COUNSELLING AND THE LAW.

ISSUES OF CONFIDENTIALITY IN MALTA

A Qualitative Study

by

Benjamin Calleja

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fulfilment of the requirements for the Masters in Counselling at the

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ABSTRACT

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Counselling and the Law. Issues of confidentiality in Malta.

The purpose of this study is to show whether breaching of confidentiality creates any legal and moral dilemmas for participants in their lived experience to do so. It aims to explore the reaction of three counsellors to the question of whether or not confidentiality is to be breached in given situations. It will also investigate the meaning that each participant gives to such experiences and how the therapeutic relation was affected by the decision they took. Interpretative Phenomenological Analysis is used as the major research tool in this inquiry.

Two superordinate themes emerging from the thematic analysis of the data are (1) the safeguarding of the character of the therapeutic relationship and beyond and (2) finding ways to resolve the dilemma of breaching confidentiality. The first superordinate theme embraces two master themes which are (a) feeling safe and protected in maintaining or breaching confidentiality and (b) non-maleficence towards the client and others. The second superordinate theme incorporates four other master themes. These are (1) legal demands and ethical processes (2) consulting (3) learning from past experiences and (4) contract-based relationship.

Participants’ responses indicate that the therapeutic relationship is almost sacred and do their best to protect their clients. Furthermore, participants’ strain to disclose clients’ stories is in favour of the client. Participants tend to take calculated risks until it ceases to be legally safe for them to withhold information. A contract-based therapeutic relationship secures participants’ action to breach confidentiality without becoming legally liable. An important factor on disclosure is that all participants are driven by subjective moral intentions rather than by legal motives. Participants rely on their past experiences of when they had to breach confidentiality and also on becoming more confident to assess situations on whether a disclosed issue should be divulged or not; moreover they also rely on consultation with peer and professional supervision.

This study also brings forth suggestions and recommendations to be considered by counsellors as well as by legal authorities.

Keywords: Professional Secrecy Act; confidentiality; counselling relationship; legal demands and obligations for breaking or maintaining confidentiality; moral strains to protect professional secrecy.
TWO MAIN DEDICATIONS

To

my wife Marthese

and my children Laura, Ruth, and Luke

whose understanding, patience, perseverance, and encouragement

helped to make this study possible

and to the

WONDERFUL COUNSELLOR

(Isaiah 9:6)

JESUS CHRIST
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• All six participants who participated in the interviews. *For ethical reasons their names are not being published*

• The 2010/12 Executive Council of the Malta Association for the Counselling Profession (MACP), for disseminating an email to MACP members to send their legal concerns regarding confidentiality

• The professional bodies updating the Laws of Malta and the Malta Government Website
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CHAPTER ONE

INTRODUCTION

The journey of a thousand miles begins with one step

Lao Tzu

1.0.0 Why Confidentiality and the Law

It is not common to find a counsellor\(^2\) carrying out research on two diverse aspects namely counselling and the legal structure of one’s own country. There are a few foreign studies pertaining to various aspects of counselling and the related laws; however, this cannot be said to be the case of Malta. It is not a matter of taking in hand a foreign study and applying it *mutatis mutandis* to the local context. There are many things which have to be considered before adapting such content locally. Apart from the cultural differences of how our laws are written and interpreted one has to take also into consideration the country’s type of legal system in use, which may vary a lot, even from one democratic country to another. The raison d’être of this research is to fill this legal lacuna from a Maltese point of view in relation to the counselling profession.

In this study, I will try to conjoin my experiences in law and in counselling. My practical and formal exposure to law started in 1982 when I joined the Malta Police Force till 2009. In


\(^2\) In this work, counsellor and counsellors refer also to other professions that use counselling and other therapeutic skills in their course of work which include psychotherapists and psychologists.
contrast, my experience in counselling goes back to 2007 when I started training in counselling with a foreign entity and with greater confidence from 2008 to date when I started reading my Master’s Degree in Counselling. In fact, this very dissertation forms part of this Master’s study.

Where confidentiality is concerned, in my opinion, Malta enjoys a better legal basis and weighting when sharing delicate information compared to other countries. The laws also distinguish between those professionals receiving privileged information who are protected by law and those who are not when it comes to disclosing such information. Other laws also maintain a level of control of what is classified or not.

Many laws may be interpretative and place the responsibility on the receiver to weigh the legal circumstances tuning into his or her personal ethical and moral standards if not also to his or her expertise in the profession. Countries, as is in the case of Malta, pass laws and update them throughout the years to reflect the modern mentality of the community; a case in point is where many counsellors at present are voicing the importance of a law that regulates their profession.

This work by far is not intrinsically a legal advice; therefore it is important for me to state here that counsellors should know that according to the Code of Organisation and Civil Procedure taking a lawyer’s role without a warrant is prohibited (Chapter 12, Article 79). An offence according to the same Code and the Code of Police Laws is employing a taut (Chapter 12, Article 97 (a) and Chapter 10 Articles 42 to 47). Thus, in the course of practice there may be occasions where a counsellor has to seek legal redress from a lawyer of his or
her trust before taking any action or is in doubt of any consequences. Counsellors should refrain from taking the role of a lawyer or taut when colleagues seek advice. A legal professional advice in certain circumstances would be more proper. In the context of this study, a counsellor seeking legal advice is to be taken in relation to disputes involving one’s client or the counsellor per se in his or her profession.

I tend to agree with Tim Bond, when he notes in his Preface to the book ‘Therapists in Court’ (2004), that a legally prepared therapist is in a better advantage than those who are not; however, it is also recommended that counsellors seek redress from a lawyer when they are involved in a legal matter of concern (Bond and Sandhu, 2004). In the same vein, Bond (2010) reiterates that having a legal frame of mind can help counsellors to know where they stand when confronted with situations that may have legal consequences. Knowing the gravity of a presented offence may further help the counsellor to make judgment of how serious the consequences may be. I may say here that with the introduction of the online accessibility to all the Chapters of the Laws of Malta has not only made this thesis less difficult but made it more practical for counsellors to follow suit when required.

1.1.0. Confidentiality: an Officer and a Counsellor

During the time I spent in the Police Force I have seen a number of changes in the legal structure that as a member of the Police Force I had to uphold (see Constitution 47, 1a; The Police Act, Chapter 164, Article 16 and First Schedule ‘Oath of Police Officers’; Kodići ta’ Etika – Pulizija ta’ Malta, 2005). Since joining the Police Corps, the legal reforms and the

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3 Enter: malta.gov.mt and click on Laws of Malta. One can chose to seek law chapters both in analytical format (by chapter name – alphabetically) and in chronological format (by chapter number – numerically).
numerous enactments of new laws never ceased to offer new challenges and we had to keep constantly abreast with these changes (Calleja, 2004).

The 2\textsuperscript{nd} Schedule of The Malta Police Act subsidiary legislation Chapter 164/01 article 7 (a) to (d) lists the offences of breach of confidences that police officers must refrain from committing. As a police officer I had to maintain certain information confidential by not tipping off, for example, that a person or an organisation is being shadowed or an undercover investigation is in process. This is the limit of keeping information as privileged. Through my tenure in the force I have come to treat confidential matters as protected information, which was already second nature to me once I took counselling as my present main career.

Yet, there were instances where I was obliged by law to make appropriate disclosures. For instance it the duty of police members to report any infringement of the law and record such infringements in writing. Subsequently, perpetrators have to be brought to justice where the arraigning police office has to give evidence in an inquiry or in Court of Law (see The Criminal Code Chapter 9 articles 4(1) and 137). At this level, confidentiality has no place for the police officer taking the witness stand.

Although in theory there is no difference between a police officer and a counsellor taking the witness stand the two professions diverge from each other because the former has a wider spectrum where the breaking of confidentiality is legally obligatory. And here was my dilemma.
1.2.0 Confidentiality: Counsellor vs. Police Officer; a Legal Dilemma

One of the requirements of the Masters in counselling course included that from the second year (in 2009) onwards I had to carry out supervised practical experience in client contact hours. By then, I was still a serving member of the Force and even though I was granted permission to practice counselling as a trainee I was still regarded by law as a police officer rather than a *trainee* counsellor. This was not an easy task for me as I always conceived the fact that a police officer and a counsellor sitting on the same chair will someday lead to conflicting and detrimental situations. Why so?

For example, it is illegal for police members to remain silent when they acquire knowledge that a person has committed a crime or any other breach of the law. My concern, which I always communicated with my then supervisor, was ‘what if a client self-discloses to have committed a crime? As a member of police force I was obliged to breach that confidential information irrespective of whether it would be obligatory to do so as a counsellor who is not also a police officer.’

Another matter of concern that arose in supervision was the question ‘when should I tell the client that apart from being a counsellor, I was also a police member?’ In both situations the most legal obligatory weighting of responsibility fell on the role as a police officer as it was becoming clearer that the obligations to divulge information superseded that of a *regular* counsellor’s obligation.
During the sessions I had these dilemmas bothering me. This was an ethical issue that was crossing my thoughts over and over again. Confidentiality was at the root of my dilemma. To be more precise, the breaking of confidentiality was the issue that was the most challenging. It was not just simply on matters of harm to self and to others, or in being absolved by court authorities to be released from all confidences received.

Although there was never a straight answer to this situation, for me, it only solved itself after my resignation from the force on the completion of police service. Thankfully, not one case was linked to any criminal connection. This may reflect that only a small portion of cases seen in counselling may have legal connections or consequences. Once no longer in the force, I became a regular counsellor. However, there was still this eagerness in me to put the issue of ‘breaching confidentiality’ to the scrutiny of research. I felt that a research in counselling and the local laws was not only an original venture in the local context but would also be beneficial to the counselling profession in Malta and other kindred professions.

Just over two decades ago, in his book ‘Guide to Ethical Practice in Psychotherapy’, Andrew Thompson (1990) wrote ‘so the issue of confidentiality should continue to be pertinent for some time to come (p. 66).’ Confidentiality within the counselling profession may be a new venture in Malta to write upon, however if we apply Thompson’s statement to the future aspect, this study forms part of that time frame that had to come.
1.3.0 Confidentiality: Shapes of Things to Come

Following this introductory chapter is the literature review of this study. Chronologically speaking the literature chapter takes us from Roman Malta to the present day. It touches the external environs that we live in and how confidentiality became ingrained in the legal and ethical arenas. Furthermore, it delves into the innermost personal conflicts of moral obligations that one is bestowed or haunted with – take it as you will – leading us to that finite moment of being alone when the decision is made to breach or not to breach confidentiality.

In the methodology chapter I show that this study is rich in reflexive voices, otherwise this study would not have been possible. Together with this personal voice of mine, there is also the participants’ reflexive voice. These were the two limbs as, so to speak that have balanced this study however the third factor – the documents – has given this work the necessary legal stability. I also metaphorically consider that documentation is the body of this study, yet both reflexive voices gave this body the life that was required.

The finding chapter is the plain results of the qualitative questions that were put forward to my participants. There are a number of interesting discoveries that are scrutinised in the chapter that follows these finding – the Discussion. Finally, in my conclusion I will highlight the important parts of the preceded chapters and give recommendations to all stakeholders who include all those persons from those who make use of helping skills in their place of work, as counsellors do, to state persons who design and legislate laws that regulate such professions; counselling being the one I practice in.
CHAPTER TWO

LITERATURE REVIEW

Our prime purpose in life is to help others. And if you can’t help them at least don’t hurt them.

*Dalai Lama*\(^4\)

PART I

INTRODUCTION

2.0.0 Confidentiality in a Holistic Maltese Scenario

Confidentiality as a value has come a long way in human history and Malta also had its share. In its holistic approach, I see it is embedded in culture — *E.g. tradition, language, religion, politics and communal and familial demands*; in what is idiosyncratic — *E.g. personal positions, convictions and opinions*; and in what is legal — *E.g. laws, regulations, procedures, and policies*.

From the Maltese cultural point of view, at a micro level, many families hold secrets very much similar to those foreign counterparts (see Bird and Melville, 1994; Appendix 1) refraining from being shared with other families or even with certain family members. Sasse (2000) also adds that confidentiality in families is a need. At a macro level, local organisations, such as the government may be holding top secrets as classified or privileged information, *hence*, to be known only by those at the top.

---

As individuals, we all have our own secrets, choosing special persons to confide in. We also can choose to keep these secrets to our own and remain personal throughout our life (Pearson, Nelson, Titsworth, and Harter, 2008). Sharing such classified or intimate information with the wrong person will carry heavy penalties and even unnecessary exposure with consequences to self or one’s own group’s dignity and stability. I am confident to deduce then, that principles of confidentiality seem to have evolved with humans for their individual and collective survival.

The most ancient confidentiality contract known to mankind goes back to the 4th century BCE Greece, a contract which is still in use today. Doctors of old swore on oath to protect any client’s disclosed data (see Appendices 2 and 3). The initial paragraph of the famous Hippocratic Oath opens with the words “Whatever I see or hear in the lives of my patients ... will keep secret, as considering all such things to be private” (US National Library of Medicine, 2002).

In time, this Oath was also adopted by Roman doctors in Malta as from 218 BC, Malta formed part of the Roman Empire (Savona Ventura, 1999, p. 25). Thus, one can deduce that since the second century before the Common Era the concepts of confidentiality, at least in the medical world, were also imported to Malta by the Roman medical doctors practicing their profession locally.

In time, the moral composition of the principles of confidentiality required legal backing and Malta developed its unique form of protecting confidences. Without doubt, the development of the legal system in Malta went through centuries of foreign occupation (see
Appendix 4) and of religious influence (sees Appendices 5 and 6). This unique historic-legal process established our local pluralistic legal system that Aquilina (2011b) refers to as a hybrid form of legal system moulded through nine different legal epochs that our country experienced from Roman times to present day (Aquilina, 2011b). Since Malta’s accession in 2004 to the European Union, such laws are being concerted with those of the Union (Aquilina, 2011b; Dinan, 2006).

Each event in history always saw laws that protected aspects of confidences or classified information and others protecting the security of the government (Grech, 1995; e.g.: Chapter 50 The Official Secrets Act). Other laws granted rights to specific persons that by nature of their profession receive confidential information to protect it (e.g.: the priest and the lawyer according to the Professional Secrecy Act). It seems that the moral fibre of the method of legislation was always to safeguard both the interest of the individual and that of the public within a secure environment.

Today we still have laws balancing between these two extremes; some empowering authorities to demand disclosure of secret information and other laws prohibiting the breach of confidence. In a simplified mode, this reflects the Maltese pluralistic system having both aspects of the Civil Laws protecting the individual and the Public Laws protecting the interest of the public. Confidentiality and the law seem to have grown together and this mutual dance is still in its developing process as seen in the changes certain laws go through since they first were in force. Confidentiality has and will always have its share in this continual legal evolution (Grech, 1995).
2.1.0 Confidentiality as a Facility of Trusting Intimacies

Tim Bond states in his Preface in ‘Therapists in Court. Providing evidence and supporting witnesses’, that the ‘talking therapies’, which includes the counselling profession, are gaining popularity (Bond and Sandhu, 2005). Without confidentiality there could be no practice of medicine, no counselling, no psychotherapy; in essence, no assistance to the person in need of recovery from particular ailments. It is important that there are trained people like counsellors to share confidences with; as doing so with the wrong individual can do more harm than good (Adler, Rosenfeld, and Proctor II, 2001; Grech, 1994).

Bond and Mitchels (2008) define confidentiality as protected ‘information that could only be disclosed at some cost to another’s privacy in order to protect that privacy from being compromised any further’ (p. 4). Without trust there could not be a relationship and no belief in confidentiality (Grabois, 2008). A Maltese traditional adage goes ‘kelma bejn tnejn sa tlieta mnejn sa fejn’ roughly translated as “what is meant to be said between two persons is none of a third (or more) person’s business” (for a full etymological meaning and definition of the word ‘confidential’ see Appendix 7).

Without doubt, this is a Maltese maxim of old echoing the importance of confidentiality. In my experience, like any other person from same and other kindred professions, clients in counselling pour confidences, confidences and more confidences (See Appendix 8). I am mentioning this to show that the intimacies clients entrust us with is not easy for them to confide; not even with family members or friends. This is why confidentiality may be one
reason a person seeks counselling to talk about his or her difficulties from any other types of support lacking this condition.

Thompson (1990) argues that there are many assumptions and different meanings given to confidentiality even to the point of being misunderstood as a concept in itself. Grabois (2008) posits that the meanings stakeholders give to confidentiality are so subjective and relative to the person concerned showing the importance that the counsellor must be very clear when explaining its limitations. Whilst both the client and the therapist can experience such misconceptions, the promise that confidentiality conveys may be perceived much clearer: ‘it is to encourage the client to reveal openly and honestly anything relevant, no matter how private, to the professional (p. 66) without this promise the client will not confide’ (Thompson, 1990).

For the counsellor the limitations of confidentiality are second nature however this may not be the same for the client. This is one reason that Grabois (2008) suggests that pertains to confidentiality; it must be written and signed by the client in the initial stages of counselling.

Quite succinctly Grabois (2008) catches a number of phrases of what happens to the client in therapy. The client ‘lays bare his entire self, his dreams, his fantasies, his sins, and his shame’ (p. 8). Without confidentiality there will be silence in the counselling rooms as the clients will not be ready to expose themselves; it can be fatalistic if secrets are continually forced to be breached under the hammer of the law especially when not in the interest of the client.
From a police survey carried out in 1998 by the Metropolitan Police officers in Washington D.C. Anderson (2002) posits that the underlying reason for clients shying off counselling is fear that their issues will not remain confidential as expected. This will inevitably place the client to postpone taking action and seek the necessary help. It takes courage to make the first step and find the right confidante and it only takes one single word to expose the client placing him or her in a more vulnerable position. That is why Anderson’s definition for confidentiality includes the ‘implicit and explicit promise and client’s expectation’ that whatever is said within the walls of the counselling room will remain confidential.

Like in other professions such as accountancy and legal arenas (Grech, 1994, see also Professional Secrecy Act) confidentiality in counselling facilitates the process of a client’s self-disclosure, many a times of intimate secrets. The client in receipt of counselling and those referring the client for counselling need to know the importance and existence of confidentiality, let alone its limitations. The importance of enhancing confidentiality is not only pertinent to the counselling profession even in the local context but it is also pervasive to other professions receiving intimate information from their clients (Appendix 9 lists some of these professions).

Bond and Mitchels (2008) explain that confidentiality ‘presupposes trust between two people within a community of at least three people’ (p. 4) and actively preventing information from being communicated to others. Thus when saying ‘confidentiality presupposes trust’ it implies that without trust there is no shared confidential matter and if confidential information is breached trust is compromised. On the same lines, McLeod

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5 In Anderson’s paper, clients refer to police officer.
(2007) places the onus for the protection of confidentiality on counsellors, advising them ‘to refrain from passing for on what they have learned from the person to others in the person’s life’ (p. 15). Grech (1994) succinctly captures that confidantes have to treat and protect the clients’ disclosed secrets as if these secrets are now their own. Murray (1986) explains that what is private is still not shared but what is shared is confidential and has to be protected (in Grabois, 2008, p. 9). In order words, confidentiality must protect what is private.

Clients expect their counsellors to maintain confidentiality when making such intimate disclosures of vulnerable moments of their lives (Thompson, 1995). Similarly, Grech (1994) regards these professions as privileged depositories of secrets whilst levels the clients’ expectation of confidentiality as a right. Grech (1994) also quotes an important reflection made by a Court in declaring the decision regarding the case Chev. Dr Joseph Bugeja PH. C., MD vs. Alfred B. Farrugia noe dated the 15 of April 1991. This court sentence pertains to confidential bank affairs. The relevance of this court sentence to this work lies in the first two sections where the court declares that confidentiality is a privilege of the client and not of the professional body (see Appendix 10 for the full sentence).

In our profession intimate information shared by a client places responsibility on the counsellor to refrain from divulging such secrets to others. However, there are times when such intimate stories place another type of moral responsibility or obligation on the counsellor to divulge that information for the protection of either the client or a third party. The application of discretion determines whether clients’ secrets remain either intimate or require the sharing with other authorities (Bond and Mitchels, 2008) or professionals.
Familiarity with the legal requirements helps the counsellor to make a better decision where such things are concerned (Bond, 2010). From my experience, clients perceive their counsellor not as a common person but as that person they want to trust in their story, a person who can understand them and help them out in their ordeal without exposing them. The results obtained in Anderson (2002) research show that in the counselling service offered, privacy and confidentiality were two of the three important items revered by counsellees. The other was the therapist’s competence (Anderson, 2002).

The oneness of the counsellor and client is so unique that it creates an environment where the client feels safe with the counsellor. The privacy of the premises, the equipment used, may be part of the therapy, however, the counsellors’ attitudes and professionalism creates that warmth where the client feels that sense of safety of being understood. This safety feeling causes the client to self-disclose her or his inner troubled feelings, painful as may be, perverse or disgusting as they may go or detrimental as they might be.

This client’s sweet feeling of being ‘held’ and contained may easily turn sour by the mentioning of the words that we need to involve others in their story, especially when the authorities are these others. Referring to the reaction of the clients, this could be placed under the scrutiny of an interesting study that one can undertake.

2.1.1 Confidentiality: “to breach or not to breach” dilemma

In their extensive medico-legal work Health, Bioethics and the Law, Cauchi, Aquilina and Ellul (2006) give a succinct definition of what breach of confidentiality is. Breach of
confidentiality takes place ‘when information about a patient, in the realm of counselling we call a client\textsuperscript{6}, obtained through verbal communication, or through physical or other examination, obtained under professional conditions, is disclosed to a third party without permission and without the consent of the person to whom it refers’ (p. 42).

Vickery (1982) highlights breach of confidentiality as ‘unconsented, unprivileged disclosure to a third party of non-public information the defendant has learned within a confidential relationship’ (in Grabois 2008, p. 29). Note that the word ‘breach’ in these definitions refer to disclosures without ‘permission or consent’ of the client however in this study it also refers to the simple act of divulging information in terms of moral and legal obligations with or without consent.

Today, confidentiality has gained implications in ethical and legal standing that many professions have to uphold (Bond and Sandhu, 2005; McLeod, 2007; Mitchels and Bond, 2010). Implications where improper breach of intimate material is experienced (see Grabois, 2008; Polden, 1998) therapists are sued for improper breach of confidences. Again, confidentiality has its ethical limitations and its legal parameters that professionals such as counsellors may find themselves in ambiguous situations of whether to breach and when they should breach confidential information to competent authorities or to other professionals. Thompson’s (1990) advice to therapists facing a dilemma is that their margin of error ‘should surely be on the side of secrecy’ (p. 67). I would take this advice with caution and reflect further on the safety of the client, especially when the client is a minor.

\textsuperscript{6}Italics mine
Cauchi, Aquilina and Ellul (2006) list a number of instances where the Laws of Malta oblige disclosure of such secrets to medical and legal authorities. The Modern Hippocratic Oath (see Appendix 11) conditions doctors to breach confidentiality where safety is concerned. Cauchi, Aquilina and Ellul (2006) make known the fact that when doctors are required by law to breach confidential information they consider it as ‘a very difficult situation’ (p. 76). Thus this very difficult situation is also peculiar to counsellors when they come to the point to being obliged to divulged clients’ confidentiality.

These parameters can create elements of uncertainty for counsellors; like a two edged knife where the decision to disclose client’s narrative is a fine line to thread on. McLeod (2007) shows that these dilemmas may be present because of the challenges moral differences offer in this postmodern age (See Appendix 12 for a comparison between modern and postmodern decisions).

Even though it is one of the main pillars of the helping professions (Jenkins, 2007), confidentiality is not absolute in counselling and in kindred professions. In not being absolute, confidentiality can create in us helpers a level of to breach or not to breach dilemma. Unlike in the seal of confession or in the lawyers’ domain for example, deposited secrets are regarded as absolutes and hence are protected by law.
2.2.0 Confidentiality: Four Categories of Persons

For the purpose of clarity and not as being established legal terms or divisions, I divide depositories of secrets into four distinguishable categories of people. These I will call privileged, the conditioned, the demanded and the mandatorily. The name of these categories were inspired from legal words ‘embedded’ in the related articles of the laws, to which I will refer to shortly.

Persons can fall in any or all of the categories depending on the present, past or multiple roles presumed at the moment of being a depository of secret information. The four categories mentioned above are related to divulging of secrets, not only in court settings but in any possible situation. The first are the privileged ones. Privileged is here taken in the sense of persons bound to protect information entrusted to them.

In this category one will find those persons whom no authority can order the divulgence of secrets deposited in them in view of their profession (see Appendices 13 and 14). This category can include employers, employees or persons who have knowledge of another person’s medical conditions. Obvious examples would be persons in the medical profession. For example, it is also illegal for these persons to disclose information about someone who has acquired a sexually transmitting infection to a wrong recipient (see Appendix 15).
Another category of people could be persons who are burdened with secret information which makes it illegal for them to tip off the person under the authority’s shadow that he or she is in the process of under-cover investigation. Persons in the accountancy profession or police officers may fall under this category (Appendix 15 shows legal instances of such privileged situation). The legal understanding for tipping off is because this act may prejudice the effectiveness of an investigation. Article 133 of the Criminal Code expressly binds public officers to maintain secrets pertaining to their profession.

Witnesses in court who are excluded to give evidence due to self-incriminatory information also fall in the privileged category of persons. The court would have to agree not to absolve the witness and thus shall not take the stand (see Appendix 14) of give evidence in that particular topic of legal scrutiny. Irrespective of how the persons in this category obtained information, whether through the nature of their calling, office or by coincidence, it would be illegal for them to share such data. Special types of persons that fall in this category are clergymen and defense counsels are directly bound not to divulge information entrusted to them if such information was deposited under the condition of their specific profession.

The second category is made of special people who by nature of their calling are obliged or conditioned to divulge information for the necessary action to be taken. Conditioned because it is only obligatory if pertinent to their call of work. The law refers to committed and omitted legal obligations where failure of the person to abide to may render that person in infringement of these laws. Other persons are required to abide by the specific orders given by the court and failure to do so will result in contempt of court. Police officers are a clear example of people bound to bring evidence of crime in public court.
Medical practitioners are obliged under the Notification Cancer Act, Chapter 154, to divulged sensitive medical information of a patient suffering from a cancerous growth. A detailed medical certificate is to be drawn and sent to the Superintendent of Public Health (articles 1 to 3).

The recent Protection of Minors (Registration) Act Chapter 518 was passed in January 2012 ‘to provide for the registration of sexual offenders and other offenders who commit offences of serious violence’ places obligations only on chief and administrative persons working in entities such as ‘institution, establishment or organisation which provides or organises any service or activity which involves the education, care, custody, welfare or upbringing of minors’ (Act 518’s interpretation of ‘relevant entity’) to breach confidentiality where employees are implemented to be offenders. This Act does not impose any obligation to report on persons offering counselling service to children unless the counsellor has also the role mentioned in article 5 (2) of this Act.

Article 5 (2) states that ‘directors, managers, secretary or other similar officer of a relevant entity who becomes aware of the commission of a scheduled offence and fails to report shall be liable on conviction be liable to the same punishment laid down in sub-article (1)’. The punishment sub-article is referring to amounts to ‘imprisonment from three months to four years or to a fine (multa) of not less than two thousand five hundred euro (€2500) and not more than fifty thousand euro (€50,000) or to both such fine and imprisonment’ (Article 5 (1)). Appendix 19 is a detailed list of the scheduled offences mentioned in the above Act.
As for counsellors, we form part of the third kind. We have to give evidence or produce reports only when demanded by a competent authority. This is binding irrespective of whether the client is in receipt of therapy, the accused or a witness, either an adult or minor. At least in cases where minors are involved the court sitting will be heard *in camera*, and restrictions placed on the media.

According to article 587 of the Code of Organisation and Civil Procedure Chapter 12 ‘The witness **shall** answer any question which the court may allow to be put to him; and the court can compel him to do so by committing him to detention until he shall have sworn and answered’. Contempt of Court is considered to be a serious offence indeed. The common citizen too falls under this category of people and the common counsellor to date is one of these common people.

The last category involves persons who unconditionally are obliged to breach particular information. The Laws of Malta place every person in this mandatorily category when that person will be a depository of information threatening the security of state or has information that threatens the public health or the national security of the Country. Unless the information was received under privileged condition that is under the seal of confession or under legal counsel then the authorities are to be unconditionally informed according to the laws to take the necessary actions. To date the Education Division policy of child safety mandates any person working in educational settings to breach child abuse information.

(Appendix 16 is a list of privileged and non-privileged persons and professions)

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7 Bold mine to show verb emphasis of the article
2.2.1 Confidentiality: in loco confessionis and in legal assistance

Part and parcel with confidentiality is the Maltese Law protecting the seal of confession. In the laws of Malta any information entrusted in confession is protected as an absolute right for the penitent. Our Constitution gives the Roman Catholic (RC) Church precedence over any other religion practiced in Malta. This may be due to the fact that Catholicism is deeply rooted in the Maltese tradition becoming almost synonymous with the identity of the country.

Canon Law has no direct constitutional or legal binding nature in Malta except in matrimonial affairs. Article 588 of the Code of Organisation and Civil Procedure Chapter 12 highlights the privilege of a priest disclosing information under the seal of confession (see Appendix 14). However, to safeguard the case article 588 of Chapter 12 provides that the penitent can consent to renounces to this right (see also Constitution of Malta, Article 41), and permits that his or her confession be divulged.

When the penitent gives his consent to the disclosure of his or her confession the judge or magistrate may overrule the protection of the privileged information given under the seal of confession and may absolve the priest and be requested by the court to give the necessary evidence viva voce. In these circumstances the court orders that this evidence is heard in camera, meaning behind closed doors. Under the same order, nothing heard in camera shall be made known to the public without the court’s exclusive permission. Article 588(1) and (2) of the Code of Organisation and Civil Procedure Chapter 12 offers non-disclosure protection in civil proceedings (Aquilina, 2011a). According to Aquilina, sub-article 1 of
article 588 places advocates, legal procurators and clergymen as enjoying what he calls absolute privilege.

2.2.2 The qualified privileged

Sub-article 2 Article 588(1) and (2) of the Code of Organisation and Civil Procedure Chapter 12 refers to accountants, medical practitioners, social workers, psychologists and marriage counsellors. Aquilina (2011a) contends that these professions enjoy what he calls qualified privilege because only the court can absolve them from confidential information that they may have received. It is best for the professions falling in Aquilina’s ‘qualified privilege’ category to be also acquainted with article 257 of the Criminal Code, Chapter 9 of the Laws of Malta, before breaching confidentiality. These persons include counsellors; they have to weigh the pro and cons before taking their preferred action. For ease of reference I am reproducing hereunder the wording of this article.

Article 257 of the Criminal Code places confidentiality on a level of highly protected expression. It explicitly shows that professionals that mistreat confidential information incompetently will on conviction be liable to high penalties. If legal grievances are calculated by the severity of the penalty which is ‘a fine (multa) not exceeding forty-six thousand and five hundred and eighty-seven euro and forty-seven cents (46,587.47) or to imprisonment for a term not exceeding two years or to both such fine and imprisonment’ can be considered quite grievous in my opinion. In fact, in the case of Malta, Grech (1994) explains that the quantum of penalty is simply on the inappropriate breach of entrusted intimacies and not just on the damages that may be caused by the inappropriate disclosure.
INFORMATION VIGNETTE 1: The Criminal Code, Chapter 9

Article 257 “If any person, who by reason of his calling, profession or office, becomes the depositary of any secret confided in him, shall, except when compelled by law to give information to a public authority, disclose such secret, he shall on conviction be liable to a fine (multa) not exceeding forty-six thousand and five hundred and eighty-seven euro and forty-seven cents (46,587.47) or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.”

“Provided that, notwithstanding the provisions of any other law, it shall be a defence to show that the disclosure was made to a competent public authority in Malta or outside Malta investigating any act or omission committed in Malta and which constitutes, or if committed outside Malta would in corresponding circumstances constitute –

(a) any person who is in breach of the articles mentioned in article 22(2)(a)(i) of the Dangerous Drugs Ordinance Chapter 101:

(In short – cultivation, possession – not for own use, conspiracy, transportation, selling, distribution of persons, material, equipment or drugs or transacts drug money or property. On conviction shall be guilty to life in imprisonment (see also provision re: age, conduct, etc)

or

(b) any of the offences referred to in article 120A(2)(a)(i) of the Medical and Kindred Professions Ordinance Chapter 31:

(In short – selling or dealing in drugs, conspires or financing drug conspiracy, possession not for own use, transportation, selling, distribution of persons, material, equipment or drugs or transacts drug money or property, on conviction shall be guilty to life in imprisonment (see also provision re: age, conduct, etc)

or

(c) any offence of money laundering within the meaning of the Prevention of Money Laundering Act Chapter 373

Source: Justice Malta

The three exceptions provided in article 257 with regard to defence when breach of confidence is required are specifically in relation to drug trafficking. There is no legal requirement for the person receiving intimate information on such issues to inform
authorities of such criminal activity. Article 257 states that when an investigation on drug trafficking or money laundering is underway, counsellors who happen to become depositories of intimate secrets if ‘compelled by law are obliged to give information to any public authority’.

2.2.3 Professional secret

What is really secret according to law? Whilst the law is silent on giving a definition other than being simply ‘information’, the Professional Secrecy Act gives more importance on the context rather than the content where and to whom, and why that information is given. The Professional Secrecy Act Chapter 377 Article 2(3) states that "Professional secret" or "secret" in this Act refers to information which falls under any of the following three categories:

a. information which is to be considered secret under a specific provision of any law;

b. information which is described as secret by the person communicating the information to a person falling within the scope of article 257 of the Criminal Code;

c. information which has reasonably to be considered as secret in view of -
   (i) the circumstances in which the information has been communicated and received,
   (ii) the nature of the information, and
   (iii) the calling, profession or office of the person receiving the information, and of the person giving the information, where applicable.

The Professional Secrecy Act, Chapter 377 of the Laws of Malta (see Appendix 13), opens with the words “If any person...” According to one of the provisions of this article the phrase

\^ \^ bold mine
‘any person’ ‘shall not apply to the assisting lawyer, clergymen and to the medical profession’ the remainder of the population, including counsellors, are not exempt from this legal obligation; that is there is no illegality if the person was ‘compelled’ by a competent authority to divulge information.

The Professional Secrecy Act regulates professions that function as ‘depositories of any secret’. Grech (1994), in his extensive work ‘Professional Secrecy in Malta’ considers information received under the conditions of professional secrecy as being confidential and law binding. Grech (1994) also regards professional secrecy as a ‘powerful tool’ in the hands of professionals ‘to be used diligently in the interest of the client’ (p. 25). This privilege in the hands of the professional carries a legal ‘duty to preserve as confidential all information’ as being the expected right of the client (Grech, 1994, p. 41; see Anderson, 2002).

Grech’s (1994) study on this Act happened took place during the time of its inception. He argues that it is futile to have a defending lawyer obliged to breach a client’s story. He sees that it would be a direct attack on the principle of confidentiality. Grech also seems to be against extending this privilege to other professions other than the law prescribes; however I beg to defer.

2.2.4 Right but not duty

Apart from the proviso to article 257 of the Criminal Code, article 535 (1) of the same Code expressly states that ‘any person may give information to any officer of the Executive Police
of any offence liable to prosecution by the Police *ex officio*\(^9\), of which such person may have in any manner become aware’. Article 535 gives each common citizen a *right but not a duty* to inform police about any known illicit activities.

INFORMATION VIGNETTE 2: Professional Secrecy Act article 6A – legally permitted types of disclosure of professional secrets

(a) a person disclosing in good faith secret information in the course of and for the purpose of obtaining advice or directions from the body regulating his profession;

(b) a person disclosing in good faith secret information to a public authority or before a court or tribunal to the extent that is proportionate and reasonably required for the specific purpose of:

(i) defending himself against any claim with regard to professional work in connection with which the secret information has been obtained by him; or

(ii) initiating and maintaining judicial proceedings seeking the recovery of fees or other sums due to him or the enforcement of other lawful claims or interests

Source: Justice Malta

In the case of counsellors receiving intimate information that is criminally linked, according to these articles, *may* choose to disclose such information to the executive police or not. This does not cover where the law expressly places a mandatory measures or demands. This is quite similar to when someone resorts to moral obligations that many ethical standards cater in the absence of a specific law. Also, departmental policies may also aid or burden one’s moral obligations.

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\(^9\) *Ex officio* – on their own accord
2.2.5 Confidentiality and mandatory reporting in Malta

When I mention mandatory reporting in this study I am referring to the laws that compel every citizen to report an infringement of a particular law. In the United Kingdom, for example, there are no laws that mandate counsellors to divulge confidential information except where terrorism is concerned (Jenkins, 2007, Mitchels and Bond, 2010). Other actions of therapist breaching confidentiality in United Kingdom are all derived either from the organisation employing them or from the personal inclination ‘to act in an ethical responsible professional way to prevent harm to the client or to third parties, if not required to do so by law’ (Jenkins 2007, p. 109).

In contrast and scope, in certain states in the United States of America the Tarasoff principles are applied. In short, the counsellor has to assess the client about to harm another. The counsellor has an obligation to warn the third person about to be harmed by the client and also inform the third party if the client is about to cause damage to the third party’s property (Jenkins, 2007). To date, Malta has no laws that demand mandatory reporting. The source to breaching confidentiality in cases of suicidal allegations, self-harm and harm to others do not emerge from a body of laws in Malta.

Cited also by Jenkins (2007) the sentence passed in the case Yuen Kun-Kue vs. Attorney General of Hong Kong 1988 according to McKendrick (2000, p. 109) the presiding Judge, Lord Keith, declared that there is no legal obligation for a person to interfere with anything illegal acts of another. The Tarasoff principles applied in certain US states and the Yuen
Kun-Kue case law are two extremes in realm of breaching or non breaching confidential information.

In the first part of this literature review I made reference to special category of persons that because of their nature of work they may have obligations imposed by law to breach confidentiality.

In my opinion, the category of persons that have a wider scope of mandatory reporting of law infringements is by far that of police officers. Article 346(1) of the Criminal Code Chapter 9, shows that police officers are duty bound not only to prevent and preserve peace but also to investigate already committed crimes. In doing so they are also obliged to bring to justice both the principals and accomplices. Note, the Police Act Chapter 164 article 12 stipulates that every police officer is to carry out his or her duties even when off duty; in other words 24x7 (see Appendix 17).

Now imagine a police officer, who is also a counsellor, where a client confides information which qualifies as an infringement of the law. Failure to proceed in ex officio cases will not only render that officer liable for shirking responsibility and also of breaking the law itself. This places counsellor police officers on one end of the breaching confidentiality spectrum, whilst priests and lawyers are on the other extreme. Breaching confidential information released in confessionis will render the priest’s act scandalous and the priest liable to excommunication from the church. All other special people fall somewhere between this continuum of breaching of confidentiality.
Normal citizens, like counsellors, are only obliged to breach confidentiality when demanded by an authority and also in the following circumstances.

2.2.6 Crimes against the safety of the Government

Crimes against the safety of the government are not exclusive to the local context. Both democratic and non-democratic countries have laws to protect their sovereignty. In the case of Malta articles 55 to 62 of the Criminal Code pertains to government’s protection. Article 61 of the Criminal Code refers to crimes mentioned in all preceding articles 55 to 59. In short article 55 refers to the assassination, injury, or removal of the liberty of the President of the Republic of Malta. Article 56 deals with a coup d’etat, and article 57 dealing with crimes of conspiracy against the State. Article 59 also makes it illegal to carry out propaganda that provokes the perpetration of such crimes against government’s safety.

INFORMATION VIGNETTE 3: Criminal Code Chapter 9 Title 1 Bis

Article 61:
Whosoever, knowing that any of the crimes referred to in the preceding articles of this Title is about to be committed, shall not, within twenty-four hours, disclose to the Government or to the authorities of the Government, the circumstances which may have come to his knowledge, shall, for the mere omission, be liable, on conviction, to imprisonment for a term from nine to eighteen months.

Article 62:
The provisions of the last preceding article shall not apply to the husband or wife, the ascendants or descendants, the brother or sister, the father-in-law or mother-in-law, the son-in-law or daughter-in-law, the uncle or aunt, the nephew or niece, and the brother-in-law or sister-in-law of a principal or an accomplice in the crime so not disclosed.

Source: Justice Malta

10 Bold and Italics mine
Even the attempt of committing such crimes against the safety of the government is considered a criminal offence. In contrast article 60 is a provision for turncoats exempting them from punishment if they inform the competent authority about the subversion prior to its taking place. Interesting that article 62 provides that any family member who knows about such crimes to be committed by other family members is exempted from such obligation to report.

2.2.7 The Prevention of Contagious Diseases

INFORMATION VIGNETTE 4: Duty to report diseases

Prevention of Disease Ordinance Chapter 36, Article 10

(1) For the purposes of articles 5 and 9 inclusive, the expression “disease to which this Part of the Ordinance applies”, means any of the following diseases, namely - plague, small-pox, cholera, diphtheria, membranous croup, typhus, yellow fever, leprosy and epidemic cerebro-spinal meningitis.

*(2) For the purposes of articles 7 and 9, the expression “disease to which this Part of the Ordinance applies ” means any of the infectious or contagious diseases hereinafter mentioned, namely - scarlatina or scarlet fever, typhoid or enteric fever, malarial fever, undulant fever, puerperal fever and the diseases known as measles, erysipelas, varicella, influenza, whooping cough, hydrophobia and tubercular phthisis.

Subsidiary Legislation 36.35

Acute Encephalitis, Acute Flaccid Paralysis, Congenital Rubella Syndrome, Creutzfeldt - Jakob disease, Leptospirosis, Meningococcal Septicaemia (without Meningitis) and Mumps

Public Health Act Chapter 465, Article 18

(1) Any person who becomes aware of any fact or situation which he reasonably ought to believe to be a public health risk or a potential public health risk shall, as soon as he becomes aware of such risk, inform the Superintendent.

(2) Any person who fails to comply with the provisions of sub article (1) shall be guilty of an offence against this Act.

Source: Justice Malta

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This is the second and only article where there is direct obligation on a citizen to inform the competent authorities of such infringement of the law. Regarding the risks mentioned in article 18 (1) of the Public Health Act can be obtained from the Prevention of Disease Ordinance Chapter 36.

Needless to say that the risks mentioned in the Public Health Act falling under mandatory reporting is due to curb the chances of the spread of diseases. The same Ordinance mentions persons such as those in the medical field, school employees, ships Captains and Hoteliers to name just a few that fall in the category of conditioned persons. They are conditioned because they are bound by law to breach such occurrence to which failure carries legal punishment. Nonetheless, communards have the obligation to report such situations as well.

2.2.8 The Official Secrets Act

INFORMATION VIGNETTE 5: Duty to Collaborate on Demand 1

Official Secrets Act Chapter 50 Article 22

‘It shall be the duty of every person to give on demand to any Police officer not below the rank of inspector appointed by the Commissioner of Police for the purpose, or to any member of the armed forces of Malta engaged on guard, sentry, patrol, or other similar duty, any information in his power relating to an offence or suspected offence under this Act, and, if so required, and upon tender of his reasonable expenses, to attend at such time and place as may be specified for the purpose of furnishing such information, and if any person fails to give any such information or to attend as aforesaid, he shall be liable, on conviction, to imprisonment for a term not exceeding two years or to a fine (multa) or to both such imprisonment and fine’.

Source: Justice Malta

32
This Act is not directly binding on citizens being recipient of official secrets except by legal demand. It gives executive powers to the competent authority that under reasonable suspicion one may be in possession of classified information who is an inappropriate recipient. A recent foreign case is the now famous Wiki-leaks (Meikle, 2010) and more recently the Vatileaks cases (Ehlers, 2012).

2.2.9 Duty to collaborate with police investigation

In this sub-article one finds the obligation that every person has to collaborate with police investigations with the exception of when such collaboration will incriminate that person. This is similar to the obligation demanded by the court to a witness unless such evidence does not incriminate the same witness.

INFORMATION 6: Duty to Collaborate on Demand 2

Criminal Code Chapter 9

Article 355AD (4)

‘Any person who is considered by the police to be in possession of any information or document relevant to any investigation has a legal obligation to comply with a request from the police to attend at a police station to give as required any such information or document:

Provided that no person is bound to supply any information or document which tends to incriminate him’

Source: Justice Malta
2.2.10 Mandatory reporting and the administrative policy

The above are the only mandatory reporting provisions that exist in Malta. However that said, there are these underlying currents that are simmering to enforce mandatory reporting on a wider scope of breaches of certain laws. Until mandatory reporting becomes a legal obligation there are other mandatory reporting demands but these only have policy binding nature.

For the purpose of education and welfare a child is considered to be a person under 18 years of age according to article 34 (1) (g) of the Constitution of Malta. The Education Act Chapter 327 provides that the Directorate of Education should create policies regulating the Safe School Programmes. The Anti-bullying (2000), Child protection (1999), and Anti-substance abuse (2001) policies although in my opinion these are outdated, regard the safety of children as paramount and oblige all employees from the teaching and non-teaching staff, working with children who, even on suspicion, report any abuses to the highest school authority for the necessary action (Appendix 18).

These policies, which are only administrative in nature, even include the procedures to be taken for this legally based breach of confidences which are in line with both the Constitution article 38(2)(a) and the Education Act\(^\text{11}\) which provide for the “services required to deal effectively with issues such as good conduct and discipline, of child abuse, of bullying and of drug abuse”. On policies Bond (2010) states that there will be times when a counsellor is faced with a dilemma where policies can contradict one’s personal

\(^{11}\)PART II of the Constitution and the Functions of Directorates of Education according to the Education Act sub article (n) of article 11
values and this may be experienced in the time factor taken to breach confidentiality or otherwise. There is this risk in such mandatory reporting, as the same policies acknowledge.

As cited in McLeod (2007, p. 395), it takes the personal qualities of empathy, integrity, resilience, respect, competence, fairness and courage for a counsellor to take a stand against the perpetrator for the sake of protecting the abused child. Having said this, the mentioned policies also recommend that the reporting body, in our case the counsellor, has to apply prudence and tread cautiously when forwarding a report. Divulging of information has to be determined by the obligations set out in the policy and also on the level of further exposure of the child or young person to abuse.

Put it simple, it is based on the sharing ‘of what needs to be known’ information only. Giving information more than required will consist of irregular breach of confidence. I consider sharing information that need not to be known would be an irresponsible act and contravenes legal, ethical and professional standards. On the same lines, many authors (example Mitchels and Bond, 2010 and Jenkins, 2007) agree that confidentiality can be compromised in situations where the client is not in a state to maintain safety to self, the safety to others, and where there is the need for the counsellor to give evidence in court.

In line with protection of others the proviso of article 32 of the Constitution of Malta states that ‘the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest’. In other words, although it does not obliges any counsellor to breach privacy it limits privacy or intimacy to the point where it conflicts on the right of others’ privacy.
At any rate, in her book on group therapy, Posthuma (2002) encourages counsellors leading groups to refrain to offer absolute confidentiality to clients especially when disclosing information of harming self and others. This is also the case in individual therapy. Bond and Mitchels (2008) advice counsellors to act cautiously in situations when a client discloses suicidal or self-harm ideations as in certain cases it can place the counsellor in a legal litigation.

2.2.11 Confidentiality as a protected data

Data in counselling and giving evidence are related to confidentiality. Witnesses who store data about events may have to be produced in court if relevant to the case being heard. A witness in court is the person who is giving evidence viva voce. The court may order the witness to produce any other relevant information written or otherwise to be presented in court as evidence (see Criminal Code Chapter 9 Articles 636, 637 and 643).

Presenting material in court may take a whole study relating to what one should write during or about sessions, where and for how long data should be stored. Should clients know what is being written about them? What does the Data Protection, Chapter 440 of the Laws of Malta has to say in regards to data? These are all legitimate questions to reveal what the laws say about content data, data storage, data as evidence, etc. It is impossible to cover all this in this study as in my opinion it merits a full research in the subject otherwise it will be too superficial to cover. A list of principles on report writing adapted from Bond and Sandhu (2005) are found in Appendix 20.
PART III

THE ETHICAL AND PHILOSOPHICAL CONCEPTS OF CONFIDENTIALITY

2.3.0 Confidentiality: Larger than the Client

According to Cauchi (2002) the ethical reasons regarding confidentiality are the patient’s right for privacy (p.312) and that confidentiality is more essential in genetics than in any other health related areas (p. 19). He gives the following three important reasons why information related to hereditary conditions or diseases should be kept classified:

1. If this sensitive information leaks it can expose the patient for life
2. If this sensitive information leaks it exposes the family of the patient
3. This can lead the patient and his or her family to stigmatisation

At all cost, Cauchi continues that the consultant must be sensitive to such information and should take into consideration responsibility of when the patient needs to disclose results to family members for preventive measures. I beg to differ with Cauchi for the sole reason that he relates these three points of confidentiality as being ‘more’ appropriately applied to the genetic realm. In my opinion, they are also essential to social sciences such as counselling. Bond and Mitchels (2008) go further than the self and the family. They insist that when counsellors come to the point of dilemma to disclose information or not, they have to assess the situation of whether the protection of the client overrules the safety of the public or of the common good. In the case of Malta, this is only binding where policies are part of the conditions of employment and at the level of contract.
2.3.1 Confidentiality and the contractual stage of counselling

In Maltese we have an old saying ‘bniedem avzat nofsu armat’ roughly translated as a pre-warned person is pre-armed person, connoting the state of awareness by preparedness. This saying makes sense to this study because when a contract is being created all parties need to know what they are agreeing upon. An agreed upon contract is binding on all parties and the ones agreeing need to understand clearly what they are being bound by. Contracts are legally binding (see Civil Code, Chapter 16, Articles 982, 992, 1006 and 1009) and legally the requisites do not explicitly include being a written one, thus verbal contracts are likewise binding.

The initial stage of counselling is in fact the contract stage. Both the client and the counsellor need to agree upon certain boundaries and principles especially on those aspects where a compromise is not possible. Anderson (2002) informs her readers that it is unethical to proceed with counselling if such information is not made known loud and clear to the client.

As for the method of communicating this importance, Mitchels and Bond (2010) and Bond and Mitchels (2008) note that the conditions of confidentiality can either be verbalised or produced as a written contract. The same authors however prefer to state that it is much safer to be in written form to avoid the counsellor becoming liable lest the client disputes what was really said verbally; authors bring up an example that a client might claim that the conditions of breaching confidentiality has been violated. Both authors add that a written
contract can be used as a proof by the counsellor to have acted within the contract’s legal and ethical parameters.

In fact, Bond (2010) also notes the importance to communicate with the client, in the initial contractual stage, that confidentiality may be breached even when required to assist in investigation or give evidence. Even Grech (1994) suggests that since professional secrecy is legally binding, it is wise for the confidante to ask in writing the client’s consent that breach of confidence is possible when the law courts are involved.

It is only ethical for the counsellor to inform the client about this possibility. This will serve two purposes, the first being to help the client make an informed choice of whether to disclose incriminating information or not and secondly this will save the counsellor from being liable towards the client on breach of contract (Grabois, 2008). This may also be the case in our local legal arena.

2.3.2 Confidentiality and Codes of Ethics in the absence of Law

As stated elsewhere, legal obligation to breach confidentiality varies from full privilege of not to divulge information to full absolution from confidentiality. As seen in detail, there is nothing in the law that obliges a counsellor to breach confidentiality except where the national security is concerned and where there is a national health risk.

Also, when receiving a notification or summons in court a counsellor is informed upfront that he is released from confidentiality. In actual fact, this is tantamount to mandatory
reporting. This is probably an abuse of the law, especially when it often deals with private matters such as a marriage separation cases and there is no harm to self and third parties. It was likewise shown that mandatory reporting to date is still at administrative policy level for governmental organisations. As for NGO’s and other private organisations hiring counsellors as part of their employee programme private regulations may also exists. In absentia of certain legally binding measures, many counselling and kindred organisations or associations contend to formulate their own ethical standards in order to compensate for this legal deficit.

The Third Schedule of the Health Care Profession Act, Chapter 464, for example, refers to a list of professions which are regarded as kindred or complimentary to medicine. The closest profession in the list to counselling is psychotherapy. The social workers and psychologists have a separate Act – one for each - that regulates their professions. Irrespective of which profession the corresponding laws dictate that each profession should have a Code of Ethics which legally is indirectly binding.

Indirectly because the contents of the code are not listed in the law per se but only referred to as binding. Another similar example where professionals’ ethics are legally binding is the Commission for the Administration of Justice Act, Chapter 369. This Act regulates the process and procedures that professionals in the legal arena from legal procurators to judges take when ethical grounding for decisions, even to divulge certain information is required.
Looking at the framework of certain Code of Ethics mentioning confidentiality may have given more light on the ethical standards of this principle. For example, the Malta Association for the Counselling Profession’s Code of Ethics obliges us counsellors (as members) to respect clients’ confidences and protect their secrets, even after the counselling case is closed. It is like binding the counsellor that the received secret is never revealed; as if saying till death do us part and beyond.

Using Tim Bond’s title, the person taking the role of a “talking therapist” come to a point where they have to juggle between three options in order to come to a decision. Sometimes these choices do not always tally between them. This creates in the therapist dilemmic elements. Firstly, the laws are not very clear on what contents can be disclosed when this is demanded and to complicate further there are laws which prohibit such disclosure. Secondly, Ethical Codes are just guidelines that professionals may or may not apply. And thirdly, in today’s challenges certain laws protect counsellors becoming liable for having inappropriately breached confidentiality, even if not intently doing so. To add insult to injury, it is all left in the hands of subjective interpretation. In the absence of a trustable structure, counsellors tend to rely much on their moral obligations.

2.3.3 Confidentiality and natural moral obligations

Many existing laws and ethical guidelines are based on a collective regulated understanding determined by the signs of the times. However, not all natural laws find their way into the supra-legal system. To a certain extent, there are still times where we have to rely on our internal system of knowledge. In his book “Natural law and natural rights” Finnis (2005)
explained how natural law came about. It is there to help the person come to a sound decision which more often than not the principle of the common good is taken into consideration. Mifsud Bonnici (2008) shows that the basic ethical principle of regulating human behaviour is determined either by morality or by law.

What meaning one gives to taking a ‘good’ action is normally a subjective one and it is also influenced by what others say about the decision (Finnis, 2005). This is reflected in Mifsud Bonnici’s paper stating what constitutes morality are the written or unwritten rules of one’s behaviour whether they are good, bad or indifferent. Thus our subjective decisions may well be ‘widely shared or commended in one’s community’ (Finnis, 2005, p. 71). Listening to what others have to say will certainly strengthen one’s clear view to decide. One could therefore confirm or not what his or her original course of action would have been. Having reflected on the possible views and consequences hopefully the counsellor will eventually come out with a definite decision.

Finnis (2005) contends that the style we use to make decisions is based on how our conscience was nurtured in our upbringing. Referring to St Thomas Aquinas teachings, Mifsud Bonnici (2008) notes that one’s practical moral judgments or decisions that strengthen our “inner voice (p. 6) is in fact the notion of our conscience.

Those who have experienced love and care may well use ‘reasonable mores’ (Finnis, 2005, p. 125) and make sane decisions; giving more authority to what is moral. Our inner moral principles form from strong external influences such as rational philosophical convictions.

\(^{12}\)Italics mine
and religious doctrines (Josephson Institute, n.d.). In turn our moral obligations develop according to these influences. According to the same source, these principles are the guide to one’s decision taking. Irrespective of what the written laws of committing or omitting nature, philosophical moral principles always prevail (Josephson Institute, n.d.).

One has to find a balance between self-interest and the well being of others. Sometimes, according to Finnis (2005) one has to sacrifice the self for others to grow. Curbing egoistic values, however, is one thing and to maintain the self is a right of identity. As seen above the socio-cultural upbringing context and later consequential and experiential exposure play a big part of how we perceive or interpret situations.

One of the prerequisites to become a counsellor is an inclination to reach out and help others. Doubtless to say, the dilemma that counsellors face is when the common good and that of the good of client collide. Since the law is silent, unless a health or government risk is imminent, we, as persons, tend to turn to see what our conscience has to say to us (Finnis, 2005).

If a counsellor’s moral obligation says that breach of confidentiality is necessary but is prohibited by law, the breach will take place. On the other hand if the law demands breach of confidentiality and the counsellor’s moral principle says otherwise then confidentiality is maintained. Even if in each of these examples given above carries a penalty, idealistically speaking, counsellors’ decision will not move from their moral principles if highly pervasive to their ethical convictions. Having said this, in the main, moral principles uphold laws,
contracts and other commitments that the moral principles adhere to (Josephson Institute, n.d.).

Normally, when initially counsellors become aware of a dilemma, they see other’s views and the actions they took in similar situations. We can discuss it in supervision and with any other relevant stakeholders, such as other professionals. We also may search and educated ourselves in relative laws or seek legal advice. We also check out our associations’ ethical guidelines. We can always tap on our past experiences and rely on our moral principles within us. In the final moment of decision counsellors may experience that feeling of aloneness when taking that crucial step. (Appendices 21 and 22 list five principles that practitioners may consider before taking the crucial step followed by the 7-step Ethical Decision Making Model adapted from a number of authors by Forester-Miller and Davis (1996)).

2.4.0 Conclusion

In a nut shell, confidentiality is so crucial to the counselling profession that persons seek help in counselling to enhance their life skills in order to be able to deal with life’s challenges and obstacles (Bond, 2010 and McLeod, 2007). McLeod adds that in counselling clients “invite and allow another person” (p. 15) to build a professional rapport that enables them to self-disclose any issues troubling and are too difficult for them to solve on their own. McLeod also posits that the counsellor has to create that atmosphere where it encourages this client’s endeavour to share confidences respecting the client’s own pace, values and other personal convictions.
As seen above, self-disclosed information by a client in counselling includes many elements that are regarded too personal to share with other people. It is a privilege, so to speak, that a client decides to share his or her intimacy with a counsellor who in the initial stages would be a total stranger. It is here where the professional counsellor needs to know what information is reportable and what is to be kept from being divulged. The client needs to know and understand confidentiality and its limitations *a priori* to make an informed choice on whether to accept the counselling service or not.

Certain cases are referred to protection services whilst others do not merit the level of disclosure to third parties. Irrespective of whomever the client is an adult or a child, a male or a female, with whatever opinions, values and orientations she or he has to be respected and treated with equal fairness especially where confidential issues are concerned. To render counselling as a profession, all the ethical standards and legal boundaries have to be maintained at all times; especially those concentrating on confidentiality.

Save the mandatory reporting requested where national security, public health risk and under the Education Act’s policy apart from the legal requirement to give evidence by a court or tribunal, counsellors are left to their freewill, whether to infringe confidential information received under the conditions of therapy. No other legal obligation currently exists and so counsellors have to rest upon their moral judgments. Bond (2010) advises counsellors that over the years of practicing it would be wiser to bring personal morals and ethical values closer together in order to minimise situations of ambiguity in their profession.
A law regulating the profession of counselling is imminently necessary as this will certainly bring our profession to the legal status that it deserves. Having a profession regulated by law will increase the measure of protection both to clients seeking our service and to our profession preventing it from being hijacked by other non-related professions or by what I call pseudo-counsellors.
CHAPTER THREE

METHODOLOGY

I keep six honest serving-men (they taught me all I knew); their names are What and Why and When and How and Where and who.

Rudyard Kipling (79)

3.0.0 Introduction

This research study attempted to explore and describe the meaning given by participants to their lived experience of having disclosed or retaining from authorities sensitive information entrusted to them by their clients.

A phenomenological approach was chosen for this research because it deals with the perception of the concept under scrutiny. In line with this approach, I analysed data by using Interpretative Phenomenological Analysis. Furthermore, the reason why triangulation of data was used will also be explained later in this chapter.

In this methodology chapter I described a number of features, such as the selection of participants, the method of obtaining the research data and the processes used. The raison d’être of applying such method is also discussed. To sum up, the opening quote from Kipling tends to encapsulate the essence of what is being communicated in this chapter.

3.1.0 Why a phenomenological study?

Although phenomenology recently was being widely used in psychological, human and social sciences (Creswell, 1998; Birkbeck, 2011), its philosophical roots are owed to Husserl’s construct of philosophical science of consciousness (in Birkbeck, 2011, para 3). It deals with the subjective nature of the meaning one gives to his or her experience(s) and the intentionality of one’s actions. In other words, the way individuals experience their environment is highly subjective to each and every one of them depending on how each perceives it. Further to this philosophical outlook, phenomenology deals with the study of phenomenon or phenomena.

Creswell (1998) defines phenomenological study as an approach describing “the meaning of the lived experiences for several individuals about a concept or the phenomenon” (p. 51); A phenomenon can be defined as “a mental event” referring “to a whole, intact, meaningful experience” (Hergenhahn, 2001, p. 248). In this study, the lived experience or experiences was centre on whether confidentiality can be breached or not.

As pointed out by Creswell (1998), one of the important issues for a researcher using the phenomenological approach is to have a sound understanding of the philosophical background of how people experience or perceive their phenomena. Another concept referred to by the same author is the ability of the researcher to bracket him or herself off from the participant’s lived experience. This was crucial for this study lest it be biased with the author’s, being the researcher, preconceptions of the phenomena being studied.
In other words, the researcher has to bracket off him or herself and refrain from influencing the informants’ responses regarding their phenomenon. This important concept of bracketing, also referred to as epoche or transcendental phenomenology, will result in having data which reflects the participants’ voice or meaning given to their lived experience (Creswell, 1998) and not that of the researcher.

### 3.1.1 Interpretative Phenomenological Analysis

Since my research study concentrated on participants’ lived experiences, the approach preferred to analyse the collected data was that of Interpretative Phenomenological Analysis (I.P.A.). Developed by Jonathan Smith in the nineties, I.P.A. centres on participants’ attitudes, beliefs and personal reflections on the phenomena under scrutiny.

More clearly, I.P.A. explores “how people make sense out of their major life experiences” (Smith et al, 2009, p. 1). This idiographic element and the reflection of their experience in a phenomenological way (Smith et al, 2009) makes I.P.A. an excellent approach for this study. As a researcher using the I.P.A. approach I analysed details from participants’ major experiences of when they had to face the dilemma of whether or not to breach confidentiality comprising clients’ self-disclosed intimacies entrusted to them during counselling. Participants’ experience extended to include the consequent effects either action left on the therapeutic relationship.

(See Information Vignette 7 for a step by step procedure of how to use the I.P.A. method).
INFORMATION VIGNETTE 7: Five stages of IPA

1. Reading for meaning. Upon reading every individual transcript I planned to have a collection of idiographic reflections and from this collected data I searched the meaning they gave in relation to the discussed phenomena. It is important that I become familiar with the given data.

2. Identifying themes. Here I looked through the participant’s point of view and at this stage I avoided analysis. At this stage I commenced in identifying themes formulated from the participants’ lived experiences. Making sense of the data acquired facilitated the coding of such themes.

3. Structuring themes. I then clustered the themes taken by creating superordinate and subordinate themes. Some themes eventually were absorbed into other themes and those that were irrelevant for the research were removed.

4. Producing a summary table. At this stage I produced a table of themes and clusters. At times I quoted from the transcript to give these themes weight. Here I also removed irrelevant themes which I presumed to be too idiosyncratic and marginal. I placed the participants’ responses in a column on the left hand side of the table. From this information I could easily determine the relevant themes pertaining to the research questions.

5. Integrating case. At this stage I gathered the themes and integrated them into master themes. In turn these master themes also had a number of subthemes. Master themes captured the meaning of the phenomenon for all participants.

Source: Langdrige (2001) (pp. 286-288)

The reason why I. P. A. was preferred was because it shed new light on how the ‘phenomenon of breaching or retaining confidentiality’ was separately and subjectively perceived or experienced by each and every participant. It did not try to investigate the objectivity of the phenomenon per se (Smith, 2011). As seen above, the I.P.A. approach investigated the phenomenon of participants. Furthermore, the method I chose, that of collecting the necessary data, was semi-structured interviews. This method of data collection was preferred from other methods on the basis that no local data existed to date relevant to this area of research and thus I had to build the required data base through
interviewing. Furthermore, the questions used in semi-structured interviews compliments well with the chosen approach.

3.1.2 The theory of interpretation

A fundamental element of I.P.A. is hermeneutics. To put it in simple terms, hermeneutics is the ‘theory of interpretation’ of participants’ lived experience (Smith et al, 2009, p. 3; Smith, 2011). The process of interpretation depended on the ability of the researcher to make sense out of how the participants’ perceived their lived experience. Smith et al (2009) calls this process ‘double hermeneutics’ (p. 3).

This hermeneutic aspect of phenomenology placed the approach in the realm of qualitative research. Etherington (2001) illustrates qualitative research as heuristic in essence. Linking this to this study, participants tried to make sense of the meaning they attributed to their lived experiences. This was reflected in the response they gave when answering the questions put to them. Since subjectivity fell within the ambit of I.P.A. one cannot in actual sense expected to obtain objective answers (Smith, 2011).

For an effective qualitative research, the voice of the researcher needs to be heard, the researcher’s relevant experience has to be shared with that of the participants’ (Etherington, 2001). Creswell (1998) points out that one of the most challenging aspects that researchers need to assess in a phenomenological study is that of identifying the right moment during the interview to interpolate such an action.
3.2.0 Approval and clearance

Prior to the commencement of this research it was necessary to obtain approval and clearance from the University of Malta’s Research Ethic Committees and that of the Faculty of the Education. Once the clearance by the boards was given I commenced with the necessary preparational procedures of contacting participants and completing the interviews with them.

3.3.0 Choice of research participants

The type of sample I required for this research was a purposive one. The reason behind choosing a purposive sample was because participants had to satisfy a number of pre-set criteria. In my case participants were mainly course colleagues with the exception of one who I already had acquaintance with through my place of employment. The following is a list of the seven criteria required to participate in this study.

1. Were qualified counsellors (first part of cohort)
2. Other qualified persons who practiced professions kindred to the counselling (second part of cohort).
3. They had to have at least one experience in giving evidence in court as witness.
4. They had to accept to being interviewed.
5. Had to accept to having their interview audio recorded.
6. Accepted that themes will be elicited from their interview, which themes will be used for the study.
The cohort consisted of six participants all qualified and with extensive experience in their profession. Three participants were counsellors. The other three were made up of a counselling psychologist, a clinical psychologist and a social worker. Note that the social worker was reading a Master’s Degree in Counselling, during the interview. Originally I ventured to call six counsellors for the interview, however only three replied to the Recruitment Letter. The second part of the cohort had to be kindred to the counselling profession and had to satisfy the same criteria of the first part of the cohort.

3.4.0 Semi-structured interviews

Langdridge (2001) contends that a successful interview is subject to the use of appropriate language, neutrality and confidentiality assurance. Another characteristic of having an effective interview is that the interviewer has excellent listening skills; in fact the majority of the interview time should be taken by the participants’ narration.

Langdridge (2004) shows that interviews in qualitative research maintained the following characteristics.

1. Were a flexible method enabling researchers to collect detailed conversational material for analysis
2. Can be audio recorded.
3. Able to gather data about a topic being studied.
4. Able to gather data about participant’s feelings, thoughts, and beliefs.

5. Had both pre-planned open ended questions and the possibility to create questions generated by the interview itself to elaborate on the discussed topic.

Zorn (n.d.) contends that semi-structured interviews are both flexible in nature and at the same time focus on eliciting answers from interviewees. In fact, this method was used because the researcher is left in a flexible position where he or she can probe further into the particular topic being discussed by using what Cohen and Crabtree (2006) call ‘topical trajectories’. Semi-structured interviews were ultimately used to elicit the subjective meanings and experiences that participants gave to the presented topics. By not being rigidly tied to the planned list of guiding questions, it placed the researcher in a better position to move away from the guiding questions in order to focus more on participants’ idiosyncratic perceptions and ideas subjectively (Zorn, n.d.).

The Sociology Organisation of the UK (n.d.) places this as being an advantage for participants giving them ‘time and scope to talk about their opinions on a particular subject’ (p. 1) or topic. In fact, the above Organisation gave deep and meaningful responses and not just simple answers on their lived experience. This meant that I, as the researcher, felt more confident that the deep information elicited about the phenomenon being studied was not superficial. It also gave the interviewer the opportunity to decide what to focus on and on what to explore further.

The same Organisation highlights that understanding the ‘point of views’ of respondents was the raison d’être of this research instrument. Furthermore the open-ended questions
asked were either pre-planned or emerged from the responses given by the participants (Sociology Organisation, n.d.). Regarding questions, Zorn (n.d.) and the Sociology Organisation (n.d.) suggest that through the use of open and non-leading questions, the interview is allowed to be more effective thus rendering it more reliable and credible.

An important characteristic of semi structured interviews was that it allowed rapport between the interviewer and interviewee to form. This depended on the ability of the researcher to create this warm environment. Another benefit of semi-structured interviews was that the researcher also takes note of the participant’s non-verbal communication, most notably their reactions when asked certain questions.

On one hand I tried not to influence the participant’s response by my body language and at the same time I was also reading theirs. Non-verbal messages were useful because they gave out clues on what questions to use in order to be able to elicit the hidden facets of respondents – their thoughts and feelings (Sociology Organization, n.d.).

One of the main disadvantages mentioned by the Sociology Organisation of UK (n.d.) with semi-structured interviews was the possibility of eliciting inappropriate information from participants. This can be done through lying, inaccurate recalling of past events, or in not having the right information. Another criticism by the same Organisation on semi-structured interview was that since the interviewees were small in number then it may render this method relatively weak.
Cohen and Crabtree (2006) contend that from semi-structured interviews one can obtain reliable qualitative data. From semi-structured interviews one can create and compare participants’ subjective responses – which can be common or individual – into themes after analysing them accordingly (Cohen and Crabtree, 2006).

### 3.4.1 Administering Interviews

In administering interviews, the researcher needed to consider a number of factors before commencing with the work. I chose my first interviewee purposely. Being my first experience of conducting such interviews, I felt that an experienced person in interviews could be the candidate that could have given me feedback regarding the effectiveness of the interview’s delivery. The feedback helped me to adjust accordingly.

Once the guiding questions were prepared, the interview can only be administered at the participants’ convenience. Such factors had to be communicated with participants before the interviews began. I felt that the vetting of the guiding questions was one of the important factors participants needed to do. I allowed participants to acquaint themselves with the questions I had prepared. In fact, their consent was signed after such an exercise was completed.

The duration taken to carry out a full semi-structured interview was a factor that the researcher needed to consider and communicate with participants prior to its commencement. One of the reasons why such interviews take some time to complete was
because as the researcher, I had to be creative enough to probe into the participants’ responses; so an estimate of duration had to be communicated with participants.

The time and venue of meeting to carry out the interview was left entirely in the hands of the interviewee. I observed that the more participants felt at home the more they participated. Feeling safe and in control is important for the participant which was crucial for me to carefully present the guiding and probing questions at the proper time.

The fact that I created a warm environment may have helped participants to relax during the interview. After all, the researcher’s aim of creating an open and trustful environment is to inspire participants to share their experiences from their internal frame of reference (Moustakas, 1990), hence the subjectivity of responses given.

One of the criteria to participate, participants agreed that their interview will be audio recorded in order to be later on transcribed verbatim. Attention was given to how participants worded or better interpreted their lived experience and the non-verbals they used to narrate their lived experiences.

3.4.2 Scenarios

Twelve scenarios were presented to participants in order to elicit the action each would take when faced with the possibility of breaching confidentiality. Also it shed light on what procedures each participant used and on what basis such confidentiality was breached or
otherwise. In case the scenario was never experienced I asked the participants to reflect on what their action might have been if faced by the particular situation.

The scenarios presented were based on instances such as suicidal cases, abuse of minors, clients involved in drugs and risks teenagers take. Less common cases included suspected cases of human trafficking and use of firearms by minors. Other rare to never occasions in the local scenario included what action counsellors would take in case a coup d’état plan was to be self-disclosed by their client and if a client was absconding from justice.

The coup d’état plan scenario was given by one of the legal obligations to breach such information. It was also inspired by the Arab Spring occurring in Malta’s vicinity particularly in Tunisia and Libya. The human trafficking scenarios where instigated by two relatively recent local cases where persons were arraigned in court and a sentence was given.

Lists of these scenarios are found in Appendix 24.

3.5.0 Data Analysis

The questions presented to participants were designed to touch upon at least five aspects of their lived experience to breach or not to breach confidentiality. A number of questions were centred on the aspect of the therapeutic relationship. A second aspect related more to the feelings participants’ experienced when they had to breach confidentiality. A third important aspect that emerged was the principle of preservation of life.
The fourth aspect revealed personal information about their experience in the profession and court summoning, including their tenure and settings where they practiced. The fifth aspect referred to their level of knowledge of the laws, policies, ethical standards and experiences. This also included the need of consulting and preparing the client for the possible and actual breaching event. Case scenarios were also used to place participants in actual or possible situations. A list of these questions can be found in Appendix 23.

The audio recording data was replayed a number of times to capture and memorise what was discussed in the interview. The data was also transcribed in the language used, Maltese, and the meaning extracted was taken within the context it was said. This method helped me recall the underlying message better which eventually led to the eliciting and grouping of themes.

Fade (2004) shows the importance that transcripts should be thoroughly analysed. In fact, during the analysis I kept in mind participants’ expressed thoughts, reflections and observations until the meaning they gave to the phenomenon was satisfactorily uncovered. As Fade suggests, the initial themes abstracted from the transcript were recorded on the right hand side of the actual transcript for ease of analysis.

In turn, I categorised the extracted data into codes reflecting particular themes. As Langridge (2004) prescribes, the elicited crude data are to be coded as initial themes by placing those having the same concept or the same underlying meaning into further exhaustive categories. According to the same author, this procedure is to be carried out
until the master and then the superordinate themes are identified as falling under the same phenomenological umbrella.

This process led me to come out with the themes described further above and in more detail in the Findings Chapter. Also in the Findings Chapter, details of the sub-themes supporting the master themes were backed by quotes made by each and every participant.

3.6.0 Documentation

The legal structure of the Laws of Malta is an ever changing makeshift making it challenging but not impossible, for each and every counsellor to keep abreast with these changes through their continual professional development. This is also true where the laws pertaining to the counselling and kindred professions dictate. Legal documentations were an integral part of this study. Likewise, though not legal in essence, I made use of the Code of Ethics used by local and foreign organisation

3.6.1 Laws of Malta

Various documents were used in this study. Primarily the Laws of Malta were used extensively even in forming scenarios in the face of lack of related cases to that particular law. Articles were extracted from a number of Chapters of the Laws of Malta mostly from the Constitution of Malta, the Criminal Code (Chapter 9), the Code of Organisation and Civil Procedure (Chapter 12), the Civil Code (Chapter 16) the Education Act (Chapter 327), the Professional Secrecy Act (Chapter 377), the Data Protection Act (Chapter 440), the Health
Care Professions Act (Chapter 464), the Public Health Act (Chapter 465) and The Protection of Minors (Registration) Act (Chapter 518) together with a number of related Subsidiary Legislations. I also made use of administrative policies emanating from these laws

3.6.2 Codes of Ethics

In connection to confidentiality I made use of a number of Code of Ethics namely the one in use by the Malta Association for the Counselling Profession (MACP), the one pertaining to the British Association of Counsellors and Psychotherapists (BACP) and the one currently in use by the American Counsellors Association (ACA). Apart from these the codes of practice regulating professions like lawyers’ conduct and medical staff and other kindred professions constituted an integral part of my study.

3.7.0 Ethical measures

When conducting a research study, especially where participants’ lived experiences were examined in detail ethical measures needs to be considered. One of the important features of this study was that participants know and consent to what is to happen to their data and all that will take place during and after the interview. In fact, as the researcher I saw it necessary that my obligation towards participants is bound by a mutual signed contract. Participants were given a signed copy of my ethical obligations, which obligations are produced hereunder in point form.
1. Protecting their anonymity throughout the research and beyond, however their data can be seen by my supervisor and by the examiners if necessary.
2. Accepting their withdrawal at any time from the study without questions being asked.
3. Cancelling, erasing or not making use of parts of their recorded data from their interview if they feel so.
4. They are not bound to answer any question I ask.
5. Consented to all this in writing.

These ethical obligations were set up in order to safeguard the participants throughout the research and to raise the reliability of genuine answers from their lived experience. In fact, before embarking on this research, participants were required to understand the content of the Recruitment Letter. This contained information about this research and what was expected of them and what they were to expect from me (see Appendix 25). Subsequently, upon agreeing participants gave their consent to participate in this research by signing the Consent Form created purposely for this study.

As mentioned above, in order to help them feel more secure I also signed a contract promising that I would do my utmost endeavour to maintain all ethical principles (see Appendix 26).

In fact, when the interview was transcribed and the initial themes were identified, I asked each participant to analyse the content to see if I had understood them well. I believe that this increased the credibility of the research and its outcome as it was not based on my
interpretations but rather on the exact meaning that the participants intended to give to their phenomena.

Participants knew from the start that it was their ultimate right to refrain from participating in full or in part and to erase or adjust any already made responses. They knew that if during and after the interview they felt in some way vulnerable, uncomfortable or threatened, they had the right to withdraw without having to give any explanations for their withdrawal. This may have made them feel more secure in giving confident and genuine responses. The intentions of this research were communicated to participants as transparently as possible.

Participants were guaranteed confidentiality and anonymity before the interviews commenced. At any rate, anonymity and confidentiality are two ethical aspects participants needed in order to be assured in this or any research. Zorn’s (n.d.) gives importance to assuring interviewees’ anonymity whilst Anderson (2002) explains the importance that participants feel confident that their data will not fall in the wrong hands; hence confidentiality.

Another important ethical measure taken was trying to make participants feel as comfortable as possible and giving them the necessary space to reflect on their answers, even to the point of being free to revisit the questions in order to ultimately give meaningful answers. Coercion and manipulation were not part of this study; however it was of utmost importance for me that participants felt the freedom to participate or resign. These ethical principles made participants feel safeguarded from any possible exploitation. In fact respect,
privacy, dignity, beneficence and non-maleficence towards each and every participant were all continually communicated throughout the process.

As Part of the phenomenological ethos, it was also crucial for participants to feel that they are the experts of their lived experience; this was performed by bracketing my opinions and judgements.

It was ethical to make interviewees feel comfortable in answering the questions asked. A warm environment is the spirit that makes this type of interview work out well, rendering it into a type of relaxed conversational method of communication (Cohen and Crabtree, 2006; Zorn, n.d.). This helps the participant to be ready to shift from giving generalised answers to more subjective ones (Sociology Organisation, n.d.).

**3.8.0 Credibility and Reliability**

Credibility and reliability are two crucial aspects in any method of research (Silverman, 2006). Not without criticism researchers have to validate their research and present reliable data in order to achieve sound results. Brinkmann (2011) shows how today validity in qualitative inquiry is being replaced by ‘ethical criteria’ (p. 85). It seems that sound ethical measures increases the credibility of a qualitative research. On the other hand, Peräkylä (2004) shows that the issues of reliability do not offer concern in qualitative research (Silverman, 2004, p. 286).
Brinkmann (2011) states that a number of qualitative researchers acknowledge that qualitative research is not inferential because it is based on presuppositions. In line with what Brinkmann says Creswell (1998) connotes that phenomenological researchers do not place “verification beyond the perspective of the researcher” (p. 207) yet according to Silverman (2006) this “leads to a certain preciousness about the validity of the researcher” (p. 47).

This approach did not stifle or invalidated this qualitative research. It was simply a method of understanding or interpreting one’s way of perceiving phenomena and nothing more. To have reliable data it was important for me not to contaminate the research. Being one of the challenges to perform accurately (Creswell, 1998) I bracketed off my preconceptions as much as practicable. Furthermore, to increase the credibility of the data, participants were given the right to read through their transcript and elicited themes from that transcription in order to validate the content and context of their data and findings. After all, the interview belongs to the participants and only they have the right to clarify any misconceptions; only they can validate the meanings of the responses they wanted to give.

In this study triangulation helped me examine the phenomena from other similar sources. Sources of other data used in triangulation increases the research credibility (Silverman, 2006). Having responses from non-counsellors participants to compare with those of participants who were counsellors made it possible to analyse whether responses were similar or diverse. Foreign studies that were cited are to be found in the literature review chapter (E.g. see Anderson, 2002).
Memory is certainly an unreliable medium to recall important and detailed information. To increase the reliability of my research the interviews were all audio recorded. Sacks (1984) as quoted in Peräkylä (2004) argues that audio recording increases the research’s reliability in the sense that it gives the researcher all the time in the world to check and recheck what has been recorded even by other researchers (Silverman, 2004, p.285).

Peräkylä (2004) adds that the reliability also depends on the quality of the recordings and transcripts (Silverman, 2004, p. 285). Having transcribed the recorded material immediately after the interview was carried out helped me not only to record in writing the material precisely but also helped me to recall the moment being transcribed and include all the necessary reactions of the participants.

3.9.0 Conclusion

In this Methodology Chapter I have shown among others the process of how this study was implemented in terms of design, how it was conducted, and the analysis in the light of the literature review using the Interpretative Phenomenological Analysis.

Ethical measures taken in consideration were also referred to in this chapter. The documentation used consisted of legal information – Laws of Malta, Subsidiary Laws acquired online and local and foreign case laws – Codes of Ethics of a number of renowned local and foreign counselling associations. According to the content of this chapter concepts of reliability and credibility were put forward in the light of recent material.
In the subsequent chapter I will be presenting the findings and themes – superordinate and master themes elicited from the interviews – based on the qualitative analysis described in this chapter. The Discussion Chapter will follow the Findings Chapter.
CHAPTER FOUR

PRESENTATION OF FINDINGS

There is a higher court than courts of justice and that is the court of conscience. It supersedes all other courts.

Mahatma Ghandi

4.0.0 Introduction

This study could have been easily produced from document analysis only. This would have been a non-intrinsic study because the law is law. Likewise depending on just case law or other ethical guidelines will only reflect value from written material. I consider the documents referred to in this study as the body of the research, the voices of participants and mine as the soul.

Producing the participants’ verbatim statements will give this study the voice that it needs and help the reader to understand how participants view their lived experience in the world of breaking confidentiality. Apart from the production of the very words of participants, produced in italics and within inverted commas, I will also, where necessary, include the non-verbal messages participants expressed.

4.1.0 Participants’ Profile

For the purposes of ethical standards participants are given a pseudonym in order to obscure their real identity. Since this study focuses on the local context, I decided to use Maltese traditional names to further reflect the spirit of this research. Pseudo-surnames were not used to avoid complications. There is no link between the name sequences here with the order of the interviews made. Also, any resemblance to persons with the pseudonyms having gone through similar experiences are purely incidental.

The information given here regards the experience of participants’. The mix of having persons from diverse backgrounds and different tenures in the profession and participant’s age, although had nothing to do with the choice of participant, made this study richer in giving one’s own experience on the elicited themes. Any competence mentioned in one individual does not mean it is lacking in another.

4.1.1 Ċensina

With over fourteen years of experience in counselling Ċensina is the most experienced participant in the profession. In fact, having retired a few years ago Ċensina still retained her membership with the Malta Association for the Counselling Profession (M.A.C.P). She became a trainee counsellor in the mid-nineties. It was only after two years traineeship that she became a full time counsellor in church schools. Apart from this Ċensina completed a whole year university level traineeship in PSD facilitation.
Čensina had experienced a single occasion of being called to court to give evidence. This was her share in court where confidentiality was at stake in her situation. Considering breaching of confidentiality is not only related to court settings Čensina having been a school counsellor had multiple experiences where heads of schools were her authorities that demanded divulgence of children’s self-disclosed confidences.

Her court case goes back approximately five years and it involved a child-client in receipt of counselling. The child’s parents were going through the process of separation and requested the court to order Čensina to be produced in court to give evidence regarding the child’s confidences self-disclosed in counselling. However she was exempted by the court from giving evidence in this case.

**4.1.2 Xandru**

Having been a qualified counsellor for the last eight years, Xandru has been only practicing the profession for the past five years now within the Church School setting. Xandru also works as a family therapy worker with an agency. As a counsellor he is an MACP member and thus follows the association’s Code of Ethics. However, working in a school setting Xandru is bound by the school’s ethos and also by the national policies.

His court experience was that of giving evidence in a Family Court. This was a one off experience which goes back some years ago. Working in a school setting Xandru is faced by a number of situations where school management personnel may request information from him that ultimately belongs to the clients, even though being school age children. Not
without conflict Xandru tries to find a balance between these two strains however always with the permission of the client.

4.1.3 Wenza

A clinical psychologist by profession Wenza has experienced numerous occasions where she had to give evidence in court. She works both in an agency and also has a private practice. Wenza was the most knowledgeable in the field where law is concerned. She served mainly as an ex-parte witness and also served as a court expert in many cases. There were occasions where she was appointed by the Criminal Court.

During the month when the interview was carried, Wenza declared that that month she had five court cases in hand. She literary had to give evidence in court once a week. She also experienced giving evidence during a police investigation and in magisterial inquiries too.

Wenza is a member of an organisation for psychologists that have a Code of Ethics which she recurs to for guidance when decisions are to be made apart from her experience. Wenza is the only non-counsellor participant in the cohort; however as a clinical psychologist she uses counselling skills in her work. Since Wenza’s experience in court procedure and knowledge is vast, she was an important candidate for this study. Wenza’s responses were used to compare them with the responses made by the counsellors.
4.1.4 Ġużeppina

Ġużeppina has been practicing as a counsellor well over nine years. All this tenure was experienced in Church Schools. Whilst never a member of a counselling association, she mainly relies on personal ethics and gives importance to what the law says. Even though in her interview policies were not mentioned, it can be deduced that Ġužeppina regards the Church’s and National policies as paramount in her practice.

The Court and the police were the authorities where Ġużeppina had experienced demands to breach confidentiality. To be precise, she was summoned to give evidence in two separate cases and also when she was called to give evidence in a police investigation. These three experiences were never against or in favour of her child-clients; she was always summoned as a witness of a party to testify against the other’s parental incompetence. The last case where she was ordered to give evidence in court was not more than five years ago.

4.1.5 Anġolinu

Anġolinu has been practicing as a warranted counselling psychologist for over seven years now. He is bestowed with a psychologist’s warrant by the Malta Psychology Profession Board and has worked as such with clients in addiction. At present he is a fully fledged private practitioner. Being a warranted counselling psychologist, he is a member of the Malta Psychology Association bound by its Code of Ethics.
His court attending experience goes back to when he was a counselling psychologist working for an agency; however this has not stopped there. In fact, he has been summoned by court also after becoming a private counselling psychologist. Being one of the few participants who are acquainted with the court system, he has been summoned to court for over five cases, with the most recent one being a few months ago. He also was once appointed by the court to serve as a court expert.

Angolinu recalls that for all these cases he was exempt only once from giving evidence in court. In all the other cases he was released of confidentiality both in favour of his clients and against. Although not a counsellor but a counselling psychologist, Angolinu is one of the most important subjects in this study due to his multiple experiences in giving evidence in court. Like that of Wenza, Angolinu’s responses were used to compare them with the responses made by the counsellors.

4.1.6 Lieni

Lieni was a social worker by profession when she went through the experience of giving evidence in court around ten years ago. Working in an agency as a counsellor, she is bound by the agency’s Code of Practice and Policy of Confidentiality and by being a member of the Malta Association for the Counselling Profession she is also bound by the association’s Code of Ethics.

Her experience in court concerned persons with an addiction, which in all amounted to less than seven cases. For each mentioned case she only was called to give evidence once.
Lieni’s concerns about the court system is that the defence counsel can be very mean at times when trying to elicit information from her as witness. As for the presiding judge, her experience was quite a positive one; they were all respectful in her regard. Lieni’s overall opinion of having to give witness in court is that it is “never an experience to look forward to”. Again Lieni’s responses were used to compare them with the responses made by the counsellors.

4.2.0 The Themes

INFORMATION VIGNETTE 8: Overview of The themes

Superordinate theme:

✓ Safeguarding the character of the therapeutic relationship and beyond

Master themes:

❖ Feeling safe and protected in maintaining or breaching confidentiality
❖ Non-maleficence towards the client and others

Superordinate theme:

✓ Finding ways to resolve the dilemma of breaching confidentiality

Master themes:

❖ Legal demands and Ethical processes
❖ Consulting
❖ Learning from Past Experiences
❖ Contract-based relationship

Source: participants’ responses

The elicited themes revolve around the research question which is the ‘lived experience of the participants on breaching confidentiality’. Two superordinate themes identified are the ‘Safeguarding the character of the therapeutic relationship and beyond’ and ‘finding ways to
resolve the dilemma of breaching confidentiality’. The following table helps illustrate these themes which will be followed by the participants’ statements that give weight to these themes.

4.2.1 ‘Safeguarding the character of the therapeutic relationship and beyond’

The first superordinate theme is branched with two master themes where one relates to ‘Feeling safe and protected’ in view of the relationship and other relative stakeholders. In other words they refer to ‘in whose interest’ confidentiality is maintained or breached. This master theme integrates feelings of anger, fear and other concerns when confidentiality has to be breached as well as the effects on trust and fidelity when doing so. The other master theme relates to “Non-maleficence towards the client” which is also connected to breaching confidentiality to prevent client harming self. How far do participants go in maintaining confidentiality before breaching in their lived experience and given case scenarios?

4.2.1.1 Feeling safe and protected in maintaining or breaching confidentiality

Participants had much to say on this aspect of the formation of the therapeutic relationship. In Maltese, we use the word ‘bena’ as in building a house to literally refer to building the therapeutic relationship. If a relationship is built on a strong foundation it takes a lot to be moved let alone toppled. Lieni was the only participant who clearly stated that when it comes to breaking intimacies ‘...ultimately, if there is a good foundation from the start...and you explained this limitation from before...and never doing it behind client’s back...you will save the relationship”. Lieni also stated that she has never experienced any of her
therapeutic relationships to be shattered on giving evidence as it was always in their favour. However, Lieni reflected “if I give evidence against the client it will damage the therapeutic relationship...how can he trust anymore?”

Participants have a very high esteem of the therapeutic relationship. Both client and therapist invest to create the character of the rapport. Wenza, in a strong voice of disagreement narrated about a case where she believed that she could have worked with a particular mother who had a difficult situation with her daughter. The team she was working with decided to refer the mother to child protection and after the case was closed from the protection services Wenza said “I do not know what happened to the client and the child, they vanished...she [the mother] says ‘I cannot trust them anymore’”.

Feeling safe in the therapeutic environment is of utmost importance for all participants. For example Wenza refers to confidentiality as happening only when those self-disclosing “have a certain amount of privacy”. Lieni too believes that “confidentiality is the object that is built on trust”. The therapeutic character seems to entice the client to feel safe to self disclose. Ćensina refers to confidentiality as “the protection of sensitive information safely deposited by the client”. Likewise, Wenza emphasises that even when she is working with children, confidentiality is crucial. She says “Many times they [children] would have poured their heart out to us”.

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It seems that participants use most of the energy to create a warm environment to facilitate client’s self-disclosure. Ġużeppa succinctly captures this situation by saying that confidentiality is “where a person felt comfortable enough to talk to me...about something serious”. This does not happen overnight, as Ċensina clearly stated “the relationship is built on trust on the promise of confidentiality and takes a long time to establish”.

Is breaching of confidentiality the same as breaching trust then? In their way of saying it, all participants had dilemmas when coming to breach confidentiality other than when the reason is to preserve life or where there is a risk, such as abuse.

Ċensina said “I will breach it in the interest of the client” where harm to self and others is concerned. However she considers it as a preventive measure by stating “to be honest, ‘it is just cover your back’” and that she will “not suffer contempt of court unless it is highly pervasive to my ethical standard”. Thus, the dilemma seems to fall on when the court demands or another authority pretends that they have power to dispense one from confidentiality.

Ċensina confesses her opinion on being exempted in court as witness. She says “giving evidence will always jeopardise the relationship” which as stated before takes time to be built. Sadly Xandru explains “I had to work hard to build again fidelity and trust and the relationship...it took quite a while to re-establish the rapport, but it never returned back to what it was before”. He calls this ‘loss of liberty’ to express oneself freely.

Xandru poignantly emphasises that when confidentiality is breached “the relationship of trust will be shattered and then it would be difficult to work with the client, meaning that
there will be no safety for one to talk”. Angūlinu mentioned a case were an adolescent was
involved in crime and was mandated by the court for counselling. When he had to give
evidence against the client after being absolved “it strained the relationship...the resistance
increased a bit”.

Referring to a number of separation cases in court participants saw the insensitive attitude
both of the court, lawyers and defence parties towards witnesses. Angūlinu, Ċensina and
Wenza, all had cases related to parents going through legal separation process. These
parents have at least a child – a daughter or a son – whom they referred to therapy.

Sometimes these parents summon the counsellor to appear in court to be absolved from all
confidences the child has painfully entrusted in the therapist. These parents pretend that
with the power of the court the counsellor, psychologist or whoever is seeing the child will
expose the child’s perception on each of his or her parents. According to these participants,
this is truly unfair on every client especially where minors are concerned.

Angūlinu preoccupied with the situation stated “I will say things that will give a bad picture
of the two parents, the boy had trust in me, I am afraid that if I give such evidence I may
shed a bad light on one of the parents, and he or she will lose and they will impede the
therapeutic process”. Angūlinu is of the opinion that it is better that the court does “not to
mess with the therapeutic relationship” and would be summoned as a last resort.

Ċensina’s experience was that of anger. In a disapproving voice she said, “I was anger-
struck. This will ruin all that therapeutic work...done to win the child’s trust”. Ċensina in a
relieved tone said that after explaining this to the Judge he did not release her from
confidentiality. She concluded “with my witness I would have eventually done more harm
than good...and she will not trust me anymore”. Čensina in another separation case said “I
felt as if I was being used” because she was summoned in court by a parent to make her
breach what their daughter self-disclosed against the other parent.

The case that Wenza went through was more of giving voice to the child. That is why she
continues to state “I give voice to children...in cases related to children, separations, because
many times I feel that they are being abused, used and forgotten”. In line with what Wenza
believes Čensina recounts the occasion when she had a conversation with the Commissioner
for Children. She quoted the Commissioner for Children as telling her “children’s voice has
to be heard”.

Even when it comes to adults, being taken to court and the therapist is summoned to give
witness this dilemma of where the therapist stand is, is highly felt. Xandru relates “I felt
very bad on appearing in court...I think it affects the relationship in the sense that a
particular case where I had to give my witness, I personally felt as if I lost the idea of safety, I
personally felt it as almost an act of betrayal”. Xandru sceptic with the court system stated
that this power of the court of absolving the witness from confidentiality throws the
therapeutic relationship in a phony state. He states “there no safety for the information
giving, or the conversation is taking place not in a true therapeutic contest”.

Xandru also fears that he “will be called to give evidence or the client will be afraid and says
‘what am I going to say, should I say this or that? And many things will not be said”. Lieni
says that appearing in court “is never a pleasant experience...on receiving a summons I get
terrified”. Angolinu too expresses himself as “to be honest...the less I have to appear in court the better”. Gużeppa’s preoccupation is that “the magistrate or judge can take decisions on my version of things and if he did not hear my version he may have taken a different course of decision”. Xandru state that breaching confidentiality has multiple consequences. He says “it is a grave thing, violation of privacy, self determination and autonomy”.

All participants were of the impression that they were legally bound to breach confidentiality if someone informed them that an abortion is intended to take place. In a given abortion scenario placed participants in an awkward position. The dilemma presented was a thirty eight year old woman who was raped and got pregnant. She came to counselling and informs the counsellor that she has booked to go abroad to perform abortive interventions.

Gużeppa’s values interfered in this case and announced “I am all out against abortion”, however she will help her out to change course of thought; the only thing against her is the time left before she departs. Wenza said “I think I will not breach confidentiality, however I will encourage her to move away from this intention”. Angolinu said that in reality he had a similar case and on reporting to the police and child protection he was informed that they could do nothing. He ended “so I think it is a bit of a question mark”.

Participants all agreed that breaching confidentiality will not offer much of a dilemma as when the level of client’s risk of harming self and others is high. It is a must for all persons working in the helping professions to assess the situation and the level of action a client may
take to do harm. This is the subject of the following master theme showing participants’ perception of risks.

4.2.1.2 ‘Non-maleficence towards the client and others’

All participants showed in their interventions that confidentiality is as sacrosanct as religious confession, but with exceptions. As a sweeping statement they all showed that preservation of life is paramount compared to confidentiality. If confidentiality is a holy thing, then for participants preservations of life is equal to the holy of holies. The superordinate theme incorporates what is beyond the therapeutic relationship. This risk factor notion resonated throughout the interviews across all participants which in the absence of legal obligation to breach all relied on the ethical standards of their moral standing to breach only with the intent to preserve the life of relevant stakeholders including that of the client.

Xandru in fact said “I will place confidentiality...above the legal obligations...I will not let go that easy...I would only breach it when there is risk of client’s life...and others””. Whilst for Wenza “breaking of confidentiality is a last resort”. Lieni understands that “breaking confidentiality is something serious because it involves many risks...I am not going to breach it haphazardly...I have to have a valid reason and clear information...that is the risk to break confidentiality is breaking fidelity”.

In the giving scenarios participants shown that whatever the law demands they would not breach confidentiality unless there is risk. For example in a scenario were a sixteen year old
adolescent is allowed by her parents to sleepover at her friend’s house. The adolescent who is in counselling self-discloses that she and her host friend are allowed by her friend’s parents to leave the house and come in late drunk. The adolescent’s parents are ignorant of this taking place; what will participants do if this teen is their client?

Acknowledging the parents as an authority to the adolescent girl, participant had the same method of tackling the situation. I will give some examples. Xandru said “I will not breach confidentiality abruptly but explore with the teen first then ultimately I will inform the parents”. Xandru linked this case with a real life incident in Valletta where last year an adolescent stood on the bastion and toppled over and lost his life. Ċensina’s position was that “breaching of information is possible here to inform the parents unless the girl will cease this behaviour or decides to make the breach herself”.

Participants were quite comfortable to state that where there was indication, even if doubtful, they feel morally obliged to prevent or preserve life and limb. Some participants spoke of life as larger than confidentiality. Ġużeppa’s heavy experience when she had to breach confidentiality was when a client with religious background showed signs that he was going to commit suicide. Ġużeppa had to inform his superiors and in a very hurtful voice she said that her experience of breaching confidences “was painful, I had to do it behind his back. It was a matter of life and death”. For Ġużeppa, “the burden of consequences is too heavy to carry for not preventing the harm made. Life is larger than and more precious than what the client’s entrusted me with in counselling”. Ġużeppa also said “I could not wait until the client self-discloses further...I felt that it was certain, I had to react there and then...for the sake of the individual”.

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Suicide is a huge concern with participants, and this is rightly so. In a given scenario, a male who was diagnosed with a terminal and easy communicable illness is contemplating suicide. Participants were very contemplative in giving an answer to this scenario. Both Lieni and Ėensina preferred to play safe and said that they will take upon the responsibility to report. Lieni said that she rather risk being liable for breaching confidentiality than “letting the suicide take place”. She said “I also want to put my conscience at rest”. In general, Lieni is of the opinion that “there is nothing important than life”. Lieni’s experience of dilemma when “where was this suicidal case that had to be referred to Mount Carmel Hospital at the same I knew that at the hospital he will turn to the worse. He became worse...I had to decide to take that chance” between becoming worse or lose his life.

Ėensina too is prepared to be liable for breaching yet she said “I’ll be burdened with fear of completion and live with guilt and fault”. She also believes “moral obligation supersedes that of the law”. This preventive measure Ėensina uses resonate in her very wording when she said “depending on the age, I would explain to the client that I cannot maintain information to myself and I have to tell...for your own benefit...I have to prevent harm”.

In general, Wenza is of the opinion that “safety is important, may be too important...if I should have helped a person to preserve life and will not I would feel very responsible...it is normally a cry for help”. However for the given suicidal scenario she said this is “a different kind of suicide, it’s a special case”. After a long pause of reflection she said “I think I will respect the client’s wishes...I will work with him not to do it”.
In an emotional intervention, Xandru said “I think that it is a question of being conscientious”. Xandru reflected on the aspect of life rather than on the aspect of illness. In explaining his position of this case scenario Xandru’s reflection went to a tangent away from the aspect of breaching confidentiality. It is worth noting though his standing on life itself. He delicately explained that -

“Even because of personal issue that my father died with terminal cancer ... and during those days you’ll say that it is better that he will pass on... the last smile I saw on his face I said to myself, ‘who am I to decide what is to happen to him’. I think it touches something which is personal and I think I will not accept to work with the client...it would be difficult there”.

Participants’ mindfulness of risk goes beyond the client. Ġużeppa’s standing regarding “public interest never prevails above that of the client” with the exception that harm is not intended “…to others”. In fact, even Čensina has the same moral standing as she said “I cannot let client do harm to others”. As abuse is considered as harm, Lieni was very sure when she said “I cannot rest my mind assured if I know someone is abusing children”. Talking of abuse, in the given scenario where a babysitter was about to touch the baby’s genitals for her own pleasure and stopped half way untying the baby’s nappy all participants said that they all will explore the case further.

Xandru was more preventive as he said “I will explore further with the promise that she will stop being in the situation”. A similar scenario was that the babysitter involuntarily stopped removing the baby’s napping because the parents returned earlier. Anġolinu said “then there is obligation to report...I do not thing it is a legal obligation but ethical obligation”. 
Interestingly to note that for Ċensina it makes a difference whether the babysitter is a male or a female. She said she will certainly breach if it was a male. The reason behind this decision, Ċensina explained “from my experience I had only males on girls offenders...there is more to be alarmed”.

Another scenario presented involved two clients self-disclosing that they witnessed a possibility of exploitation of minors. The clearest scenario was that of a person invited for a bachelor’s party and he recognises a minor performing a striptease act in this venue. The other scenario involves a client who suspects that his neighbour is prostituting persons as he hears shouts coming out from his villa when men are invited there.

In these cases Lieni declared “it is second hand information, I will work with the client to help realise the importance to inform the police”. The other participants, although all said that they work with the clients to make the disclosure themselves, also felt an inclination to report or to find ways to bring the information to authorities. Ċensina was of the opinion that “moral obligation supersedes that of the law, especially when minors are involved”. Angolinu, to avoid exposing the client said “I would report to a police officer who happens to be a friend of mine and tell him that there is a chance that children are forced for prostitution”.

Another scenario that participants linked to the level of risk was that of a coup d’état case where the one of the involved is a client in receipt of counselling and self discloses these plans. Interesting to note that none of the participants knew that crimes against safety of the government requires obligatory immediate reporting. Their motive to breach here was
not the government per se but because the action tilts towards harm to others. Xandru declared “I will inform, I think there is also risk that innocent people will suffer...there you have persons about to be injured”. Wenza said “I suppose that there is going to be a lot of bloodshed, then yes”. Lieni too said “I think I will not hold the information as ultimately there is the risk of harm to others...it is not for the government’s sake or just the President’s life, but because it is life threatening to all population”.

4.2.2 ‘Finding ways to resolve the dilemma of breaching confidentiality’

The second superordinate theme deals with coping strategies participants take when deciding to breach confidentiality, especially when burdened with the breaching dilemma. This superordinate theme is divided into four master themes. These are ‘Legal demands and ethical processes’, ‘Learning from experiences’, ‘Consulting’ and ‘Contract based relationship’.

4.2.2.1 Legal demands and Ethical processes

Participants seem to be caught up in a strain here whether to divulge intimacies due to legal demands or ethical obligations. Wenza, Xandru, and Lieni knew all along that the Laws of Malta do not demand breaching secrets on their own merit. Yet all participants knew that authorities, especially the court have powers to demand disclosure of confessed facts. In the absence of legal obligations participants rely much on ethical convictions.
Wenza knew “in our laws there is no obligation” yet she also knew that the “court exempts participant from withholding information”. Wenza also emphasised that “under Oath I am not capable to say ‘I do not know’, when ‘I know’” “I think [the court] have to have more sensitivity...they are victims that feel that they are under process [when giving evidence in court] like vulnerable children”. Xandru’s hunch read “if I am not mistaken there is no obligation to report in Malta”. In fact he added “it is not the law I think as such, but our Code of Ethics guides me when confidentiality requires breaching” he also added that “there is the school policy” too.

Lieni was surer when she stated “my profession does not oblige me to report to the police”. Lieni clarified “my point is not towards the law, but in ethics, more than ethics, towards the person, the individual, the client”. Aware of the courts’ powers, Lieni declared “if you are at court in front of the magistrate or judge...you have no choice...if I am obliged to give evidence...I would do it. I do not want to end in prison!” The court is not the only demands imposed on Lieni. Working in an agency Lieni feels that the “agency’s policies...are imposed on me...I have no choice...the agency obliges me to break confidentiality if there is risk”.

Similarly Ċensina said that if the magistrate dispenses her from confidentiality “I think you couldn’t refuse. I am not ready to go to jail...after all, this will be of no benefit to the client; going to jail is not a principle”. However, Ċensina also was of the opinion that if a demand to breach is grossly oppositional to mine “for my principles I would go” to jail. This shows Ċensina’s drive to act upon when she said “it is not because the law obliges me, but because I am morally inclined”. Regarding breaching of secrets, Xandru draws on the same principles
like Ċensina, when he clarified “I am not going to do it haphazardly since I am obliged to ethically and morally maintain the secret”.

In contrast, Anġolinu sees the situation as being “more legal than ethical” as “confidentiality policies are not always that clear”. Aware of the powers of the court when he takes the witness stand Anġolinu said since “the Magistrate and the Judge have the power, that is, over confidentiality...I ask the Magistrate or Judge and tell him ‘Listen, my ethics demand that I require your permission to disclose information’”. This plea to the court will save him being liable for having disclosed secret information.

Lieni was concerned for the fact that “the court wants facts not what you think or feel...it is still difficult sometimes to give facts...because our work is process...feeling...hunch. Maybe that is why I feel uncomfortable...it is too rational...our work is not rational...I believe that these things are highly subjective”. Ċensina also said “I was given an advice to state facts not opinions”. “You report the facts not interpretations” said Xandru referring to giving evidence in court.

Ċensina rightly said “The easiest situation is when ethical reasoning tallies with the laws and the policies”. Although it is not always like that, in fact participants prefers to side with ethics. Lieni will go to the extreme of “if it is like the ethics is against a law...I think I would go with the ethics”. Ċensina also said “I would breach for ethical reasons”. In a strong voice Ġużeppea said “if there is legal obligation to breach confidentiality but it would be unethical to do so, I wouldn’t...if it is illegal to breach confidentiality but it would be unethical to do so, I would breach confidentiality...even if I will be liable...I want to stick to my guns”.
Apart from laws and ethics Ċensina, like Anġolinu, also mentioned confidentiality policies which are not so clear as expected. Refereeing to the school agency she worked for, Ċensina said “we had our own policies...within the schools...we could not have done a legal framework”. However she recalls “once I had a case that after months passed it turned out that more harm was done than benefit” when she was demanded to breach confidentiality. She added “however, since I was employed with the schools, I had to abide by the Schools’ National Policy” even though disclosure was done “…on a need to know basis”.

4.2.2.2 Learning from Past Experiences

Experience is the best teacher for participants. For example Ġużeppa thought that it was so easy to communicate with the Judge, as she said “when I was summoned for the first time I was of the opinion that I tell him ‘I am bound by confidentiality’ and the Judge promptly replied ‘I am releasing you of it right now’”. Ġużeppa considers “nowadays I feel more prepared”. Lieni quite succinctly replied “I think in time, even on your assessing clients, you will be more fine tuned...experience makes a whole difference”. “Nowadays, I’m more familiar”, said Wenza referring to the legal system and procedures.

4.2.2.3 Consulting

Xandru shared his experience saying “you know what I find helpful ... when I consult”. Participants even showed interest in learning from one another’s experiences within their sphere of work. Lieni for example said “if something is not crystal clear, black on white...I will discuss with my manager and supervisor”. Referring to court witnessing, Ċensina too
felt comfortable to consult her peers when she said “I asked others, my colleagues, if they ever were requested and was examined”.

In line with her statement here Censina added “I would imagine that the team which I was part of...would have pre-informed me” about practical legal matters. Xandru relies on his peers however before he said “I reflect things on my own, and then I consult with my peers and later on, and also discussed case in supervision. Sometimes I consult with professionals”.

Supervision is a crucial pivot in the helping careers’ arena. Legal matters too place some responsibility on the therapist and many of the participants; the lawyer was also one of the choices of consultation. Lieni clearly stated “deep down any ethical dilemma, any legal issue I’m not to do by myself, for sure”. She said she will seek assistance in “supervision to guide me what should be done...what the supervisor would have done in my stead”. Ġużeppa said “I keep myself abreast, always asking, I read...my colleagues...yes I seek lawyer’s advice”. Even with Xandru, his opinion on consultation is seeking supervision and then “depending on the gravity of the case I will seek legal advice”. Lieni, like Ġużeppa prefers to go step by step. She said “I first read the policies, I discuss it with the supervisor, and if the need arises I contact the agency’s lawyer”.

4.2.2.4 Contract-based relationship

Another medium that participants find useful to lower the strain of the dilemma is making the client aware of the consequences of certain self-disclosures. This informed consent
places clients in a position of sharing the responsibility of breaching intimacies. When such issues arise and clients are reminded of this contract, participants believe that eventual breaching of confidences will still maintain the relationship. Preparing clients for the eventual disclosure, as opposed to making it behind their back, was also an important principle for many of the participants. All this falls within the theme of the contract-based relationship.

Lieni, being policy bound, explains “the first time I meet clients I will explain to them from day one. It is part of the contract that I do with them...we will sign this written contract”. “That is why I explain in detail from the very beginning the limits of confidentiality”. Although being policy bound, Lieni said that she would still maintain the same procedures if she would start a private practice. Likewise, Ċensina said “I inform them from the initial session, ‘listen if you tell me something that is causing harm to you or to others I have to break confidentiality, however I will do nothing behind your back”.

Anġolinu explained “they would know during the initial contract which they sign” I had to breach confidentiality, but the clients would know about this before when I meet them... “Even in private practice, I ask the client to sign for the limitations too...both verbal and written”. For participants the issue does not stop in the initial stages of counselling. For example Ċensina said “I will remind the client when he is about to tell me information that merits breaching”. Lieni explained “I discuss with clients about things they would like to say or would like me to say in court...I also prepare them that I cannot lie; I will be under oath, I cannot give false witness”.

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Speaking about the truth, the whole truth and nothing but the truth, even Wenza, to the same extent expressed that “normally I meet them and I prepare them so they know what will happen, that I will be giving evidence”. Yet Anġolinu conditions this to other possibilities saying “I think in respect of confidentiality, where it is possible, I would have talked with the client”. As he was saying this statement Anġolinu placed emphasis on the personal pronoun ‘I’.

4.3.0 Conclusion

Concluding this interesting chapter was part of my issue. Given the possibility I would have included other themes and concepts onto this work. In this chapter I tried as much as possible to give a clear picture of the lived experience of participants having breached confidentiality by grouping their replies into two superordinate themes that further encapsulate a number of master themes for each.

What happens to the relationship and beyond when the dynamics of breaching confidentiality takes place? This is determined by the experiences lived by each participant. The adage ‘practice makes perfect’ was reflected on the second presented superordinate theme. This theme delved into the methodologies participants use to buffer the dilemma to breach or not to breach confidences.
CHAPTER FIVE

DISCUSSION

‘Whatever someone sows that is what he will reap’

Galatians 6:7

5.0.0 Introduction

This Chapter of Discussion welds together relevant material from the Literature Review chapter with themes presented in the Findings germane with the responses participants gave during the interview. In other words, it places participants’ responses – their lived life experience to breach confidentiality – to what theory says about the subject in scrutiny. The local context of this study is also reflected in this chapter.

5.1.0 Discussion

Participants have shown over and over again that the therapeutic rapport is something which is at heart to them; however, this does not happen in a blink of eye. They have to work hard to make that special relationship work. The therapeutic environment needs to be inviting, warm, and above all without the threat that the client’s intimacies will be exposed to the four winds. For this to take place the client has to experience it fully to feel safe to self-disclose issues that are interfering with the normal way of life.

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15 The New Jerusalem Bible
This importance of feeling safe is consistent to what literature states about confidentialities. Anderson (2002) for example shows that participants in a study expected such a safe environment, being one of their prerequisites for self-disclosure. Anderson’s clients had to put their mind at rest that their privacy is fully respected. This client’s need to expect privacy also resonates in Thompson (1995) who noted expectations increase to the point that counsellors have to maintain confidentiality. Here the openness that participants use by offering the basic counselling skills, such as empathy, may help the client to gradually increase the trust in the counsellor. It is like the clients start to settle down that the confidential nature of the rapport will be safe enough to start to trusts more. This is what Bond and Mitchels (2008) refer to confidentiality as a product of trust.

This warm environment is required in order to help clients’ self-disclosure. Participants gave me the information that they uphold confidentiality to the limit law and ethics permits, however not at all costs. This is reflected in the literature where Grech (1994) states that once they have become the recipients of clients’ secrets; they feel the obligation to protect these secrets as their own.

Safety to self-disclose and protection of content disclosed is offered to the clients in terms of fidelity. If the contrary takes place it qualifies to infidelity that is the shifting of loyalty from towards the client to inappropriate third parties. Participants adamantly felt that the safeguarding of intimacies was paramount yet they acknowledged that there are still instances where confidentiality has to be breached.
Confidentiality is not absolute in counselling. In fact research results exclusively show that although at times breaching confidentiality may be painful it might render it safer to inform relevant persons. This was very clear especially when participants had suicidal clients or clients ready to perform self-harm or harm to others. It also transpired that participants spell clearly enough the limitations of confidentiality that in the above circumstances will be reached. In line with the research results both Bond and Mitchels (2008) and Posthuma (2002) acknowledge that confidentiality should not be guaranteed where there is actual or possibility of client harming self or others or in suicide cases.

Posthuma (2002) adds that as part of the initially set boundaries, instances where counsellors must breach confidentiality should be communicated with clients clearly even through possible examples. Breaching confidentiality in such circumstances makes participants feel safer and more protected now that the client is in safe hands and other support systems, like family members and hospital staff. These preventive measures are all taken on personal convictions of participants. Finnis (2005) shows that persons have their own natural laws which participants use in the absence of legal measures to breach confidentiality in order to protect a client from committing harm. This is also part of a one’s, in our case the participants’, moral standing as explained by Mifsud Bonnici (2008).

A number of them prefer to make this initial formal contract in written form. This is interesting in the sense that the laws regulating contracts (Civil Code Chapter 16, Article 992(1)) explicitly state that what is said in the contract is binding between the contracting parties and changes only if the parties agree upon any requested changes (Article 992(2)).
In other words if a participant is contractually bound to breach confidentiality as per agreement and fails to do so, legally speaking, this qualifies as a breach of contract. On the other hand both parties can agree to a new agreement, which is also to be revered by all parties involved. We find many instances in literature where this contract should be clear enough to be comprehended by the client.

Grabois (2008), for instance shows the importance of communicating the limitations of confidentiality as this will save the counsellor form being liable for having breached the contract. For this reason the same author suggests that these types of contract should be made in writing and signed by parties and made in the very first session. Participants’ timing for communicating limitations was always in the initial stages of therapy.

Authors like Bond (2010), Bond and Mitchels (2008), and Grech (1994), agree that there should be a contract either verbally or written. Bond further suggests that in the contract there should be information that confidentiality can be breached if demanded by authority and Grech also advises that this should be in written format for the sole reason that the Professional Secrecy Act Chapter 377 is legally binding. Having a clearly worded contract of confidential limitations was one of the buffering items that participants use to counteract their feelings of dilemma when they were required to breach confidentiality.

Talking about buffering methods to ease the dilemma highly worked. Participants, although more inclined towards the ethical sphere of decision making, still heeded to laws and policies that demand breaching of confidentiality. On the one hand they were acting on legal terms mainly to avoid circumstances such as contempt of court. Note article 587 of
the Code of Organisation and Civil Procedure Chapter 12 (reproduced again in wording): ‘The witness shall answer any question which the court may allow to be put to him; and the court can compel him to do so by committing him to detention until he shall have sworn and answered’. Bond (2010) acknowledges that the more counsellors and therapists are law-knowledgeable will be more in a position to make correct decisions especially where a legal issue is in the main.

The legal implications were not the only tools used to comfort their conscience for having breached confidentiality. Notice the instance presented above where breach of confidentiality is required due to cases such as suicide, harm to others and self. Participants come to the conclusion to breach confidentiality relying on ethical sources of their affiliated association or personal morality. Codes of Ethics such as that in practice by members of the MACP16 are highly sought as a guide on confidentiality. As for the psychologists they too rely much on their association’s Code of Ethics.

Forrester-Miller and Davis (1996) list one of the seven steps for decision making as applying the ACA Code of Ethics. Applying this to the local context participants relied on their professional association’s ethical guidelines. From the research it resulted that participants find it easier to decide in a given situation where the law and personal moral standing are similar. In fact, Bond (2010) is also of the opinion that the more one’s moral convictions are closer to what policies dictate the better.

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16 Malta Association for the Counselling Profession
Participants mentioned many a times that when they come to breach confidentiality on the terms of high risk situations their conscience is much at play. In fact Mifsud Bonnici (2008) explains that one’s moral judgement forms one’s conscience. Without doubt participants’ level of morality is very high where it comes to preservation of life and limb.

Another buffering element used by participants to clear their conscience for breaching confidential information is consulting others. Consultation seems to be the talk of the day for counsellors and psychologists alike. The weight of the decision is not taken on one’s own pretences. Learning from others who are more experienced is valued a lot.

We all learn from repetition that installs our personal experience and perception of things; we can learn through our mistakes as the English proverb “once bitten twice shy” states. Literature has it that we can also vicariously learn from other’s mistakes (Ormrod, 1999, pp. 116-120). According to the National Policy for Child Protection when disclosure is required it should be done on a need to know basis.

This I believe should be the case in supervision and when consulting other professions. In other words, many if not all of the steps that are mentioned in the 7-step model of ethical decision making compiled by forester-Miller and Davis (1996), are guidelines that participants, consciously or not, make use of. Used in sequence or as the matter arises, the 7-step model seems to cover much of the practical side of ethical decision making when faced with a dilemma that I highly recommend.
5.2.0 Conclusion

In this chapter the themes elicited from the results were discussed alongside the reviewed literature. The most prevalent theme was the one pertaining to the breaching of confidentiality as a measure of prevention when there is risk that the client is to either harm self or others. Suicide ideation is on top of the agenda. A second important theme discussed is that participants, especially novice ones, refrain from taking the decision on their own accord. The team is much at heart.

To cap it all up there is the moral standing of each participant that although they heed to what the law say, seek ethical guidance and consultation of the team, they tend to rely much on their moral standing. This is visible when the laws are silent in relation to the issue in hand. This is the lived experience of participants of having to breach confidentiality.
CHAPTER SIX

CONCLUSION

“When it is obvious that the goals cannot be reached, don't adjust the goals, adjust the action steps”.

Confucius

My journey in the counselling realm has touched hard on the aspect of confidentiality. Over 25 years experience of policing and almost half a decade of counselling experience made this study possible for me. I view this study as a marriage between my past and present roles; and this is how I refer to my study when colleagues ask me about it. It is a dance, a tango in space between ethics for counselling and law which help me reflect on my moral conclusions and to update them if necessary.

We have extensively seen today confidentiality has a legal backing with different levels of obligations for disclosing confidences according to the profession. Counsellors need to know where they are threading in regards to the laws of their country whether they decide to breach or not to breach intimacies. On the horns of dilemma counsellors have to decide whether to divulge or not to divulge information that they have been entrusted with. It is a two edged knife that cuts from both sides.

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What is important is that whatever the decision taken it must respect the client and the disclosure has the least negative impact on the client; *hence* keeping in mind the ethical aspects of beneficence and non-maleficence towards the client (Bond, 2010; Jenkins, 2007). Mitchels and Bond (2010) connote that if the safety of third parties is involved this must reflect the aspect of the common good. This was a common voice echoed from all participants.

Unlike other western countries, there are a handful of Maltese Laws that place obligations on counsellors to report clients and this does not include when the common good is in jeopardy. However the law state that it is a defence against liability for all those making public sensitive knowledge when such information was divulged on bona fide grounds for the protection of the common good. Furthermore, this particular right of every citizen enhances the therapist’s moral decision to act according to the situation. From the participants’ responses I have elicited nine suggestions addressed to political and court authorities in order to change the laws pertaining to counsellors and therapist as recipients of confidential information legally better known as secrets. I have listed these nine suggestions in point form for ease of reference:

1. Counsellors are to be summoned to court only as a last resort. E.g. when evidence is lacking or in cases of risks to client or to others and always to the beneficence of the client.
2. We must be the voice of the children, even in court, because there are times when they are being abused, used and forgotten.
3. Counsellors should preferably give evidence to a court expert or by presenting a report rather than having to give evidence viva voce.
4. Information given as evidence has to be solely on a ‘need to know’ and on ‘who must know’ basis.

5. Counsellors must also be trained in methods of breaching confidentiality, court and investigative procedures, Laws of Malta, giving evidence, rights and duties of the counsellor as witness and court expert, etc. These can be part of or a whole credit in the study or in one’s continual professional development.

6. Persons working in the legal arena, in the education system with children, police officers, etc. must be given information as part of their studies and continual professional development on the importance to maintain confidentiality in a therapeutic relationship.

7. The therapeutic relationship is to be considered as paramount to legal procedures. The above courses or credits will help form a better attitude exhibited by the court towards the witnesses as they need to be more sensitive; this also applies for the defence council. All stakeholders need to realise how hard it is to build a therapeutic rapport and to maintain it and how fragile it is.

8. The court and other authorities have to understand that confidentiality is crucial for the rapport between client and counsellor. They need to realise the damage done by having the professional coerced to divulge clients’ intimacies.

9. If need be political lobbying can be used to arrive at this level of privilege by explaining to parliamentarians the need to legislate such laws.

The limitations in this study were how to include all the topics used in the semi-structured interview. However this was an impossible task to undertake. I had to choose between including everything and be superficial in every topic under discussion or to discuss the most relevant topics in more profound way. The last choice was the one I undertook. Topics such as reports writing for the court and exhibiting these reports in court, methods of giving evidence, contamination of evidence by client coaching, to mention a few, had to be abandoned in order to delve deeper in the topics chosen for discussion. Word count and the
time factor were also limitations for an exhaustive examination of all these topics. The gathered material from this research can nevertheless be used for further future study.

Finally, I am ending my research work with a poem I wrote in October 2011 which narrates my appreciation towards all clients both children and adults alike entrusted me with confidences that sometimes were quite heavy experiences. The poem narrates the necessity for the ‘healed’ counsellor who had the share of experience of reaching rock bottom to really understand the pain of the client who may be still struggling to experience healing. It is ‘A Journey to the Centre of My Earth’ reaching a point of mystic dance with the centre of the client’s earth.

A journey to the centre of my earth

I’m not sure when it really started
Was it acquired or given by birth?
All I know it’s a fantastic journey
A journey to the centre of my earth

Starting the journey with a single footstep
Walking, running; I thread along on my own
I fall, I fail, I stand up, I grow; my experience.
And I’m glad I’m not alone.

It’s a journey that led me to the deepest trenches of my inner space
Sometimes it’s the wind pushing
At others the tides and waves
Through the ice and the deserts
In crevices and in caves

The journey through the unknown
Sometimes in sweat and all the ever after
The journey through the ever known
Sometimes in sweet moments and laughter

Many times I stop and wonder
To look around and see
That the journey is not the vehicle
But the journey is one with me

It’s a journey that led me to the deepest trenches of one’s inner space
It’s privilege to be trusted
with the story of the confused
with that of the unloved,
and with that of the abused

It is a journey that for that special moment
Conjoins with the journey of those in hurt
And for that special moment my centre
Conjoins their journey to the centre of their earth

I just reach out my hand to help them; I try to walk in their pace

Benjamin Calleja
17th October 2011
Siggiewi, Malta
REFERENCES


APPENDICES
APPENDIX 1

Family secrets

Fall and Lyons, July 2003.

"Ethical Considerations of Family Secret Disclosure and Post-Session Safety Management"

“A family secret is a secret kept within a family. Most families have secrets, but the kind and importance vary. Family secrets can be shared by the whole family, by some family members or kept by an individual member of the family. The secret can relate to taboo topics, rule violations or just conventional secrets.

Issues like homosexuality, adultery, divorce, mental health, crime, substance abuse, physical or psychological abuse, human sexual behavior, premarital pregnancy or cohabitation, alcoholism, or deviance. More simple secrets may be personality conflicts, deaths, religion, academic performance and physical health problems. The confidentiality of family secrets revealed by a patient is a common ethical dilemma for counselors and therapists.”

APPENDIX 2

Copy of the original Hippocratic Oath in Greek and Latin

Source: U.S. National Library of Medicine
APPENDIX 3

Translation of the Hippocratic Oath from the original version

I SWEAR by Apollo the physician, Æsculapius, and Health, and All-heal, and all the gods and goddesses, that, according to my ability and judgement, I will keep this Oath and this stipulation.

TO RECKON him who taught me this Art equally dear to me as my parents, to share my substance with him, and relieve his necessities if required; to look up his offspring in the same footing as my own brothers, and to teach them this art, if they shall wish to learn it, without fee or stipulation; and that by precept, lecture, and every other mode of instruction, I will impart a knowledge of the Art to my own sons, and those of my teachers, and to disciples bound by a stipulation and oath according the law of medicine, but to none others.

I WILL FOLLOW that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give a woman a pessary to produce abortion.

WITH PURITY AND WITH HOLINESS I will pass my life and practice my Art. I will not cut persons laboring under the stone, but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption; and, further from the seduction of females or males, of freemen and slaves.

WHATEVER, IN CONNECTION with my professional practice or not, in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret.

WHILE I CONTINUE to keep this Oath unviolated, may it be granted to me to enjoy life and the practice of the art, respected by all men, in all times! But should I trespass and violate this Oath, may the reverse be my lot!

Source: Harvard Classics
APPENDIX 4

How the Legal System in Malta developed

Malta is one of the countries that have adopted a pluralistic legal system (Aquillina, 2011b). This system has a number of interlinked systems which in the case of Malta are civil and Common laws systems. According to the same source, Malta’s occupation by multiple foreign denominations gave way to a unique legal system. The Romans introduced their Roman law. Then the Knights Hospitaliers of St John introduced their code like that of De Rohan. The French enforced the Code de Napoleon. During the British occupation there was a dual political split between the Maltese who sympathised with the British and those who sided with Italy. The Italian culture and language brought about another tensile situation, more locally known as the pare passo era where the two cultures influenced the mentality of the Maltese aristocrats on both sides. On the one hand there was the Italian influence of the Diritto Civile or Civil Law and on the other hand there was the British Public Law. Without doubt all these different types of systems left their imprints in our legal system.

The local legal revolution did not stop here. The events that took place from the Sette Giugno, in the year 1919 onwards paved the way for the introduction of a self-governing system in Malta in 1921 (Pirotta, 2005a). With all its political implications, the Constitutional disputes from the twenties to early 1960’s, the Maltese front versus the British front must have simmered to a point where Malta was granted Independence from the British Empire (Cremona, 1997). Ten years on Independence Day, Malta was declared a Republic in 1974 and subsequently Malta became free from the British Military protectorate in 1979. Again, in 1987 Malta took the constitutional position of a Neutral Country (Cremona, 1997). The millennium events influencing the local legal system commenced prior to Malta’s accession to the European Union in 2004 (Pirotta, 2005b). Save a couple of derogations, Malta entered into an obligatory agreement to adopt in its totality the Union’s aquis communautaire and had to introduce laws that were in line with European legislations (Dinan, 2006) one of which was a recently as December 21st 2007 when Malta joined the Schengen States (Camilleri 2001 from Times of Malta online).
Confidentiality: the seal of confession as celestial blessings

In 1551 during the second period of the Council of Trent (Nolan, 1912) confession was officially regarded as a Sacrament for believers, by interpreting that it has scriptural basis and God’s authorisation.

The priest in turn retained the obligation to keep what has been confessed as absolute secret. Many believe that the Maltese Islands were christened when the Apostle Paul was shipwreck here in 60 A.D (see Act 28:1-11; Bezzina, 2002; Dalli, 2002). Taking the sources as true, during the mentioned councils Malta was thus already a Catholic stronghold and it may be deduced that whatever was legislated in these and other councils were scrupulously adhered to by the local clergy (Bezzina, 2002). The website of The Catholic Encyclopaedia, refers to the Biblical verses Mt 16:17-19 and Jn 20:22, 23 that give godly powers to what the seal of confession entails. The following are extracted from the standard edition of The New Jerusalem Bible.

Matthew 16:17-19 – “17 Jesus replied, “Simon son of Jonah, you are a blessed man! Because it was no human agency that revealed this to you but my Father in heaven. 18 So I now say to you: You are Peter, and on this rock I will build my community. And the gates of the underworld can never overpower it. 19 I will give you the keys to the kingdom of Heaven: Whatever you bind on earth will be bound in heaven; whatever you loose on earth will be loosed in heaven.”

John 20:22, 23 – “22 After saying this he breathed on them and said: “Receive the Holy Spirit. 23 If you forgive anyone’s sins, they are forgiven; if you retain anyone’s sins, they are retained.”
APPENDIX 6

Confidentiality: the Seal of Confessions and Legal Blessings

The right to teach what is right or wrong

The Catholic Church in Malta is established as a Constitutional Right and has the power to determine the principles of what is good and bad for the citizens of Malta. Although in recent years this power is diluted to a certain extent it still maintains Constitutional backing. If subarticle 2 of Article 2 of the Constitution of Malta includes the application of the Canon Law then the seal confession can be applied mutatis mutandis on church members.

Article 2 of the Constitution of Malta
(1) The religion of Malta is the Roman Catholic Apostolic Religion.
(2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong.

The seal of confession and confidentiality

A few years after the Second World War, before the development of the counselling profession as we know it today, priests helped parishioners not only in their religious concerns but also with issues of an emotional and interpersonal nature (McLeod, 2007). In fact, this altruistic mission has been practiced by religious ministers in Malta for centuries. The Catholic Church teaches and practices what is popularly known as “confession of sins” and also rendered such disclosure as absolutely confidential when disclosed under the confessional seal.

In 1215, the Fourth Lateran Council (Nolan, 1912) declared that whatever is confessed to the priest is secret with the obligation to protect the anonymity of the penitent at all costs. If the priest is found guilty of divulging both the sin and the sinner will have to face sanctions imposed by the Church, even as severe as excommunication. Note below the articles referring to the conditions of the sacramental seal from the Code of Canon Law.

<table>
<thead>
<tr>
<th>Article</th>
<th>Condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 983</td>
<td>(1) Sacramental seal administered by the clergy</td>
</tr>
<tr>
<td>Article 984</td>
<td>(1) Importance that confessor maintains the anonymity of the penitent</td>
</tr>
<tr>
<td>Article 1388</td>
<td>(1) If confessor discloses penitent’s sins he will be automatically excommunicated</td>
</tr>
</tbody>
</table>

Interesting to note is that this Lateran Council (Nolan, 1912) permitted the priest to seek counsel; a sort of supervision as we know it today. The use of counsel was recommended as required; as far as the identity of the penitent is not breached.
APPENDIX 7

Etymological roots of the word ‘confidential’

In this section I will try to explore the etymological meaning of the term and then I will be showing the importance and meaning certain entities and distinguished authors give to what is confidential information.

The word ‘confidential’ is derived from the Latin diction (Bond and Mitchels, 2010), so do other derivatives of the term, as Collins Dictionary (2003) shows words such as ‘confidant’, ‘confidante’ ‘confide’ and ‘confident’ all have the same grammatical roots in the Latin language which pertain to the term being scrutinised. All these words consists of a prefix ‘con’ followed by the stem word ‘fidens’. The prefix ‘con’ approximately translated as ‘with’ and the stem word ‘fidens’ approximately means ‘to trust’ from the word ‘fœdus’ connoting ‘treaty’. In other words the prefix and the stem word indicate an action where someone trusts something with another. It also implies that the entrusted person will be bound with a promise, hence treaty, not to convey further that something, which in our case is sensitive information. So the person sharing this type of information does so with the cognizance that the receiver will never divulge it to others.

Note the following observations of the intrinsic meanings these words portray. Collins Latin Gem Dictionary (1962) translates ‘confidential’ as ‘arcanus’ and ‘intimus’. The adjective ‘confidentially’ is translated ‘inter nos’. If we group together all these Latin meanings which subtly found the word ‘confidential’ we can extract an approximate definition of the term. Thus, sharing of ‘confidential information’ can be defined as ‘the act of connecting (committere) by trusting (credulus, fiducia) another / a confidant (conscius) with one’s most intimate (intimus) secret/s (arcanus), placing (deponere) the disclosed secret/s secure (tutis) in the confidant’s ears (auribus); which secret/s stay/s between us (inter nos) [or between the sender and the receiver]’.

Interestingly, the Dictionary of Psychology (1995) places confidentiality as a term connoting ethical and legal meanings. It defines confidentiality as ‘having the characteristic of being kept secret, an intimacy of knowledge shared by a few who do not divulge it to others’ (150-151). According to the Princeton University (2011) the underlining criteria for confidentiality, is that there are at least two persons and one of them is entrusting a secret message or information to the other with the sole intent of not being further disclosed).
Modern concepts of the word ‘confidential’

The Princeton University website content gives a number of definitions for the word ‘confidential’. All contains the basis of involving the sharing of verbal or written intimate secret or secrets by a client placing the importance of the counsellor’s respect from divulging such secret to others. In their book ‘Confidentiality & record keeping in counselling and psychotherapy’ Bond and Mitchels (2008) contend that confidentiality ‘presupposes trust between two people within a community of at least three people’ (p. 4).

The same authors qualify this act of trust between these people as restricted communication actively preventing it to be communicated to others. Similarly, in the professional sphere, Bond and Mitchels define confidentiality as protected ‘information that could only be disclosed at some cost to another’s privacy in order to protect that privacy from being compromised any further’ (p. 4). On the same lines, McLeod (2007) places the onus for the protection of confidentiality on counsellors advising them ‘to refrain from passing on what they have learned from the person to others in the person’s life’ (p. 15).

Interestingly, the Dictionary of Psychology (1995) places confidentiality as a term connoting ethical and legal understanding. It defines confidentiality as ‘having the characteristic of being kept secret, an intimacy of knowledge shared by a few who do not divulge it to others’ (pp. 150-151). According to the Princeton University the underlining criteria for confidentiality, is that there are at least two persons and one of them is entrusting a secret message or information to the other with the sole intent of not being further disclosed (Miller, 2011).
APPENDIX 8

Transitional and Experiential Difficulties

Clients tend to go through difficulties in life. I personally divide these into transitional and experiential difficulties however they do affect each other. The more resilient we are in life the better we are equipped to face both transitory and experiential difficulties (Newman and Newman, 2006). When a difficulty is overcome we become more tough and able to face similar situations in the future, however at times we require support.

Few Examples of Shared Confidences of Difficulties of Transitory and Experiential Nature

<table>
<thead>
<tr>
<th>Transitory: Internal</th>
<th>Experiential: External</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physical Appearance</td>
<td>Social Exclusion</td>
</tr>
<tr>
<td>Sexual Dysfunctions</td>
<td>Different Types of Abuses</td>
</tr>
<tr>
<td>Lack of Intellectual Abilities</td>
<td>Bereavement</td>
</tr>
<tr>
<td>Hormonal Changes</td>
<td>Traumatic Experiences</td>
</tr>
<tr>
<td>Low Self-Esteem</td>
<td>Social Encounters</td>
</tr>
<tr>
<td>Lack of Social and Other Life Skills</td>
<td>Difficult Family Situations</td>
</tr>
<tr>
<td>Confusion of Sexual Orientations and Identities</td>
<td>Exposure to Inappropriate Behaviours</td>
</tr>
<tr>
<td>Difficulty to Express Feelings Appropriately E.G.</td>
<td>Inappropriate Exhibited Behaviour E.G.</td>
</tr>
<tr>
<td>Self- Distractions Thoughts</td>
<td>Harm to Self</td>
</tr>
<tr>
<td>Revengeful</td>
<td>Harm to Others</td>
</tr>
<tr>
<td>Anger/Resentment for Life and Suicidal Ideation</td>
<td>Suicidal Attempts</td>
</tr>
</tbody>
</table>
### APPENDIX 9

**Confidentiality in the line of work of professions other than counsellors**

<table>
<thead>
<tr>
<th>DOCTORS</th>
<th>NURSES</th>
<th>POLICE OFFICERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>DENTISTS</td>
<td>PSYCHOLOGISTS</td>
<td>ACCOUNTANTS</td>
</tr>
<tr>
<td>PSYCHIATRISTS</td>
<td>PSYCHOTHERAPISTS</td>
<td>AUDITORS</td>
</tr>
<tr>
<td>RELIGIOUS MINISTER</td>
<td>THERAPISTS</td>
<td>TEACHING STAFF</td>
</tr>
<tr>
<td>PUBLIC OFFICERS</td>
<td>SOCIAL WORKERS</td>
<td>BANK EMPLOYEES</td>
</tr>
</tbody>
</table>
APPENDIX 10

Court sentence declaring the client as privileged not the professional

Sentenza tal-Qorti Chev. Dr Joseph Bugeja PH. C., MD vs. Alfred B. Farrugia noe mogħtiċa fil-15 ta’ April 1991:


Translation to English (Note: if any part of the translation of the above sentence have different connotations, the proper meaning of the context remains solely in the one produced in the original language - Maltese)

Court sentence Chev. Dr Joseph Bugeja PH. C., MD vs. Alfred B. Farrugia noe given on the 15th of April 1991

‘This privilege essentially pertains to the client, to make an analogy with the case of a lawyer, legal procurator or a priest in receipt of a confession, a reference could be made to Article 588(1) of the Code of Organisation and Civil Procedure (Ch. 12) disposes that in order for these persons can give witness, there must be the preventiv consent of the client or of the penitent. This indicates, that the opinion of the Court, that the privilege in reality is of the client and not of the professionals. This is the only reason why this privilege was recognised for the client using bank services, to be adequately safeguarded for what regard to the confidentiality of bank transactions.’

Source: Grech, 1994

18Bold mine
Modern version of the Hippocratic Oath

I SWEAR in the presence of the Almighty and before my family, my teachers and my peers that according to my ability and judgment I will keep this Oath and Stipulation.

TO RECKON all who have taught me this art equally dear to me as my parents and in the same spirit and dedication to impart a knowledge of the art of medicine to others. I will continue with diligence to keep abreast of advances in medicine. I will treat without exception all who seek my ministrations, so long as the treatment of others is not compromised thereby, and I will seek the counsel of particularly skilled physicians where indicated for the benefit of my patient.

I WILL FOLLOW that method of treatment which according to my ability and judgment, I consider for the benefit of my patient and abstain from whatever is harmful or mischievous. I will neither prescribe nor administer a lethal dose of medicine to any patient even if asked nor counsel any such thing nor perform the utmost respect for every human life from fertilization to natural death and reject abortion that deliberately takes a unique human life.

WITH PURITY, HOLINESS AND BENEFICENCE I will pass my life and practice my art. Except for the prudent correction of an imminent danger, I will neither treat any patient nor carry out any research on any human being without the valid informed consent of the subject or the appropriate legal protector thereof, understanding that research must have as its purpose the furtherance of the health of that individual. Into whatever patient setting I enter, I will go for the benefit of the sick and will abstain from every voluntary act of mischief or corruption and further from the seduction of any patient.

WHATEVER IN CONNECTION with my professional practice or not in connection with it I may see or hear in the lives of my patients which ought not be spoken abroad, I will not divulge, reckoning that all such should be kept secret.

WHILE I CONTINUE to keep this Oath unviolated may it be granted to me to enjoy life and the practice of the art and science of medicine with the blessing of the Almighty and respected by my peers and society, but should I trespass and violate this Oath, may the reverse by my lot.

Source: Harvard Classics
APPENDIX 12

Modern Counsellor vs. Postmodern Counsellor

McLeod (2007) posits that persons seek counselling for the simple reason that they are experiencing the same ambiguities of life with their perception of the world around them. The tension between modernism and postmodernism that today places challenges to all concerned. It can be viewed as a sort of contemporary feud between persons who believe that behaviours are guided by one universal Truth versus persons believing that behaviour “can only be understood in terms of the culture, group, or personal context within which it occurs” (Hergenhahn, 2001, p. 583). This feud is hereby presented to counsellors of different frames of thought.

A modernist counsellor may reflect that a client’s story merits disclosure to authority on the count of fundamental rules and principles that are viewed as universal and necessary by society. Postmodern counsellors, on the other hand, refuse to accept a universal truth or principle to guide their decisions to divulge or not to divulge clients’ information; they tend to rely more on their personal convictions, expertise and maybe on their experience. There is another genre of counsellors that are considered as being somewhere in the middle of these two extremes; on a continuum.

They may well view that issues presented in counselling as relevant to culture, group or personal contexts. However they acknowledge that there are times where certain principles overrule their own conviction and thus are able to strike a balance between the two extremes. Irrespective of the counsellor’s rational decision of whether to disclose or not client’s intimate information to competent authorities, the counsellor has to take moral and legal responsibility of whichever decision he or she takes. It is not rare that counsellors from all three schools mentioned above at times experience dilemmas in the course of their profession.
APPENDIX 13

Privileged persons by reason of calling

Criminal Code Chapter 9, Article 642

(1) Advocates and legal procurators may not be compelled to depose with regard to circumstances knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice.

(2) The same rule shall apply in regard to those persons who are by law bound to secrecy respecting circumstances on which evidence is required.

Code of Organisation and Civil Procedure, Chapter 12

Article 590 (2) No witness may be compelled to disclose any information derived from or relating to any document belonging to or in possession of any civil, military, naval or air force department of the public service and which is an exempt document under article 637.

Money Laundering Act, Chapter 373

Article 4 (3) An investigation order –

(a) shall not confer any right to production of, access to, or search for communications between an advocate or legal procurator and his client, and between a clergyman and a person making a confession to him, which would in legal proceedings be protected from disclosure by article 642(1) of the Criminal Code or by article 588(1) of the Code of Organization and Civil Procedure

The Profession Secrecy Act, Chapter 377

Article 3 (1) The persons who, by reason of their calling, profession or office, fall within the scope of article 257 of the Criminal Code include the following: members of a profession regulated by the Medical and Kindred Professions Ordinance, advocates, notaries, legal procurators, social workers, psychologists, accountants, auditors, employees and officers of financial and credit institutions, trustees, officers of nominee companies or licensed nominees, persons licensed to provide investment services under the Investment Services Act, stockbrokers licensed under the Financial Markets Act, insurers, insurance agents, insurance managers, insurance brokers and insurance sub-agents, officials and employees of the State.

Article 4 (1) A person shall also be deemed to have become the depositary of a secret by reason of his calling, profession or office when he obtains such secret by reason of being an employee, or employer, a partner or assistant, of a person who falls within the scope of article 257 of the Criminal Code or by reason of having acted as interpreter or translator in the communication of such secret.

Article 5 (1) Any person who receives or acquires secret information by virtue of a power of investigation or enquiry conferred by law or by virtue of any enactment which requires information to be communicated shall be deemed to have become the depositary of such information by virtue of his calling, profession or office

Source: Justice Malta
APPENDIX 14

Exempt persons from giving witness

“Gode l’immunita’ ecclesiastica\textsuperscript{19} et legalis”

The Code of Organisation and Civil Procedure Chapter 12

Article 588

(1) No advocate or legal procurator without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession or \textit{loco confessionis}.

Article 590

(1) It shall be in the discretion of the court to determine, in each particular case, when a witness is not bound to answer a particular question on the ground that the answer to such question might tend to expose his own degradation, or when a witness will not be compelled to give evidence as to facts the disclosure of which will be prejudicial to the public interest.

Source: Justice Malta

\textsuperscript{19}Translated as ‘Enjoying the immunity of the Church’. Used here as a antonym to the popular phrase ‘\textit{non-gode l’immunita’ ecclesiastica}’ translated as ‘does not enjoy the immunity of the Church’. The latter phrase is hanged against churches to denote that the church is no longer a haven for those breaching the laws (see Sanctuary (Abolition) Act 1828, Chapter 2). (\textbf{bold} and \textit{italics} mine)
APPENDIX 15

Instances of tipping off and sharing medical information illicitly

Dangerous Drugs Ordinance, Chapter 101, Article 24A
(6A) Where an attachment order has been made or applied for, whosoever, knowing or suspecting that the attachment order has been so made or applied for, makes any disclosure likely to prejudice the effectiveness of the said order or any investigation connected with it shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87) or to imprisonment not exceeding twelve months, or to both such fine and imprisonment

Suppliers Service Act, Chapter 117

Article 6 (1) No person who obtains any information by virtue of this Act or of any regulations made thereunder shall, otherwise than in connection with the execution of this Act or of any regulations made thereunder, disclose that information, except with permission granted by the Prime Minister

Article 9 (2) No person knowing or having reasonable cause to believe that another person is guilty of an offence against any regulation under this Act shall give that other person any assistance with intent thereby to prevent, hinder or interfere with the trial or punishment of that person for the said offence

Money Laundering Act, Chapter 373

Article 4 (6A) Where an attachment order has been made or applied for, whosoever, knowing or suspecting that the attachment order has been so made or applied for, makes any disclosure likely to prejudice the effectiveness of the said order or any investigation connected with it shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87) or to imprisonment not exceeding twelve months, or to both such fine and imprisonment:

Provided that in proceedings for an offence under this subarticle, it shall be a defence for the accused to prove that he did not know or suspect that the disclosure was likely to prejudice the investigation or the effectiveness of the attachment order.

Article 30A (1) Notwithstanding anything contained in any other law, the Unit may likewise demand from any person, authority or entity, as is referred to in article 30, any information it deems relevant and useful for the purpose of pursuing its functions under article 16.

Venereal Disease (Treatment) Act, Chapter 124

Article 10 (1) No person who obtains any information by virtue of this Act shall, otherwise than in connection with the execution of the provisions of this Act, disclose that information.
(2) Any person guilty of an offence under subsection (1) of this section shall be liable, on conviction, to imprisonment for a term not exceeding one year or to a fine (multa) of not less than two hundred and thirty-two euro and ninety-four cents (232.94) but not exceeding four hundred and sixty-five euro and eighty-seven cents (465.87) or to both such imprisonment and such fine.

Source: Justice Malta

20 Financial Intelligence Analysis Unit
APPENDIX 16

Privileged and non-privileged persons

1. **Privilege Persons E.g.**
   a. The Presidents of the Republic of Malta when acting in office (Provision to article 5 of the Criminal Code)
   b. A Member of Parliament when in parliament (Constitution of Malta article 65(3))
   c. Clergymen in confessionis (Chapter 12)
   d. Legal assistants: advocates lawyers, legal procurators (Chapter 369)
   e. Medical Practitioners (Chapter 12)
   f. Diplomatic Immunities in the course of their duties and other specific exceptions (Criminal Code article 5 (3) Chapter 191)
      i. Diplomatic agents
      ii. Administrative and technical staff of the mission if they are not Maltese nationals or permanent residents in Malta
      iii. Service Staff of the mission if they are not Maltese nationals or permanent residents in Malta
      iv. Private servants of the mission if they are not Maltese nationals or permanent residents in Malta
      v. The family members of i and ii above if they are not Maltese nationals or permanent residents in Malta
   g. The accused before deciding to take the witness stand having the right to remain silent

2. **Conditioned + Demanded + unconditioned E.g.** (E.g. Professional Secrecy Act)
   a. Psychotherapist
   b. Social workers
   c. Family counsellor
   d. Commissioner or Children

3. **No privilege + Demanded + Mandatorily** (E.g. Criminal Code)
   a. Any other professional E.g.
      i. Counsellor
      ii. Journalist
      iii. Public officer
   b. Any other person

*Source: Justice Malta*
APPENDIX 17

Police Obligation of Reporting Crimes

Criminal Code Chapter 9

Preliminary Provisions

Article 4
(1) The criminal action is essentially a public action and is vested in the State and is prosecuted in the name of the Republic of Malta, through the Executive Police or the Attorney General, as the case may be, according to law.
(2) A criminal action is prosecuted *ex officio* in all cases where the complaint of the private party is not requisite to set the action in motion or where the law does not expressly leave the prosecution of the action to a private party

Powers and Duties of the Executive Police

Article 346
(1) It is the duty of the Police to preserve public order and peace, to prevent and to detect and investigate offences to collect evidence, whether against or in favour of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities.

Police Act Chapter 164

Appointments and Conditions

Article 12
Every police officer shall be deemed to be a police officer at all times, subject to the payment of such compensation as may be due to him under any law or regulation or as the Commissioner may determine

Source: Justice Malta

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21Bold mine
APPENDIX 18

Mandatory Report by Administrative Policy

A. CHILD PROTECTION: Part II

2. Application

2.1 These Child Protection Procedures apply to all educational establishments

2.2 The duty to follow the Child Protection Procedures applies to

i. All staff of educational establishments, both teaching and non-teaching.

ii. Advisory/support staff in educational establishments.

iii. All contract workers within educational establishments (as stipulated in contracts of employment).

5. The Duty to Refer

5.1 The Child Protection Procedures need to be followed even if abuse is suspected... If we err at all, it should be on the side of vigilance.

5.2 Neglecting serious cases of abuse means neglecting one’s professional duties... Disciplinary action by the Education Division may be taken against a member of staff who does not pass on information about a known case of child abuse.

B. GOOD BEHAVIOUR IN SCHOOLS PART I NATIONAL POLICY ON BULLYING

Principles Against Acts of Bullying in School

3. The victims or witnesses of cases of bullying (excluding cases referred in article ‘1a’), as well as parents and teachers, are obliged to report every case to the Anti-Bullying Officer, or to a trusted person who in turn is obliged to report case to the Anti-Bullying Officer.

C. TACKLING SUBSTANCE ABUSE:

Principles

6. “It is the duty and obligation of school staff to take all necessary measures to prevent, curb and eradicate substance abuse in schools”. (8)

Source: Ministry of Education (Malta)

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22 Page 13
23 **Bold** theirs
24 **Bold** and *underlined* theirs
25 Pages 14 and 15
26 **Bold** theirs
APPENDIX 19

Extract of Schedule I of the Protection of Minors (Registration) Act
Chapter 518

Criminal Code Chapter 9

➢ Article 197 (1) and (2), 198: on rape
➢ Article 199: abduction of a minor by fraud and seduction
➢ Article 202: when abuse is carried out by a trusted person or by an entrusted employee
➢ Article 203: abuse of minors under 12 years of age by threat or deceit by parent or tutor
➢ Article 203A: defilement of minors
➢ Article 204: inducement of a minor in prostitution
➢ Article 204A: facilitates for a minor to act in or to audience pornographic material
➢ Article 204B: inducing persons under age to prostitution or to participate in pornographic performances
➢ Article 204C: take part in sexual activities with persons under age
➢ Article 204D: induces any person under aged to perform in any unlawful sexual activities
➢ Article 207: attempted or completed violent indecent assaults on minors not necessarily listed above
➢ Article 208A: indecent photographs, films, etc of person under age. Child pornography
➢ Article 247A: persistent neglect and ill treatment of minors
➢ Article 248D: human Trafficking of minor
➢ Article 251A: on harassment
➢ Article 251B: Causing others to fear that violence will be used against them, their family members and on their property

Medical and Kindred Professions Ordinance Chapter 31 of the Laws of Malta

➢ 2nd proviso to article 120A(2)(b)(ii): drug trafficking committed on minors

White Slave Traffic (Suppression) Ordinance Chapter 63 of the Laws of Malta

➢ Article 3: inducing a minor in prostitution holidays. It will be griever when perpetrators trusted persons like parents, tutors, religious leaders, in loco parenti persons, etc and when victim is under the age of 12 years.
➢ Proviso to Article 7(1): when offender is living on earnings from prostitution of persons under 18 years of age

Source: Justice Malta
APPENDIX 20

Principles for report writing

1. Be succinct as much as possible: Reports are read by busy and sometimes impatient persons

2. Be clear and logical in what you write: avoid vague phrases and sentences that may cause double or multiple meanings

3. Be complete in what you write

4. Use simple words or phrases: avoid flattery and emotional manipulation

5. Include only what is required

6. Remain impartial and objective as possible

7. Remain factual, focused and non-interpretative

8. Use good grammar

9. Read the report out loud for proof reading

10. Aim to produce short, simple sentences that fully express a single idea

The Five Moral Principles

✓ **Autonomy:** it is the client’s free state of to decide which action to take. If client is informed about the limitations of confidentiality and where it can be breached it would be up to the client to either self-disclose such information or retain it until an opportune moment or never disclose it at all. Counsellors have to respect this concept of independence according to the initial contract. According to Kitchener this right of autonomy depends much on whether it deprives the autonomy of others.

✓ **Nonmaleficence:** this is another of Kitchener’s concept referred to by Forester-Miller and Davis to be considered as a practitioners guide to ethical decision making. It is the act of not causing harm to client or harm to others in whatever decision taken by the divulgence of client’s self-disclosed intimate information.

✓ **Beneficence:** it is the responsibility of the counsellor to make decisions reflecting the wellbeing of the client. It is the act of doing ‘good’ to the client. In this study breaching or non-breaching of confidential information if done in the beneficence of the client, the counsellor will be carrying out a good service towards the client.

✓ **Justice:** according to Kitchener justice refers to treating equals equally and unequals unequally but in proportion to their relevant differences’ (para 2.4). the counsellor have to have a reason for treating a client differently.

✓ **Fidelity:** this concept is crucial for the relationship because the client builds trust in the counsellor and will feels that special ambience of safety to self-disclose. It is like letting go of the burden or surrendering one’s autonomy to the counsellor. Breach of confidential matters can qualify to breach of fidelity; unfaithfulness. Fidelity also means that if client had known beforehand that breach of intimacies shared is inevitable, the client would have self-disclosed responsibly.

*Source: Forester-Miller and Davis (1996)*
APPENDIX 22

The 7-Step Ethical Decision Making Model

1. **Identify the problem:** Who’s the problem after all? Is it mine, the client’s or any other person’s or situation? The more you look at the problem as objectively as possible the less you will rely on assumptions. Try to be factual; an assessment of the situation helps.

2. **Apply the ACA Code of Ethics:** Mainly all counsellors’ Codes of Ethics have similar reference to confidentiality and its limitations. In the local context counsellors rely on the MACP’s Code if members. Others examples of kindred professions in the local scenario can be members of the BACP and also, as psychologists be members of the MUPP or MPA. The MASW to have their own Code of Ethics in Malta. Applying one’s association’s ethical guidelines will certainly help to see what course of action one can take.

3. **Determine the nature and dimensions of the dilemma:** if one considers the five principles listed in the previous appendix may help as a check list to see if concepts are in any way conflicting and thus determining the course of action better. Recent professional studies may give light on the emerging dilemma and possible actions studied and maybe consequences experienced. Discussing with other professional colleagues and also in supervision are both food for thought in the direction of a better decision making. Not being as such in the dilemma they may offer a more objective advice. This consultation may go further to the top in seeking advice from one’s association or union.

4. **Generate potential courses of action:** it is not what we do with clients when we are facing a difficult situation; we explore venues to handle one’s problem as well as possible. Similarly here decision to breach or not to breach confidentiality may be help the counsellor to see how much to breach and to whom will the divulging is made.

5. **Consider the potential consequences of all options and determine a course of action:** I consider this as an important step before actually making the decision. It is carried out through elimination of the less desirable consequences until one arrives to the lesser evil of consequences. The less harm to the client and to the others may be the safest way without consequences; or is it?

6. **Evaluate the selected course of action:** the authors cite Stadler’s (1986, para 4.6) three principles of decision making Justice, publicity and universality. Justice determines the fairness of others being treated the same, publicity refers to how you would feel if your actions are publicised and lastly universality refers whether you would recommend the action taken to others. These might not be the only consideration one would make in implementing a decision.

7. **Implementing the course of action:** this is the most difficult step – the act to decide whether to breach or not confidences. It is advised that after the implementation of the action, evaluate whether the action had the expected results. This is experience in the making.

**Source:** (adapted from) Forester-Miller and Davis (1996).

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27 American Counseling Association
28 Malta Association for the Counselling Profession
29 Malta Union of Professional Psychologists
30 Maltese Psychological Association
31 Malta Association of Social Workers
APPENDIX 23

Semi Structured Interview

1. How long have you been practicing your profession?
2. In what setting do you practice your profession?
3. Are you a member of an organisation having ethical standards and policies and procedures?
4. Which authorities asked you to give evidence against or in favour of your client?
5. How many times where you required to give evidence?
6. How long ago was this?
7. What guidelines would you prefer to test yourself against whether to divulge information or not?
8. Consider the following: Would you still breach confidentiality
   a. if the law does not require you to do so?
   b. if the law prohibits you from doing so?
   c. if the law requires/prohibits you to do so but you feel it is unethical?
   d. if you would be held legally liable on either of the above scenario?
9. Do you find yourself in a crescendo of events from when the information that needs to be breached to the actual breaching of the information? How would you describe this process?
10. Your client gives you information that requires breach of confidence yet you will require more information or time to reflect before breaching? Where does this moment fall within this crescendo?
11. Sadler (1986) uses three utilitarian processes of reasoning to test oneself whether any action ethical or not. The three-step process contains the aspects of Universality, Publicity and Justice. How would you connect this to the process you have just explained to me? Do you think that these three steps are adequate to guide your process?
12. Can you recall your most difficult dilemma when you considered it doubtful whether a breach of confidence took place?
13. From your experience in giving evidence, could you give at least one suggestion of what authorities should introduce, remove or add measures relating to witnessing in court etc against or in favour of clients?
14. What does confidentiality mean to you and how would you prefer to communicate it with your client?
15. What about breaching confidentiality?
16. After breaching confidentiality how was the rapport with your client affected?
17. Did the client consider that his or her anonymity and privacy were breached?
18. How did it affect you? And in giving witness?
19. How did you prepare the client before giving the necessary evidence?
20. Would you consider confidentiality as pertaining to the Human Rights of every client?
21. The court authority reprimands you that if you refuse to witness against your client you will be liable for contempt of court. You feel that this demand will expose the client to information that you do not want to give. What will your stance be?
22. What comments do you have regarding the seal of confession where breach of confidentiality is concerned?
23. Are you informed of your legal obligations and rights as a counsellor who is under police investigation or a magisterial inquiry where a client is concerned? How do you inform yourself?

24. In relation to breach of confidences, does it make a difference to you if the client self-discloses information that

25. What would your ethical, legal and moral implications as a counsellor be when the client is implicated in crime?

26. Does the public interest ever supersede that of the client? If so, when?

27. What about the safety of the government?

28. Do you enter a report for every session you carry out with every client?

29. What do you do if a client requests a copy of his or her information you keep?

30. When do you consider it proper for the counsellor to remove these files?

31. Do you communicate with the client of the fate of their reports on being disposed of?

32. What would you exhibit in court as evidence?
APPENDIX 24

Scenarios

Scenario 1. If the client self-discloses that some months ago there was this occasion when as a babysitter she had these sexual fantasies of touching and fondling the boy-child’s genitals for curiosity’s sake. She also confessed that when this got to her mind and started to unfold the diaper, something in her mind said that this was a bad thing to do and that she felt ashamed and placed back the diaper’s flap. As the counsellor what will your action be?

Scenario 2. If a client divulges information that he is the mastermind or an accomplice in a conspiracy against the government which is going to take place within a couple of days would you help him realise the grave of the crime and give himself up to the police? Will you mention article 60 of the same Code as a guarantee of not being legally liable if he gives himself up and report to the authorities? And if he refuses to give himself up? And if the client states that her husband is involved?

Scenario 3. A client discloses information that he is wanted by the police for a crime he has committed? What if the client is assisting a fugitive? What about the wife being the client and knows that her son is a fugitive of the law. What would you do if you were the counsellor for this client?

Scenario 4. A minor client under 16 years of age expresses that she is allowed by parents for example to sleep-over at her friend’s during weekends. The client and her friend habitually enter home late and drunk. The friend’s parents are tolerant of this behaviour but the client’s parents have no knowledge of the drunkenness behaviour of their daughter. Will you as counsellor consider informing the child’s parents about this?

Scenario 5. A 16 year old boy in receipt of counselling divulges that he is allowed to carry a shotgun (against article 206 (a) of the Criminal Code) in a field of a relative or friend with or without the cognizance of the parents. (Arms Act Chapter 480) On a similar vein a child of 14 years of age self-discloses that every weekend he goes to a licensed shooting range with his uncle and practices airgun shooting for sporting purposes. He does this with parental consent. You are concerned for his safety. What would you do in face of confidentiality?
Scenario 6. An adult who is diagnosed with a terminal illness has been told that he has no more than a year to live and during a counselling session you realise that your client has suicidal ideations and obliges you not to inform the family. What action would you prefer in such circumstances? Remember that suicide is not a crime anymore.

Scenario 8. A client self discloses that he was invited for a bachelor’s party and he self discloses that out came a showgirl and started to strip. He recognised the girl that she is under-aged. He also saw other young strippers attending other clients. He explained that seeing so he decides to leave the premises which he mentioned by name. On receipt of this information what would your action be?

Scenario 9. A client tells you that he is hearing these bizarre screams from his neighbour’s house. He knows the tenant is a criminal known for pimping girls, even under age, for prostitution. The screams happen mainly when guests come to the house. The client is sure that his neighbour is keeping persons against their will.

Scenario 10. A 26 year old lady self discloses in counselling that she has proof that her boyfriend is dealing in drugs and she saw him trafficking abusive substance and getting paid by an unknown customer. Her boyfriend threatened her that if she ever speaks to anyone he will surely kill her. You happen to know this infamous drug dealer and you also know that he is very dangerous. What will your position be in relation to confidentiality?

Scenario 11. A women in her late thirties was raped an found out that she was pregnant and is very confused and is considering of going abroad to Italy next week to carry out an abortion. What will your action be if you were her counsellor?

Scenario 12. You are giving evidence in court and the Magistrate demands that you have to produce all your counselling notes, including reflections, regarding the client as the accused. The client has divulged to you that he is an accomplice in the crime to which he is not pleading guilty. In your notes you have information irrelevant to the case but is relevant to the counselling sessions. What would you do in such circumstance?
Appendix 25

Recruitment letter

Dear participant

I, Benjamin Calleja of ‘Paradise Lodge’ 72, Triq Lapsi, Siġġiewi, SGW1962, ID Card No. 189663m, contact No. 79461721 and 27461721, as part of my studies in Masters in Counselling, am carrying out a research study for my dissertation. The title of the dissertation is ‘Counselling and the Law’. Issues of Confidentiality in Malta’. This research study is supervised by Rev Dr Paul Galea from the Faculty of Theology and advised by Profs Kevin Aquilina from the Faculty of Law. The purpose of this study is to find out how certain Maltese Laws affect the counselling process in relation to the breaching of confidentiality. I would also want to find out how participants, working in counselling, experienced legal, ethical, and investigative actions when they had to breach confidences as required by law. In this study I will also try to establish whether the therapeutic rapport was perceived to be affected.

Participants who freely agree to contribute to this study will sit for a semi-structured interview which will take approximately one and half hour. In exceptional cases, I may ask for another interview which will be shorter than the previous one. Participant’s responses will be both recorded in written and audio format. The time and meeting place will be mutually agreed upon and at any time the participant has the right to cancel the appointment to postpone it or otherwise. An informed consent will have to be signed by participants stating that they are agreeing to participate freely in this study. The informed consent provides for ethical rights to be observed by me during and after the research. In relation to one’s own response, at anytime, the participant has the right to refuse to answer any question, check any written or audio recorded information, demand to cancel any already written information, demand to erase any information registered in the audio device and can withdraw from the study without the need of giving the reasons for withdrawal.

I declare that I will respect participants’ rights and guarantee to the best of my knowledge to produce responses as genuinely as possible and take utmost care to protect participants’ anonymity and information received will be dealt with the strictest confidentiality. Real names will not be mentioned in the study nor any data with which participant can be identified. Apart from me, only the supervisor and examiners will have access to these data. I will not use any form of deception in this study, nevertheless, in case that any participant withdraws from this study, all collected data will be destroyed.

Regards

Benjamin Calleja
ID 189663m
APPENDIX 26

PARTICIPANT’S INFORMED CONSENT

SUBJECT: Informed consent of participants to take part in a research study on the effects of legal, ethical, and investigative actions on themselves, on their clients, on the counselling / therapeutic dissertation in the Masters in Counselling which is being currently read by Mr Benjamin Calleja bearing ID Card No. 189663M.

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NAME OF RESEARCHER: Benjamin Calleja
ADDRESS: ‘Paradise Lodge’ 72, Triq Lapsi, Siggiewi. SGW1962
CONTACT NUMBERS: 79461721 or 27461721
TITLE OF RESEARCH DISSERTATION: Counselling and the Law. Issues of confidentiality in Malta
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I, Mr/Ms___________________________________, the undersigned and bearer of identity card number ______________ hereby give consent to participate in a semi-structured interview as part of a research study being undertaken by Mr Benjamin Calleja for his dissertation. The research is part of the Masters in Counselling the researcher Mr Calleja is currently reading. I understand by this consent that, in relation to my responses only I can at any time.

1. Refuse to answer any question made to me
2. Check any written information
3. Demand to cancel any already written information
4. Demand to erase any information registered in the audio device
5. Withdraw from the study for whatever reason and I will not be asked to give reasons

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I, Mr Benjamin Calleja, do hereby guarantee that to the best of my knowledge I will produce your responses in my findings as genuinely as possible and take utmost care to protect your anonymity and information received will be dealt with the strictest confidentiality. Your real name will not be mentioned in the study or in any data by which you can easily be identified. Only the supervisor and the examiners will have access to your data. I will not use any form of deception in this study. In case that you decide to withdraw from this study, all collected data will be destroyed.

_________________________  ______________________
Mr/Ms                      Mr Benjamin Calleja
Participant                Researcher