not override the civil law.

Canon 1598 has particular significance for the work of marriage tribunals.

It provides for the judge to make available to the parties the acts of a trial. There is a permitted exception "concerning the public good" and to "avoid serious dangers". This Canon poses some problems about inspection of documents by the parties which are well know. The meaning and implications of this canon could provide the basis for a paper in itself and there are sound arguments for and against the practice that Australian tribunals have adopted with respect to confidentiality of the proceedings. There are some useful articles on the subject noted in the commentaries.[4]

The decision not to make the acts available to the parties will not, however, prevent their being the subject of a subpoena or a search warrant. It could be argued that it may minimise the risk if the other party does not know what is there, but it may also be argued that it could exacerbate risk if the party is suspicious about what might be there.

There is the potential risk that a party may seek to be vindictive and use the statements of a party or a witness against that person, perhaps in an action for defamation.

A greater risk is that admission of guilt of a criminal offence by a party, either in marriage cases or a canonical penal process, could be used in the civil forum. This is of serious concern if the person felt induced to make the admission on the basis of a promise of confidentiality.

Even without any inducement of confidentiality, an accused person may be willing to volunteer some information for the purpose of a canonical trial but would be unwilling to do so with respect to a civil trial. It could well be argued that one ought not prejudice the

4 Cf *The Canon Law - Letter and Spirit* , Canon Law Society of Great Britain and Ireland, p.901 footnote 1.

accused's rights in another forum by creating a canonical document that could then be uncovered and used elsewhere.

In this context it is worth noting the provisions of Canon 1728 #2 which states that an accused person is not bound to admit to an offence nor may an oath be demanded of him. An accused person has a right to remain silent when questioned about an alleged offence and this is an exception to the general rule of Canon 1531 #1 which requires a party to respond and tell the whole truth. This suggests that the law recognises the rights of the accused in this matter.

The permanent retention of the acts of judicial proceedings would seem to be required in the absence of specific norms authorising destruction. It should be noted from Canon 1643 that cases concerning the status of persons never become adjudged matter.

While it may have been the accepted practice to retain the documents in marriage cases, perhaps on microfiche or other retrieval system, I would like to suggest that we review this practice and consider more carefully what is created and what is retained.

This issue will be dealt with in the final section of the paper.

The Church recognises that documents might need to be kept secret. In the context of the canonical process, Canon 1546 provides that no one is obliged to produce documents where there is reason to fear loss of reputation, dangerous harassment or some other grave evil or where there is the danger of violating a secret which should be observed. One could argue, by implication, that one is entitled not to create, or if created, to destroy documents, which have this character.

Whatever about the canonical norms the civil law will need to be obeyed and it is to those provisions that we now turn.

4. THE CIVIL LAW

4.1 Some Introductory Comments

Documents can become a part of a criminal or civil legal process in a number of ways.

I have been asked in this paper to deal particularly with search warrants. This would involve the police arriving at a Church office with a warrant and demanding a particular document or category of documents.

There are other ways in which documents can be required to be produced. A common way is through the issue of a subpoena by a civil or criminal court. This is a court order to someone to produce something to the court.

In civil litigation it is now commonplace that the parties must "discover" to each other relevant documents. The theory behind this is to ensure that both parties and the court

have access to all the relevant information. The common outcome at the moment in complex litigation, such as in the building and construction list or the commercial list in the New South Wales Supreme Court, is that numerous documents, sometime running into tens of thousands, are "discovered" and have to be produced, analysed and considered.

Since the Church engages in a variety of commercial transactions, especially in the area of building contracts, and employment, it is important for administrators to be aware of the potential for litigation and to manage files accordingly.

4.2 Search Warrants

The most dramatic way in which a document may have to be produced is the search warrant.

It has been said[5] that a search warrant is one of the curiosities of the law for its origin is unknown, but its existence has long been recognised.

The origin and present day use of search warrants is connected with the resolution of two competing legal principles[6].

One principle is the fundamental freedom of the individual to be undisturbed in his or her property. The other principle is the interest of the State to prevent the commission of crime or to obtain evidence to assist the prosecution of offenders.

Police do not have any general authority to enter premises without the consent of the owner. To do so would constitute a trespass. Under the common law the seizure of goods without a search warrant was only permitted if they were in the possession of a person at the time of his arrest[7].

In a departure from the usual principles, Lord Denning, in *Ghani v Jones* [8]attempted to justify seizure without a warrant and he broadened the powers of the police in circumstances where there was reasonable belief that a person had committed a serious crime and that the goods to be seized were in his possession and associated with the crime. Most commentators have rejected this development and Heerey J in *Challenge*

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5 Australian Law Reform Commission, *Review of Commonwealth Criminal Law*, 4th Interim Report, November 1990, at p.253 citing Carter *Law Relating to Search Warrants.*

6 *Crowley v Murphy* (1981) 52 FLR 123, Lockhart J at 140. The principles set out in this case were approved by the New Zealand Court of Appeal in *Wilson v Maihi* (1991) 7 CRNZ 178 at 179 adding that the factors listed which governed the use of statutory search powers would accord with s.21 of the new Zealand *Bill of Rights Act* 1990 (NZ). See also *Esso Australia Ltd v Curran* (1989) A Crim R 157 Hill J at 162.

7 This is the accepted position in Australia. See *Levine v O'Keefe* [1930] VLR 70 and *R v Applebee* (1995) 79 A Crim R 554.

8 [1970] 1 QB 693 at 708-709.

Plastics Pty Ltd v Collector of Customs[9] held that the purported extension of the law in *Ghani* was not consistent with Australian law.

With the exception of some specific revenue provisions,[10] we can be reasonably secure in the view that a search of premises by civil authorities without a warrant is unlawful.

The courts developed the practice of issuing warrants to enable a search of premises for stolen goods. Historically such common law warrants were restricted in their scope and it has been suggested that the common law was preoccupied with the rights of the property owner.[11]

As a result statute law gradually replaced the common law. In Great Britain, the *Disorderly Houses Act* 1751 allowed

> "...any constable or other person thereunto authorised by warrant under the hand and seal of one or more of His Majesty's Justices of the Peace...to enter such house or place and seize every person therein."

The common law warrant has been abolished in New South Wales by s.24 of the *Search Warrants Act* 1985 (NSW).

Prior to 1765 the concept of the "general warrant" was recognised. This was unlimited as to subject matter, the person to whom it was directed, and the place where it was to be executed.

Political pressure and concern by the courts that such powers could be abused led to a tempering of the general warrant. The illegality of such warrants was recognised in a series of cases.[12] In 1766 the House of Commons passed a number of resolutions to the effect that general warrants were illegal.[13]

Kirby P has noted that the abuse of warrants in the American colonies was a significant cause of discontent.[14] In *Beneficial Finance Corp v Commissioner of Australian Federal Police*[15], Burchett J upheld the 18th century rejection of the general warrant suggesting that this repudiation was "an essential bulwark of respect for the integrity and liberties of an individual in a free society."[16]

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9 (1993) 42 FCR 397 at 405.
10 Eg *Income Tax Assessment Act* s.263; *Customs Act* ss. 187, 196, 197; *Excise Act* ss. 87, 90.
11 Cf. Law Book Company, *Laws of Australia*, Vol 11.1 Criminal Investigation at 174.
12 *Entick v Carrington* (1765) 19 State Tr. 1030 at col 1067; *Leach v Money* (1765) 19 State Tr. 1001; *Wilkes v Wood* (1763) 19 State Tr. 1153.
13 Australian Law Reform Commission, *Review of Commonwealth Criminal Law*, 4th Interim Report, November 1990, at p.254.
14 *Carroll v Mijovich* (1991) 25 NSWLR 441 at 445-446.
15 (1991) 31 FCR 523.
16 at p.533.

There are still, however, examples of statutes providing for general warrants in some Australian jurisdictions.[17] Probably the most draconian is s.263 of the *Income Tax Assessment Act* 1936 (Cth) which gives the Commissioner of Taxation full and free access to premises.[18]

The matter was considered by the Australian Law Reform Commission and since its Report *Complaints Against Police*, (1975), the broad powers of search warrant issue have been increasingly fettered by legislative requirements of due process and particularity, as well as by judicial determinations concerning citizens' rights.[19]

One of the most comprehensive legislative regimes was introduced in the federal jurisdiction with the passing in 1994 of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act* 1994 (Cth). This inserted Part 1AA into the *Crimes Act* 1914 (Cth). This legislation was modeled on the comments made by the Gibbs Review Committee in its Fourth and Fifth Interim Reports,[20]

In his second reading speech the Minister for Justice explained that the goals of the legislation were "to state clearly the balance considered appropriate between the community interest in effective law enforcement and the maintenance of individual rights and freedoms".[21]

In one of the standard legal texts on Australian law there are 73 pages of summary of various provisions dealing with general powers of search and entry.[22]

There are numerous other specific statutory provisions dealing with powers to enter premises and seize articles. The Australian Law Reform Commission in its report *Privacy* (1983) found that as at 1983 there were 270 provisions in Federal statutes alone which conferred powers on government officials to enter and search property.[23] Many of these provisions relate to revenue laws and Customs investigations and to intercepting communications. Others are quite specialised such as the *Apple and Pear Levy Collection Act* 1976 (Cth) s.10, *Historic Shipwrecks Act* 1976 (Cth), s.23, *Trading with the Enemy Act*, 1939 (Cth), s.7.

Section 10 of the *Search Warrants Act* 1985 (NSW) lists 67 provisions in NSW law that authorise search warrants. This includes such diverse matters as: *Business Franchise Licences (Tobacco) Act* 1987 (NSW), s.56; *Canned Fruits Marketing Act* 1979 (NSW),

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17 *Summary Offences Act* 1953 (SA) s.67; *Police Administration Act* 1978 (NT), s.117; *Criminal Code* (Qld), s.679; *Police Offences Act* 1935 (Tas), s.59-60; *Criminal Code* (WA), s.711.

18 Cf *Commissioner of Taxation (Cth) v Citibank Ltd* (1989) 20 FCR 403 and *Carbone v National Crime Authority*(1994) 52 FCR 516.

19 Cf. Law Book Company, *Laws of Australia*, Vol 11.1 Criminal Investigation at 206.

20 Gibbs Review Committee, *Review of Commonwealth Criminal Law*, Fourth Interim Report (AGPS 1990), Fifth Interim Report, (AGPS 1991).

21 House of Representatives, *Hansard*, 17th November 1993, 3030.

22 Cf. Law Book Company, *Laws of Australia*, Vol 11.1 Criminal Investigation at 206 - 279.

23 Australian Law Reform Commission Report *Privacy* (1983), para 152.

s.22; *Environmentally Hazardous Chemicals Act* 1985 (NSW), s.46; *Ozone Protection Act* 1989 (NSW), s.19; and the *Swimming Pools Act* 1992 (NSW), s.29.

The courts have been careful to ensure that these statutory provisions are strictly interpreted. This has resulted in a vast body of case law. This tendency reflects a general desire to ensure that the balance of respective rights is maintained. It also reflects the comment of the United States Supreme Court that "the history of liberty has largely been the history of observance of procedural safeguards."[24]

The High Court of Australia considered the principles governing the interpretation of warrants in *George v Rockett*[25]. The High court stated:

> "[I]t needs to be kept in mind that they authorise the invasion of property interests which the common law had always valued highly and which , through the writ of trespass, it went to great lengths to protect."[26]

While the detail varies depending on the legislation in the particular jurisdiction, there are some common principles that apply to the issue and execution of search warrants.

The applicant is required to approach a judicial officer[27] and has a responsibility to disclose the material facts. The Full Court of the Federal Court said this duty is to "reflect the traditional policy of the common law to protect the privacy of individuals against the arbitrary use of the power of search and entry".[28]

The judicial officer cannot simply act like the proverbial "rubber stamp"[29] but has a duty to be satisfied of the facts of the matter independently of the views of the applicant. This duty acts as a protection for the citizen against the mere assertions of the applicant. The judicial officer must make a decision, based on the material presented, that the conditions required for the issue of the warrant exist[30].

Warrants must contain some description of the object of the search and this must not be worded excessively broadly.

Requirements about particularity have been the subject of detailed judicial analysis. There has to be particularity with respect to the things that are the object of the search as well as

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24 *McNabb v US* 318 US 332 at 347.

25 (1990) 170 CLR 104.

26 at p. 110-111

27 *Search Warrants Act* 1985 (NSW) s.3 refers to an "authorised justice" defined to include a Magistrate or a justice of the peace who is a Clerk of the Local Court, or a justice of the peace employed in the Department of Courts Administration and who is declared by notification in the government Gazette to be an authorised justice.

28 *Karina Fisheries Pty Ltd v Mitson* (1990) 26 FCR 473 at 481.

29 Burchett J in *Parker v Churchill* (1985) 9 FCR 316 at 322

30 *Search Warrants Act* 1985 (NSW) s.6 states that the authorised justice may issue a search warrant "if satisfied that there are reasonable grounds for doing so".

the offence to which it is alleged the things relate. There must also be particularity with respect to the place to be searched and the time when the search may take place.[31]

The warrant must be:

> "[S]ufficiently specific so that the both the person executing the warrant and the occupier of the premises searched should be able reasonably to know whether documents on the premises satisfy the description shown on the face of the warrant."[32]

A similar principle applies in New Zealand.[33]

It has been suggested that a different standard of particularity would apply depending on whether the warrant is addressed to the person suspected of the offence or to a third person.

Lockhart J expressed the principle in these terms:

> "Where the premises to be searched are owned or occupied by an innocent third party or where the person is in lawful possession of the goods to be searched for, a higher standard is required, both of the satisfaction of the Justice before he issues the warrant and of fairness by the policeman executing it. The Justice should not be easily satisfied. The information before him must clearly show the nature of things to be searched for and how they will afford evidence of the commission of the offence. The policeman executing the warrant must restrict his search to things pertaining to the offence alone, and must not search and seize at large in the hope of eventually finding something of evidentiary value. But he is entitled to search to ascertain what documents answer the description of those described in the warrant. Sometimes an inspection of an Index or Register will suffice. Sometimes not. What is appropriate varies from case to case. Plainly, he does not have carte blanche to search and seize at will.[34]

His Honour cited with approval *Frank Truman Limited v Metropolitan Police Commissioner*[35] and stated " When the premises of innocent third parties are involved, more stringent restrictions on the search process apply."[36]

The police cannot seize everything or anything they find in the hope that it might include something described in the warrant.[37] Everleigh LJ has emphatically held that police are not entitled to "snatch documents willy-nilly"[38]

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31 For a detailed consideration of these requirements see Law Book Company, *Laws of Australia*, Vol. 11.1 Criminal Investigation pp 183 -193.

32 *Esso Australia Ltd v Curran* (1989) 39 A Crim R 157 at 163 per Hill J.

33 *Aukland Medical Aid Trust v Taylor* [1975] 1 NZLR 728

34 *Crowley v Murphy* (1981) 52 FLR 123 at 153.

35 [1977] 1 QB 952 at 965-6.

36 *Crowley v Murphy* (1981) 52 FLR 123 at 153.

37 *Trimboli v Onley [No 3]* (1981) 56 FLR 321 per Holland J at 333.

According to the *Search Warrants Act* 1985 (NSW), s.7 the member of the police force may seize the thing mentioned in the warrant and may in addition seize any other thing that the member of the police force finds in the course of executing the warrant which he has reasonable grounds for believing is connected with any offence. This broadens the possibility that other documents might be uncovered and seized during the course of the search for the particular document or category of documents named in a warrant.

The courts are also willing to distinguish the handing over of documents and the more serious step of seizure and removal and to take account of the disruption to a business by the holding of documents for an extended period of time.[39]

The method of search must be reasonable. In *Bartlett v Weir*,[40] Beazley J was faced with the actions of offices who were accompanied by a computer expert and seized a large number of floppy disks and computer hardware although at that time they had no idea what was on them. Her Honour held that the execution of the warrant was unlawful and stated:

> "[T]here could have been no reasonable basis for the second respondents to reasonably believe, in respect of each item seized, that it would afford evidence of the commission of the offences specified in the warrant or any other offence."[41]

Her Honour also held that for a belief to be reasonable for the purposes of executing a warrant it must be one that is honestly held and for which there are reasonable grounds supporting the belief.[42]

The law does not permit a fishing expedition nor allow premises to be ransacked by police merely to see if a person has committed a crime. The police have to direct their attention to each item, bundle of documents, file, book, disk or document and have reasonable cause to believe that it would contain evidence of the commission of a crime.[43]

There is no consistency in the various jurisdictions about what is required to satisfy the necessary connection between the object of the search and a particular offence, and between the object of the search and the premises to be searched.[44]

In Queensland, for example, four different statutes use four different tests:

- *Crimes (Confiscation of Profits) Act* 1989 (Qld), s. 31(1) - "reasonable grounds for suspecting";

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38 *R v IRC; Ex parte Rossminster* [1980] AC 952 at 960.
39 *Challenge Plastics Pty Ltd v Collector of Customs* (1993) 42 FCR 397 per Heerey J at 401.
40 (1994) 72 A Crim R 511
41 (1994) 72 A Crim R 511 at 522
42 (1994) 72 A Crim R 511 at 522
43 *Reynolds v Commissioner of Police of Metropolis* [1985] 1 QB 881 per Waller LJ at 897.
44 Law Book Company, *Laws of Australia*, Vol. 11.1 Criminal Investigation p 195.

- *Criminal Code* (Qld), s.684 - "reasonable cause to suspect";
- *Health Act* 1937 (Qld), s.168A(1) - "reasonably suspects";
- *Second Hand Dealers and Collectors Act* 1984 (Qld), s.58 - "believes that".

In Victoria there is a variation of the usual requirement that it is the issuer of the warrant who must form the judgment. In the *Lotteries, Gaming and Betting Act* 1966 (Vic), s.61 provides that the issuing magistrate must find there to be reason to "suspect or believe", without any qualification as to reasonableness and find that the person providing the evidence "believes" certain matters.[45]

Reasonable force may be used to gain entry, if entry is refused, and to conduct the search and effect the seizure.[46]

In New South Wales a warrant may only be executed between the ours of 6.00am and 9.00pm unless there is a specific authorisation to execute it outside those hours.

It was generally thought to be incidental to the general power to execute a warrant that the Police may take advantage of specialist assistance during the search, but to put the matter beyond doubt this has been included in some statutes.[47]

Federal legislation allows the police to bring onto the premises specialist equipment to facilitate a search.[48]

It should be noted that there is no constitutional protection in Australia against unreasonable search and seizure.[49] Such provisions do exist in Canada, the United States and New Zealand.

The United Nations *International Covenant on Civil and Political Rights* in article 17 provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence..."

The New Zealand position is governed by the *Bill of Rights Act* 1990 (NZ), s.21 which provides:

> "Unreasonable search and seizure - Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property or correspondence or otherwise."[50]

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45 Law Book Company, *Laws of Australia*, Vol. 11.1 Criminal Investigation p 195.

46 Law Book Company, *Laws of Australia*, Vol. 11.1 Criminal Investigation p 197 citing *Launock v Brown* (1819) 106 ER 482.

47 Law Book Company, *Laws of Australia*, Vol. 11.1 Criminal Investigation p 197 referring to: *Crimes Act* 1900 (ACT) s. 358B; *Crimes Act* 1900 (NSW), s.357G(9); *Criminal Investigation (Extra-territorial Offences) Act* 1985 (Qld), s.5(3); *Crimes(Confiscation of Profits) Act* 1986 (Vic), s.33; *Search Warrants Act* 1985 (NSW),s.18.

48 *Crimes (Search Warrants and Powers of Arrest) Amendment Act* 1994 (Cth), s.3J(1).

49 Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice*, Oxford University Press, 1994, at p.46.

This would qualify the general law about search and seizure such as that contained in s.198 of the *Summary Proceedings Act* 1957 (NZ).

The New Zealand Court of Appeal has held that the interests secured by s.21 are broader than the mere protection of rights and property.

In *R v Jeffries* it was stated:

> "Essentially section 21 is concerned to protect those values or interests which make up the concept of privacy. Privacy connotes a variety of related values; the protection of one's property against uninvited trespassers; the security of one's person and property, particularly against the might and power of the state; the preservation of personal liberty; freedom of conscience; the right of self determination and control over knowledge about oneself and when, how and to what extent it will be imparted; and recognition of the dignity and intrinsic importance of the individual."[51]

The effect of s.21 is to protect the individual from unreasonable rather than merely unlawful seizure. Even though the search warrant may be legal the public interest in guarding privacy may be such that even a legal search and seizure is unreasonable.

In New Zealand the *Evidence Amendment Act No 2* 1990 (NZ) s.31 protects confidential communications made to a minister of religion. Section 35 of this Act also gives the court discretion not to admit into evidence a document where what is requested is a breach of confidence in a special relationship. It may be argued that a search and seizure of such communications may be held unreasonable under the *Bill of Rights Act*.

This argument would not be available in Australia, even if the courts extended the principles of *Crowley v Murphy*[52] on reasonableness, analogous to s.21. The privilege attaching to such communications with the clergy is limited to the confessional.[53] There are moves, however, to widen the scope of privileged and confidential communications and give the courts in the Australian jurisdictions a discretion similar to s.35 of the *Evidence Amendment Act No.2* 1990 (NZ).

It should be noted that these protections only apply at the point of the giving of evidence rather than at the time of the search and seizure.

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50 For material on the New Zealand law I am grateful to Peter Churchman of Caudwells, Barristers & Solicitors who have provided a memorandum to Father Brendan Daly which has been made available to me.

51 *R v Jeffries* [1994] 1 NZLR 290 per Thomas J at 319.

52 *Crowley v Murphy* (1981) 52 FLR 123.

53 *Evidence Act* 1995 (NSW), s.127.

4.3 *Subpoena and Discovery or Production of documents*

A subpoena is a court order directed to a person to attend the court and to produce a document or thing to the court.

Discovery is a pre-trial procedure to ascertain the existence, nature and contents of relevant documents. The law differs with respect to each procedure and each will be dealt with in turn.

The subpoena is a court order. If the respondent to a subpoena objects, it is still necessary to attend the court and argue the objection. In practice, some negotiation may be possible with the party who has issued the subpoena so that what is produced to the court is by agreement.

A subpoena extends only to documents in the respondent's possession.[54]

The subpoena must be quite specific in what is required and be clear and unambiguous.

A subpoena which is to be served seeking company documents must be addressed to the company, requiring it, by its proper officer, to attend and produce the documents. To simply address it to an individual does not deal with the question of the authority of that individual to produce the required document.

There are issues about the use of the subpoena as part of what the courts frequently call "a fishing expedition."

A case illustrative of the problem is *Alister v R.*[55] Here the applicants sought access to ASIO files. They argued that these documents would show that a key crown witness, Richard Seary, was connected with ASIO. The defence contended that Seary had fabricated the allegations connected with the Hilton bombing in order to discredit the Ananda Marga organisation. The High Court, by a majority, held that the trial judge ought to have inspected the documents to see if they disclosed the alleged frame-up.

The court will distinguish the use of a subpoena from the process of discovery. One cannot simply demand from a person who is not a party to the proceedings all the documents he has even though they might be discoverable if the person was a party. The stranger is likely to be ignorant of the issues between the parties and cannot be expected to form any judgment about the relevance of particular records to those issues.

One issue that arises with respect to non-party subpoenas is the cost of compliance. This task may involve a search for the documents and collation. There may be a need to seek legal advice before responding. The non-party who receives a subpoena is entitled to request the party which issued the subpoena to pay for the costs of compliance. These

54 *Air Pacific Transport v Transport Workers Union of Australia* (1993) 40 FCR 1.
55 (1984) 154 CLR 404.

may include the costs of legal advice regarding confidentiality or privileged documents, costs of copying and costs of staff time in search for and collating the documents.

Connected with the practice of the subpoena is what has become known since the mid 1970s as the Anton Piller order. This applies in civil cases and is somewhat analogous to a search warrant. It is an *ex parte* order by a superior court enabling a plaintiff in civil proceedings to enter the defendant's premises to search for and inspect and remove for safe-keeping, or take copies of documents or things which the plaintiff alleges to be important evidence in the proceedings. The rationale is to prevent the defendant destroying the material once it becomes known that there are proceedings underway.[56]

Discovery will generally only apply when the church agency or official is a party to litigation. As is the case with other areas covered by this paper, there is a well developed body of law governing the process of discovery.[57]

In all jurisdictions except Queensland a document is "discovered" by a party when that party reveals its existence to the other side. This is usually done by serving a notice of discovery. The other party then responds by providing a list, verified by affidavit, listing all documents that are or ever were in the party's custody, possession or power. The affidavit will usually list the documents in three categories: (1) those in possession which the party is prepared to disclose, (2) those formerly in possession with an explanation as to what has become of them, and (3) those for which privilege is claimed. Following this, an appointment is made for inspection and copying of the available documents and a court hearing to argue the matter of privilege if necessary.

In Queensland there is a more streamlined procedure whereby "disclosure" replaces discovery and this involves forwarding copies of the documents which are directly relevant to the proceedings. There is no need for a formal demand or affidavit.

The law requires discovery of documents that are "relevant" or "relate to" the factual issues in dispute. Queensland has adopted the more restrictive test of "directly relevant".

The meaning of relevance has been considered in the cases.[58]

A document relates to a matter in question between the parties if it is reasonable to suppose that the document contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit to advance his own case or to damage the case of his adversary. A document will answer that description if it may lead to a train of inquiry which might have either of these consequences.

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56 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; See also *In the Marriage of Talbot* (1994) 129 ALR 711 (Fam Ct).

57 See Mark Anderson and Jill Hunter *Litigation: Evidence and Procedure* (5th ed) Butterworths, pp.166ff citing as the standard authorities: Simpson, Bailey and Evans, *Discovery and Interrogatories* (2nd ed) 1990 and Cairns *The Law of Discovery in Australia* 1984.

58 The classic definition is that contained in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1982) 11 QBD 55 at 62-3; cited with approval in *Commonwealth v Northern Land Council* (1991) 103 ALR 267 (FC) (1993) 176 CLR 604 (HC).

As is the case with the abuse of the subpoena process, there are sometimes attempts by litigants to use the discovery process to go on a "fishing expedition". Purely speculative claims will not be assisted by court orders for discovery.[59]

The court has a discretion to limit the discovery process. An example is the case *Ammerlain v Distillers Co (Biochemicals) Ltd.*[60] The issue before the court was an application for an extension of time to sue with respect to injuries connected with the use by the plaintiff's mother of the thalidomide drug. The master had allowed discovery limited to that issue and the issue of a causal link between the plaintiff's condition and the defendant. Only after these matters had been decided would there be a trial and discovery on the question of the defendant's negligence. The plaintiff sought discovery of documents connected with the issue of negligence. On appeal the court held that it would be oppressive to allow a massive discovery exercise on an issue that might not be reached. Importantly the court held that discovery was a matter for the court's discretion rather than a matter of right for the parties.

There is some fascinating law on the meaning of "document" and its extension to audio and video tape, computer disks and silicon chips.[61] The meaning of custody, possession and power has also been thoroughly analysed.[62]

It is clearly established that a party may not use documents provided in the discovery process for purposes not connected with the litigation.[63]

In some cases the courts will allow their subpoenas to be used to order a third party to produce a document to the court before the trial and will allow inspection by the party using the subpoena. This is very close to the idea of discovery against a third parties which has been formalised in some jurisdictions.[64]

4.4 Powers of Investigative Agencies

As well as the traditional criminal justice process where search warrants and subpoenas are used, and the civil process where subpoenas and discovery is used, there are investigative agencies which have wide powers to demand documents.

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59 *WA Pines Pty Ltd v. Bannerman* (1980) 30 ALR 559; also *Hooker Corp Ltd v Commonwealth* (1985) 61 ACTR 37.

60 (1992) 58 SASR 164.

61 Cf *Grant v Southwestern and Country Properties Ltd* [1975] Ch 185 disagreeing with *Beneficial Finance Corp Co Ltd v Conway* [1970] VR 321; *Cummings v 2KY Broadcasters Pty Ltd* [1981] 1 NSWLR 246. Documents are clearly defined to include tapes and disks in most jurisdictions, eg *Interpretation Act* 1987 (NSW) s.21(1).

62 See eg *Palmdale Insurance Ltd (In Liq) v L. Grollo & Co. Pty Ltd* [1987] VR 113; *Roux v Australian Broadcasting Corporation* [1992] VR 577.

63 *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

64 For example the rules of the Federal Court (O 15A r 8).

The National Crime Authority can apply to judge of the Federal Court or the court of a State or Territory for the issue of a warrant where there are reasonable grounds for believing that there is in specified premises a thing connected with a matter relating to relevant criminal activity and that there would be a risk of concealment or loss or destruction of the thing.[65]

The Australian Securities Commission can obtain a search warrant only after there has been a failure to comply with a notice requiring production.[66] the Commission may also obtain a warrant under the *Crimes Act* 1914 (Cth) but that prohibits seizure of documents subject to legal professional privilege. Under its own legislation it may obtain a warrant to seize such documents.[67]

In investigations conducted by the Independent Commission Against Corruption (ICAC), in New South Wales, the Commission may obtain a search warrant from an authorised justice but the Commissioner has a discretion to issue his own warrant.[68] As a matter of policy the Commission has stated that warrants are to be obtained from judges and this policy was endorsed by the Parliamentary Committee on the Independent Commission Against Corruption. A warrant authorises the entry into and search of premises for documents or things connected with any matter that is being investigated under the *Independent Commission Against Corruption Act* 1988 (NSW). The ICAC has wide powers to demand a person appear before the Commission and produce a document.[69]

The *Criminal Justice Act* 1989 (Qld) provides powers for the Chairperson of the Criminal Justice Commission to authorise the entry into premises utilised by a unit of public administration and inspect or seize documents. The Commission may also apply to a judge of the Supreme Court for a search warrant for private premises.[70]

Royal Commissions have wide powers. The *Royal Commissions Act* 1923 (NSW) provides that a witness summoned to attend shall not be entitled to refuse to produce any document which the witness is required by the summons to produce.[71] It is often in the nature of the strategy of a Royal Commission to go on a fishing expedition and seek access to a wide range of documents.

The New South Wales Police Royal Commission has a special Act of Parliament. As well as a power for authorised justices to issue search warrants the Commissioner may do so if the Commissioner "thinks fit in the circumstances and if satisfied that there are reasonable grounds for doing so".[72]

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65 *National Crime Authority Act* 1984 (Cth), s.22, cf also *Carbone v National Crime Authority* (1994) 52 FCR 516.

66 *Australian Securities Commission Act* 1989 (Cth), ss.35 and 36.

67 Cf *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

68 *Independent Commission Against Corruption Act* 1988 (NSW), s.40.

69 *Independent Commission Against Corruption Act* 1988 (NSW), s.17.

70 *Criminal Justice Act* 1989 (Qld), ss 70 and 71.

71 *Royal Commissions Act* 1923 (NSW), s.11(1)(c).

72 *Royal Commission (Police Service) Act* 1994 (NSW), s.15(2).

4.5 *Challenging the production of documents*

In every case where a search warrant is produced, a subpoena is served or there is some other notification to produce documents, the church agency or official involved should seek legal advice. This may be quite routine and affirm the validity of the process and allow for co-operation. In some cases there may be issues to be argued. An early assessment is important before the process of responding commences.

4.5.1 The public policy issues

No legal system, whether civil or canonical, can foresee all possible conflicts of values.

The law develops, frequently, on the basis that one exaggeration is replaced by its opposite. Growth in technology has given impetus to a concern for privacy law which is a newcomer to the common law tradition. Its application, however, is often arbitrary. On the one hand there are moves to curtail government interference in the private affairs of citizens while at the same time new institutions such as the National Crime Authority, ICAC and the Police Royal Commission have extraordinarily wide powers.

Arguments have been presented claiming public interest immunity in order to defeat a search warrant. It has been suggested in the High Court that the claim for public interest immunity should not be allowed unless specifically included in the relevant statute.[73]

Public interest immunity is usually raised by a public body, such as a government department. There is little support for the view that it would be available for a private individual.[74]

One matter that has not been litigated but could present an interesting argument would be a claim that the papers generated by the diocesan marriage tribunal are generated in the course of the practice of religion and that there should be some immunity as being consistent with the right to free practice of religion.

It should be noted again that the privilege relating to the clergy in evidentiary law as it exists at the moment is limited to the confessional and will not be relevant to questions about the production of documents.[75]

While immunity or privilege as such may not be arguable it may be possible to present the confidentiality of some types of church documentation as a factor in assessing the reasonableness of a search warrant or other order for production.

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73 *Jacobsen v Rogers* (1995) 69 ALJR 131 per McHugh J at 144-5.
74 Cf *Golberg v Ng* (1994) 33 NSWLR 639
75 *Evidence Act* 1995 (NSW), s.127.

4.5.2 *Issues of legal professional privilege*

While it is possible for a search warrant to be issued authorising a search of the premises occupied by a legal practitioner, the documents in the possession of the legal practitioner may be the subject of legal professional privilege. If this is the case the documents cannot be the subject of a search warrant unless authorised by a specific statutory provision such as the *Australian Securities Commission Act.*[76]

Legal professional privilege is a matter of confidentiality not simply a rule of evidence.[77]

To overcome some of the potential problems involved in a search of lawyers' premises the Australian Federal Police and the Law Council of Australia have developed guidelines to regulate execution of search warrants on lawyers' premises, law societies and like institutions. This allows the party to indicate a willingness to co-operate and an opportunity to approach the court for a claim of legal professional privilege with an undertaking by officers not to inspect any documents until there is a ruling on the matter. If there is a refusal to co-operate then the search may proceed and may involve a search of all files in order to give effect to the authority conferred by the warrant.[78]

In order to attract legal professional privilege the document must have been brought into existence solely for the purpose of obtaining legal advice.[79]

The creation of documents, for example, in connection with internal church investigations that could be connected with likely litigation, should only happen in consultation with the legal advisers of the church agency. Advice should be taken as to how the document will be created, who will have custody of it, and what status it will have in relation to legal professional privilege.

4.5.3 *Process of challenging production*

Where the evidence is obtained illegally, such as through the use of a defective search warrant, there is a discretion in the court to admit the evidence.[80]

The Uniform Evidence Law, [81] provides for a shift in the onus relating to illegally obtained evidence. Evidence obtained improperly or in consequence of impropriety or contravention of Australian law is prima facie inadmissible and may only be admitted if

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76 *Australian Securities Commission Act* 1989 (Cth), ss.35 and 36, cf *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319.

77 Cf *Baker v Campbell* (1983) 153 CLR 52

78 Law Book Company, *Laws of Australia*, Vol 11.1 Criminal Investigation p 199 citing 'Guidelines on the Execution of Search Warrants on Lawyer's Premises' (Dec 1986) 21 ALN 21 and referring to *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* (1995) 79 A Crim R 453 at 473-474 which reproduces the Guidelines.

79 *Grant v Downs* (1976) 135 CLR 674 and *Attorney-General for Northern Territory v Maurice* (1986) 161 CLR 475.

80 Cf *R v Macleod* (1991) 61 A Crim R 465.

81 *Evidence Act* 1995 (Cth), s.138 and *Evidence Act* 1995 (NSW), s.138.

the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained that way.

The standing of a person to challenge a search warrant is not limited to the one on whom the warrant is executed. It may be sufficient if the person can show actual or apprehended injury or damage to his or her property or proprietary rights, to business or economic interests or even to social or political interests.[82]

The warrant may be challenged at the time of the attempt to admit the evidence.

It may be challenged by way of judicial review of an administrative action through a direct approach to the court at the time of the seizure. In relation to federal warrants the Federal Court exercises the jurisdiction to review the administrative decision to issue the warrant pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s.9.

The form of warrant used in New South Wales under the *Search Warrants Act* 1985 (NSW) explains how it may be challenged:

> "If you are dissatisfied with the issue of the warrant or the conduct of the search you should seek legal advice. This advice may assist you to decide whether your rights have been infringed and what action you can take. If your rights have been infringed you may be entitled to a legal remedy."

One can only imagine how a person at 6.05am, faced with police at the door, goes about seeking legal advice.

5. OUR POLICY FOR DOCUMENTS

What should be our policy?

I have already mentioned the importance of obtaining legal advice concerning the creation of documents in circumstances where litigation is likely.

In every case when there is a request for document, whether by search warrant or subpoena or order for production, legal advice should be sought. The law is too complex to even contemplate making one's own judgments about what should be produced or how a request is best handled.

It is not practical, always to direct the mind of everyone in the Church to all the possibilities before every letter is written or statement is made in writing.

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82 Law Book Company, *Laws of Australia*, Vol. 11.1 Criminal Investigation p 202 citing *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 per Mason J at 547 and *Onus v Alcoa of Australia* (1981) 149 CLR 27 per Gibbs J at 35-36.

It is important, though, to set up some basic principles so that there is a policy with respect to creation, retention and destruction of documents. In formulating a policy perhaps the starting point is to ask:

- why it is that we wish to create this document?
- why do we wish to retain it? or
- why are we destroying it?

A document retention programme needs to specify what will be kept and what will be destroyed. A policy could require that everything is kept, or that after a certain period of time everything is destroyed, except documents that might be required for a specific purpose, such as insurance policies, registers and documents that are required to be kept for statutory periods.

In practice, however, the need for an historical archive would prohibit total destruction even after a period of time. The limits on space probably mean that it is impractical that everything be kept.

Some selection is required.

Selection based simply on what is potentially embarrassing or unhelpful in litigation will be counter productive and courts would draw adverse inferences if certain documents only were missing from files. A selective culling of all the incriminating material will be likely to be discovered. It is easy enough to discover the existence of documents from other sources, such as from a copy kept by the author of a complaint letter. Stories are told of computer experts being called in to recover files erased from computer disks.

The criteria for selection must be related to a standard that is not connected with potential litigation or able to be interpreted as an attempt to thwart the process of justice.

Usually we create a document as a means of communication. Its secondary purpose is to serve as a permanent record of its contents.

Obviously we would retain a document that serves as a permanent record for something.

We would ask then - do we need a permanent record?

If the document is only useful as a means of communication for a specific purpose, or period of time, it might be possible to establish a policy for regular review and destruction.

For example, is every letter written to a bishop retained for all time?

Do we need to distinguish letters received from copies of letters sent?

Some documents would be important and they form the basis of the historical archive. Other letters are of a general and non historical nature. They may be connected with some

passing event, and it might be legitimate to have a policy that those letters are culled every few years.

Documents that affect the status of persons and that evidence legal rights and responsibilities will have a different status to those which deal with routine business.

The civil law sets a precedent with respect to the time one is required to keep financial records. It might be legitimate to follow those practices for that type of documentation.

Subsidiary documents may be destroyed when the primary document is retained. Submissions received from others and then used to prepare a report may be less significant than the report itself, depending on the circumstances.

Working papers connected with a significant project may need to be retained in case the project involves litigation. When the project is completed, and after a suitable period has elapsed, it may be sufficient to retain the main documentation and destroy peripheral notes and documents.

Documents that involve allegations of misconduct need to be considered as a separate category.

If the allegations are admitted then the retention of the complaint is irrelevant. All that may need to be retained is the evidence of the admission, and then only if there is some further purpose for this.

If the allegations are denied or not proven then it may be useful to retain the document lest there be some future similar complaint and it can shed light on the veracity of a denial.

In this respect one ought to note provisions of Canon 1339 relating to canonical warnings already mentioned above.

It should be noted that destruction is not always a protection against incrimination.

The person who does the destroying may be called as a witness to explain what was in the document that was destroyed. The person who created the document may be called to give evidence as to what was it in it.

If complaints are properly handled then the existence of the documentation will probably be helpful rather than unhelpful. The evidence of how the complaint was handled, the letters of reply or the documents outlining the investigation and the response of the one accused can combine to form a reliable picture of the facts of the matter.

A well kept file can either save you or damn you. If the documentation sets out the facts it may provide a defence to an unjust allegation of wrongdoing.

What some one says later on was the content of a complaint may collapse in the face of the production of the actual letter.

The allegation that "the bishop did nothing" may collapse in the face of the production of a contemporaneous report of what in fact was said and done.

Where the policy is to retain documents containing serious complaints one might well argue that if a complaint was made it would have been noted and retained. The argument from silence is not always reliable but it may have some value.

A different policy might need to be adopted with respect to documents that affect other people. This might be the case with respect to the Marriage Tribunal and papers connected with applications for dispensations.

Once the purpose for which the document is created has been fulfilled, and the case is finalised, there is an argument that the rights of privacy of those affected by that documentation should be acknowledged and the documents destroyed. This is not a total protection since the persons who created the documents could be required to give oral evidence. It does go some of the way towards protecting legitimate privacy concerns.

There we may need to ask, in an extreme case, should the process even begin. Should the statement be taken?

There may be cases that appear to be so sensitive that it is in the best interests of the parties, or one of them, and of the Church, that the documents not be created in the first place.

One must be aware of the provisions of the law that may compel disclosure of knowledge of criminal offences. For example s.316 of the *Crimes Act* 1900 (NSW) creates an offence if a person who has knowledge of a serious crime fails to disclose this to the authorities without lawful excuse. The section is rarely used and its exact meaning is contentious. Nevertheless there are moves by the authorities to invoke provisions like this by way of threat to induce disclosure. There are provisions in some jurisdictions dealing with mandatory reporting of child abuse. While these do not extend to the personnel of a church tribunal there is a growing community sentiment that would make it difficult not to report, if one had knowledge of certain crimes. In fact the present mood might even go so far as to suggest that failure to report amounts to an active cover-up.

One way of avoiding such provisions is not to acquire the knowledge in the first place. It seems rather problematic, however, that one should deliberately embark upon such a policy with the stated intention of remaining ignorant in order to avoid co-operating with authorities.

The only justification for a policy of calculated ignorance would be a desire to avoid a conflict of duties. There are legitimate rights about privacy and there is a right which an accused person has to remain silent. Against this is the need to protect people from harm.

If, through a tribunal process, it comes to light that a person is abusing children, might it not be argued that the greater good would be served by disclosing this concern to the authorities. Is this a higher value than the value of preserving the confidentiality of the church process? This is a matter that is at least worth discussing.

The argument that cases involving the status of persons are never adjudged does not necessarily require that the papers in the matter be retained. If there is fresh evidence, perhaps the case might need to start again.

In the case of a first instance affirmative and a second instance affirmative why is there a need to retain all the statements? What is the likelihood of the case being re-opened? As a general policy, therefore, for the protection of those few individuals whose privacy may be at issue, it might be acceptable to have a policy of routine destruction of that category of tribunal file when the case is completed.

The formulation of a document retention policy will necessarily involve a number of Church officials if it is to have value and be consistent in its formulation and application.

As a practical suggestion perhaps a diocese should engage someone, such as the Archivist or the Chancellor, to routinely review files, and categories of files, and advise the Bishop on issues pertaining to destruction.

It might be useful for our Archivists to give some attention to these issues perhaps with a view to publishing a standard set of policies.

The way in which documents are filed must be considered. The tests for search warrants and discovery process are more likely to relate to complaints and so documents should be filed with respect to the incident rather than the alleged offender. This minimises the likelihood that irrelevant material would be exposed in a particular case.

It may be worth considering having two files for the clergy. One relates to documents in the public forum such as routine appointment letters and the other, if needed, is of the nature of the documents envisaged by Canon 1339 which are filed in the secret archive and culled according to the principles of Canon 489.

In the end, however, there is really no protection from disclosure. Our archives are not safe in the sense of being free from scrutiny. They will be safe if the material in them can withstand that scrutiny in accordance with our standards of truth and love.

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