To Testify or Not to Testify: A Comparative Analysis of Australian and American Approaches to a Parent-Child Testimonial Exemption

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To Testify or Not to Testify: A Comparative Analysis of Australian and American Approaches to a Parent-Child Testimonial Exemption

Hillary Farber*

Introduction

Parents compelled to testify against their under-age children conflicts with deeply rooted societal values about familial privacy and the appropriate reach of government. As a society, we place a premium on time spent with children and the accompanying level of communication and care implicit in that. It goes without saying that parents are the most important contributors to the socialization of their children.1 From birth they teach the child to act in socially appropriate ways and to become a productive member of society.2 The family plays the central role in determining the child’s initial trajectories in life. Trajectories in crime and deviance are no exception.3 Social scientists who have studied patterns between parental attachment and delinquent behavior have found that when parents devote time to their children, communicate about the child’s feelings and frustrations, and provide guidance and advice, they prevent involvement in crime and delinquency.4

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2 Dr. Travis Hirschi, a renowned expert in social control theory, believed that a child who does not have strong attachment to his parents has no way of learning moral rules and is incapable of developing a conscience. See generally, TRAVIS HIRSCHI, CAUSES OF DELINQUENCY 86 (Transaction Publishers 2007) (1969).


It is natural that children will share some of their most personal secrets with their parents in order to receive the benefit of their parents’ counsel. Children know that a parent’s advice is at its most reliable when being told truthful and accurate information. Children are by nature impulsive and frequently fail to consider the long term consequences of their actions. In a close relationship, parents have considerable sway over their child’s decisions. They are often the first to assess their child’s predicament and can judge when to access professional services, if needed. Accurate and truthful information from the child provides parents the ammunition to make the best decisions. There is an implicit assumption of privacy and confidentiality in the information shared between parent and child within the institution of the family.

Given these assumptions, it is shocking to think of undermining the trust and confidence essential to the parent-child relationship by forcing a parent to testify against his child in order to assist the government. And yet, except for Australia, none of the common law countries recognize an evidentiary privilege for parents and their children. The United States Juvenile Justice system assigns parents a key role when it comes to all stages of advising and participating in the decision-making process.

Wardle, The Fall of Marital Family stability and the Rise of Juvenile Delinquency, 10 J.L. & Fam. Studies 83 (2007). Hirschi found that as intimacy of communication between parent and child increased, the less likely the child was to commit a delinquent act. Two more leading researchers in social control theory, Rolf Loeber and Magda Stouthamer-Loeber, have concurred with Hirschi. According to Loeber and Stouthamer-Loeber, if parents are generally unaware of their children’s activities, social relationships, and whereabouts, the children have greater opportunity to become alienated from their parents, and to act without adult guidance and supervision, thereby increasing the likelihood of committing delinquent acts. See Rolf Loeber and Magda Stouthamer-Loeber, Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency, Crime and Justice, 38 (1986). One later study examined the relationship between parental efficacy and emotional support. See John P. Wright & Francis T. Cullen, Parental Efficacy and Delinquent Behavior: Do Control and Support Matter?, 39 CRIMINOLOGY 677 (2001)(authors use term ‘parental efficacy’ to refer to parents who control and support their children). Wright and Cullen found that parents who give their children emotional support are more likely to exercise greater supervision and form greater attachment. See id. at 693.

5 Due to the personal nature of their relationship, parents commonly offer unsolicited advice to their children out of a sense of moral and social responsibility.


7 See Anne C. Dailey, Constitutional Privacy and the Just Family, 67 TUL. L. REV. 955 (1993)(exploring how the familial privacy has helped shaped the Supreme Court’s conception of privacy).
in juvenile delinquency proceedings. The law encourages parents to be present prior to an interrogation by police to advise the child as to whether he should speak to police. In most jurisdictions parents are mandated to be present at all proceedings, and many courts require parents to sign off that they are informed as to the plea arrangement upon which their child has agreed. For the unemancipated minor, parents are usually financially responsible for their child’s legal expenses. Many courts automatically assign to parents the costs and probation fees, even for indigent defendants. In an adjudicatory system whose principal players are predominantly between the ages of 11 and 16, parental presence and intervention is as common as it is both required and expected. The fact that the information shared between the parties is not protected from government intervention would constitute an unpleasant shock for most parents.

Relationships that enjoy legal protections, such as evidentiary privileges, are an expression of their societal worth. The concern which is present upon consideration of any barrier to the admissibility of relevant evidence is that such evidence will not be considered by the trier of fact toward a fair and just determination. In a criminal prosecution, any mechanism that limits the availability of relevant evidence to the fact finder is controversial. In the United States, courts have recognized an evidentiary privilege for spouses, lawyers and their clients,

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8 See, e.g., CAL. PENAL CODE § 987.4 (West 2004) (allowing a court to order “the parent or guardian of [a] minor to reimburse the [state] for all or any part of such expense, if it determines that the parent or guardian has the ability to pay such expense”); COLO. REV. ST. § 19-2-706(2)(b) (2002) (mandating that the state seek reimbursement for the cost of an appointed counsel for a juvenile defendant where the parents refused to retain counsel); MD. CODE ANN. art. 27A, § 7(h)(ii) (2003) (allowing the state to collect from the “parents, guardian, or custodian of the minor . . . an amount that the parents, guardian, or custodian may reasonably be able to pay” in cases where the court is exercising other than criminal jurisdiction); N.H. REV. STAT. ANN. § 604-A:9(I-a) (2003) (permitting the state to collect the cost of providing a public defender to a juvenile from the juvenile defendant or the person liable for the juvenile’s support commensurate with present of future ability to pay).

9 See, Andrea, L. Martin, Balancing State Budgets at a Cost to Fairness in Delinquency Proceedings, 88 MINN. L. REV. 1638 (June 2004) (acknowledging that legal expenses are generally considered “necessaries” that a parent is financial responsible for despite difficulties association with the classification).
psychotherapists and their patients. Individual states have also identified relationships deemed worthy of a testimonial privilege, some of which include relationships not recognized under federal common law. For instance, most states recognize a clergy-communicant privilege. Some states recognize a privilege between victims and domestic violence advocates. Surprisingly, given all of the arguments stated above, the United States has not adopted a federal common law or statutory parent-child privilege. Only Connecticut, Idaho, Massachusetts, Minnesota, and New York have a parent-child testimonial privilege. Massachusetts does not recognize a privilege protecting parents from testifying against their children; rather it protects children from testifying against their parent in proceedings other than domestic violence cases. Connecticut’s parent child privilege is the most protective because it extends to communications and observations made by the parent. Paradoxically, the absence of legal protections for parent-child communications is inconsistent with society’s expectations of parents and with the value placed on the parent-child relationship.

12 ARIZ. REV. STAT. ANN. § 12-2239 (2003); CAL. EVID. CODE § 1035.4 (West 2009); COLO. REV. STAT. ANN. § 13-90-107 (West 2005); ILL. COMP. STAT. ANN. 750/60-227 (West 2009); MASS. GEN. LAWS ANN. ch. 233 § 20K (West 2004); PA. CONS. STAT. ANN. § 6116 (West 2001).
13 See H. Farber, Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child? 43 LOY. L.A. L. REV. 551 (WINTER 2010)
14 IDAHO CODE ANN. § 9-203 ( 2003) (a parent or guardian “shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party” unless the case involves violence against the adult); Conn. Gen. Stat. Ann. 46b-138a(West 2009) (parent of a minor who is accused in a juvenile court matter “may elect or refuse to testify for or against the accused child” regardless of whether the source of the parent’s knowledge is a confidential communication or personal observation, with the exception that the parent must testify if he or she is the victim of violence allegedly inflicted by the child). Minn. Stat. Ann. § 595.02 (West 2003) (a parent may not be compelled to testify “as to any communication made in confidence by the minor to the minor’s parent,” except in certain enumerated situations), MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004).
15 MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004).
The practice of failing to protect parents and children from testifying against one another is not unique to American law. None of the countries in the United Kingdom\(^\text{17}\) recognize a common law or statutory evidentiary privilege for parents and their children.\(^\text{18}\) Australia is the only common law country to restrict the compellability of parents and their children testifying against one another in a criminal proceeding. Although the Australian legal system is modeled on the British legal system, it breaks rank with its common law counterparts over the testimonial exemption for parents and children. The 1995 Evidence Act in Australia first recognized a parent child exemption as it applies under federal law. Two of the six Australian states have statutorily created parent-child testimonial exemptions that that pre-date the Australian federal law.\(^\text{19}\) Additionally, New South Wales and Tasmania followed suit shortly after the Federal Act was instituted. Among the civil law countries in Europe and Asia, a majority of countries prohibit parents and children from testifying against one another.\(^\text{20}\) The origin of this prohibition is rooted in Judeo-Christian tradition. Traditional Jewish law forbids family members from

\(^{17}\) The United Kingdom encompasses three separate legal jurisdictions which maintain different rules and procedures: England and Wales, Scotland, and Northern Ireland.

\(^{18}\) Tom Ginsburg and Richard M. Mosk, “Evidentiary Privileges in International Arbitration”, Int. Comp. Law. Q. 50(2), 345-385 (2001)(“the approach of English law is to provide few absolute privileges, and to accord substantial discretion to the court to determine whether public policy weighs in favor of nondisclosure in individual cases.”)

\(^{19}\) See Evidence Act, 1929, s. 21 (S. Austl); Crimes Act, 1958, s. 400 (Victoria).

\(^{20}\) See Austria, Austrian Code of Civil Procedure, Sections 321, 380 ZPO, France, C. PR. CIV. art. 248, § 336 (G. Koch trans. 1963), German Criminal Procedure Code, Chapter VI, Section 52., Italy, Art. 247 Code of Civil Procedure, Art. 199, Code of Criminal Procedure. , Japan, The Code of Criminal Procedure, Article 147 (A person who has the relationship prescribed in the preceding Article with one or more of the accomplices or co-defendants may not refuse to give testimony on matters relating only to the other accomplices or co-defendants.); Netherlands, Philippines, Revised Rule of Evidence, RULE 130, Sec. 25. Parental and filial privilege. — (20a), Russia, The Constitution of the Russian Federation, Art. 51 (1993), Sweden, The Swedish Code of Judicial Procedure 141 (Anders Bruzelius & Krister Thelin eds., rev. ed. 1979)., Taiwan, Taiwan Code of Criminal Procedure, Article 180: “A witness may refuse to testify under one of the following circumstances:

(1) The witness is or was the spouse, lineal blood relative, blood relative within the third degree of kinship, relative by marriage within the second degree of relationship, family head, or family member of the accused or private prosecutor)
testifying against one another. Similarly, the Romans believed that the foundation of society depended on a cohesive family unit. As a result, early Roman law barred persons closely related to the plaintiff or defendant from testifying.

This article adopts a comparative approach toward the promotion of the legal and social utility of a testimonial exemption for parents and their children. The Article will contrast Australia’s widespread acceptance of a parent-child exemption with the general rejection of the privilege in the United States. Although the Australian and American juvenile justice systems were born at virtually the same time, there are significant differences in their approaches to the treatment of youth. Australia’s model for dealing with the transgressions of its youth can be characterized as a community based restorative approach. Instead of making the juvenile the focal point of the process, the restorative model provides ample opportunity for all affected parties to be heard. The emphasis is away from a formal adjudication and toward proceedings that can be characterized by a degree of informality. In practical terms, the system incentivizes diversionary practices that accommodate offender/victim dialogue, family involvement, and community based programs geared toward achieving offender accountability without

21 In re Grand Jury Proceedings (Greenberg), 11 Fed. R. Serv. (Callaghan) 579, 581 (D. Conn. 1982). A core value of the Jewish tradition is protecting the sanctity of the family. Jewish law holds that the importance of the familial relationship outweighs the government’s fact finding responsibility. Greenberg at 110.  
23 Referred to as testimonium domesticum. Spouses, patrons, freedmen and slaves were excluded as witnesses at a trial of a close relative or master. See Wendy Meredith Watts, The Parent-Child Privileges: Hardly A New Or Revolutionary Concept, 28 WM AND MARY L. REV. 583, 592 (1987). The Romans believed that a family member’s testimony was of little or no value because he would have strong urges to misrepresent the truth to protect the family. Rather than weigh the credibility of the testimony on a case by case basis, the government adopted a law simply disqualifying any witness who fell within this category of persons. Roman law is the embodiment of the view that the preservation of familial relations supersedes law enforcement’s need for evidence. Anyone who violated this legal and social code was considered disloyal and unworthy of belief. See Hunter at 1056.  
24 In the United States a rule of evidence that bars otherwise relevant evidence is characterized as an evidentiary privilege. Under Australian common law and statutory authority, a rule that disqualifies a witness from testifying is called an exemption. Exemptions preclude an otherwise competent and compellable witness from testifying. Aust. Evid. Act 1995 and its state counterparts are exemptions to the compellability of specific persons, such as spouses, parents, and children.  
stigmatizing the juvenile for transgressions committed at a young age.\textsuperscript{26} On the other hand, over the last forty years the American juvenile justice system has evolved into a retributive system, with an emphasis on deterrence and incapacitation.\textsuperscript{27} Zero tolerance policies, waivers for transferring youth to the adult criminal court and greater numbers of youth in detention evidence a paradigm shift in America’s treatment of its youth. These legislative prescriptions designed to address public safety concerns and school decorum increased the formalism in the adjudication of such matters. Throughout the juvenile justice system in the United States, due process is central to the adversarial nature of the proceedings.

The differences in these two paradigms explains, in part, why Australia recognizes the need for an exemption for parents and children, while the majority of the states in the United States have not. But the differences in the legal paradigms regarding the relationships between parents and children are not insurmountable. It remains that the Australian experience suggests important ways in which the American legal system can consider alternative ways of supporting these relationships, including the adoption of a testimonial privilege for parents and their children.

This Article begins, in Part I, by explaining the history of the parent-child privilege in the United States. In Part II, the Article turns to the Australian experience, looking at the origins of the exemption from compelled testimony that developed in that legal system and where it is today. Next, in Part III, this Article addresses the ways in which the Australian system provides a fertile ground for the legal protection of the parent-child relationship. Finally, this Article

\begin{footnotesize}
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\item \textsuperscript{26} See id at 344-46.
\item \textsuperscript{27} See supra note X (numbers of kids sentenced to commitment and use of detention as an indicator that there is a shift from rehabilitative emphasis to more of an incapacitation and public safety concern)
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suggests ways in which the American legal system can benefit by considering some of the reforms adopted by the Australian system.

I. The History of a Parent-Child Privilege in the United States

The United States Congress has considered a ‘parent-child evidentiary privilege’ bill in four separate legislative sessions. 28 Senator Patrick Leahy (D-VT) introduced legislation instructing the Attorney General and the Judicial Conference of the United States to study “important questions” concerning the establishment of a privilege to protect parent-child communications in civil and criminal cases following the treatment of Monica Lewinsky’s mother, Marcia Lewis, by Independent Counsel Kenneth Starr. 29 Leahy explained:

This is not the Star Chamber of hundreds of years ago. This is not the Spanish Inquisition. No child, no matter what their age, expects his or her conversations with a parent to be disclosed to prosecuting attorneys. Compelling a parent to betray his or her child’s confidence is repugnant to fundamental notions of family, fidelity, and privacy. Indeed, I can think of nothing more destructive of the family and family values, nor more undermining of frank communications between parent and child, than the example of a zealous prosecutor who decides to take advantage of close-knit ties between mother and daughter, of a prosecutor who said, if a mother loves a daughter and a daughter will go to a mother to talk to that mother, then we are going to grab the mother. Great family values, Mr. President. Great family values, Mr. Starr. 30

29 144 Cong. Rec. S803-01, at S803 to S804 (Feb. 23, 1998). Mr. Starr subpoenaed Ms. Lewis to testify before the grand jury investigating President Clinton as to statements Ms. Lewinsky was believed to have made to her mother concerning her relationship with President Clinton. Despite her lawyers’ best efforts, and public sentiment opposed to intruding into the private conversations between mother and daughter, no privilege barred Mr. Starr from compelling the information.
30 144 Cong. Rec. S1508-02, S1509-10 (March 6, 1998). The bill was read twice and referred to the Senate Committee on the Judiciary. The bill never made it out of the Judiciary Committee.
Simultaneously in the House of Representatives, U.S. Representative Zoe Lofgren, introduced H.R. 3577 “The Confidence in Family Act”\(^{31}\), proposed a parent-child privilege in federal criminal and civil proceedings, and amended the Federal Rules of Evidence. One of Representative Lofgren’s principal justifications for the proposed legislation was her belief that the parent-child relationship merits the protection of a testimonial privilege for the same reasons that the spousal relationship does.\(^{32}\) According to Lofgren, “the relationship between mother and daughter, between father and daughter, between father and son is as valuable, as precious as that between husband and wife.”\(^{33}\) Representative Lofgren called the absence of such a privilege a “trilemma” of cruel choices for parents compelled to testify against their children: perjury, betrayal of the child’s confidence, or potential jail time for contempt of court.\(^{34}\)

The over breadth of Lofgren’s bill was largely responsible for its failure.\(^{35}\) The proposed privilege made no distinction between adult children and minor children.\(^{36}\) The privilege was designed to pertain to any relationship where an individual had a legal right to act as a parent.\(^{37}\) This definition included foster children and long term custody relationships. Some lawmakers suggested that they would support a parent-child privilege limited to minor children in civil cases only: the implication being that shielding inculpatory communications between children and


\(^{32}\) This amendment would ensure that parents and children could not be compelled to testify against one another, and that confidential communications between parents and children will be protected. These privileges would be similar to the privileges currently provided under Federal law to spouses, and would be developed by the courts in light of the common law, reason, and experience. Modeled on the marital privilege of Trammel, the legislation contained both an adverse testimonial privilege and a confidential communication privilege. 144 Cong Rec. at H2269.


\(^{34}\) See, 144 Cong Rec. at H2272.


\(^{36}\) See id.

\(^{37}\) See supra note X.
parents from a criminal investigative arm of the government was contrary to public policy. The legislation was fashioned in accordance with the spousal privilege, but left to the courts to determine its applicability to specific situations. “The Confidence in Family Act” was rejected by a vote of 162 to 256 on April 23, 1998.


On the state level, Massachusetts is considering amending its evidence rules to include a parent-child privilege. During the 2009 legislative session, State Senator Cynthia Creem introduced a bill in support of a parent-child privilege that would protect parents from being forced to testify in any criminal proceeding against their child. Currently Massachusetts has a

38 See Jefferson supra note 35 at 456.
39 See id.
40 Supra note X at 456.
41 H.R. 4286, 105th Cong. (1998)
42 The bill included the standard exceptions for testimonial privileges: 1) in any civil action or proceeding by the parent against the child or the child against the parent; 2) in any civil action in which the child’s parents are opposing parties; 3) in any civil action contesting the estate of the child or child’s parent; 4) any proceeding concerning custody, dependency, deprivation, abandonment, support, abuse or neglect of child, termination of parental rights; 5) in any criminal or juvenile proceeding in which the parent or child is charged with an offense against the person or property of the child, parent, or any member of the household or family. The bill also assigns a guardian ad litem or attorney for a minor child to represent the child’s interests with respect to the privilege. Cong. Rec. H. R. 3433 (July 26, 2005).
43 See Mass. Senate Bill 1670, “An Act Relative to Testimony in Criminal Proceedings,” 12 January 2009, <http://www.mass.gov/legis/bills/senate/186/st01pdf/ST01670.PDF>. A similar bill was introduced in the House by Representative Eugene O’Flaherty. See House Bill 1570, “An Act relative to parent child privilege”. Senator Creem originally introduced legislation in support of a parent child privilege in 2000 following a Massachusetts case involving two Braintree, Massachusetts teenagers who were arrested for rape and their parents were subpoenaed to testify before the grand jury regarding communications they had with their sons pertaining to the rape accusation. The Supreme Judicial Court stayed enforcement of the subpoenas in order to allow the legislature the opportunity to
statute which disqualifies the child witness from testifying against his parent, unless the inquiry involves domestic violence or child abuse.\textsuperscript{44} The proposed parent-child privilege completes the circle for a relationship already established as deserving of an evidentiary privilege.

Drafting legislation for a parent-child privilege involves a myriad of considerations, such as whether the protections should apply to adult children, civil and criminal proceedings. As evidenced on the federal level, legislation that was not limited to parents and their minor children, or criminal proceedings weakened majority support. For example, in 1998, the Illinois legislature considered a bill that would have amended the Civil Procedure Code to create a parent-child privilege.\textsuperscript{45} The privilege, which was supported by the Illinois State Bar Association could be asserted by either the parent or the child. The legislation extended to communications between adult children and their parents, as well as communications between parents and minors.\textsuperscript{46} The majority of the opposition to the legislation focused on its breadth.\textsuperscript{47} Legislators expressed concern that the legislation would upset the proper adjudication in abuse and neglect proceedings, custody disputes because parents would exercise the privilege to

consider the important social policy issue affecting children and families inherent in establishing a parent-child privilege. In the Matter of a Grand Jury Subpoena, 722 N.E.2d 450, 451-52 (2000). Senator Creem has gone on record regarding the injustice that can occur as a result of the lack of legal protections for communications between children and their parents: “We would hope that if children came to their parents, they would be able to share their problems.’ . . . But as it stands now, ‘if my children come to me, I have to say, ‘Go talk to your priest, go talk to your doctor, because I can’t hear it.’” Kris Axtman, \textit{Do Parents Belong on the Witness Stand?}, Christian Sci. Monitor, Feb. 17, 2000, at 1.

\textsuperscript{44} \textit{See} MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004).
\textsuperscript{45} Transcription Debate, State of Illinois 90th General Assembly House of Representatives (April 2, 1998), 1-94, 11-12 at http://www.legis.state.il.us/house/transcripts/brtrans90/t040298.html. “Many of you here are quite familiar with the attorney client privilege. There exists in law, the untouchable secrecy of the confessional and the privileged communication between a doctor and patient. In some cases even the media has attempted to claim this exemption. Are these relationships any more important than that of a parent to child? And what might the affect be if these secret entitled communications were corrupted and society would lose confidence in the confidentially of communication with these parties? I submit to this Body, that certain relationships must remain sacred, incorruptible, inviolate and secure.” Rep. Burke’s introduction of House Bill 2167 at 11.

\textsuperscript{46} \textit{See id.} at 19.
\textsuperscript{47} The legislation proposed in the House was devoid of certain exceptions that are commonly included with such privileges, such as in cases alleging physical abuse. \textit{See id.} at 65.
prevent their children from testifying. Ultimately a vote on the bill was postponed indefinitely.

During the 2009 legislative session, the Oregon legislature considered a narrowly tailored bill, which proposed to create an evidentiary privilege in criminal cases for confidential communications between children under the age of eighteen and their parents. The legislation was designed to allow either the child or the parent/guardian to whom the communication was made to assert the privilege. The legislation was approved in the Senate and defeated in the House. Also in the past year South Dakota’s highest court considered the constitutionality of a parent child privilege in a case involving a mother subpoenaed to testify against her minor child in a delinquency case. The Court declined to recognize a parent-child privilege in their state constitution but left open the possibility that such a reform could be achieved through legislative action.

The United States Supreme Court has never decided a case involving judicial recognition of a parent-child privilege. In 1984, the Court declined certiorari in a case involving three adolescent children compelled to testify before a grand jury investigating their father for murder. Three Juveniles was the first and last time the parent-child privilege was presented to the United States Supreme Court for review. In 1986, the Supreme Court showed receptivity toward expanding the privileges recognized under FRE 501 when it created a psychotherapist-

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48 See id at 14-26.
49 See legislative history
50 See Oregon Senate Bill 313, section 2. (4); http://www.leg.state.or.us/09reg/measpdf/sb0300.dir/sb0313.b.pdf.
52 In re O.F. 773 N.W.2d 206 (2009)
53 See id. at 206.
Since then, only three federal courts have considered recognition of a parent-child privilege.56 Most courts that have refused to recognize a parent-child privilege have done so in cases involving an adult child compelled to testify against his parent or a parent testifying against an adult child. The paucity of reported cases involving a parent compelled to testify against his or her minor child makes it difficult to assess how frequently this phenomenon occurs. However, we know from media accounts that have revealed instances of parents compelled to testify against their children that this phenomenon is occurring, even if only occasionally.59 Moreover, there has never been a research study that has examined the frequency nor the context with which prosecutors compel, or even contemplate compelling, parents to testify against their children. Despite the lack of such empirical data, some courts have used the

56 See In Re Grand Jury, 103 F.3d 1140 (3rd Cir. 1997).
58 A contributing factor to the few reported cases involving compulsion of parental testimony is that juvenile prosecutions go to trial even less often than adult criminal cases, and the cases that go to trial are even less frequently appealed than adult criminal cases. Second, due to the private nature of juvenile proceedings, information about the proceedings is difficult to obtain.
59 Examples of parents compelled to testify against their children include Arthur and Geneva Yandow, subpoenaed to appear before a Vermont grand jury to testify against their twenty five year old son. Both parents protested that they could not testify against their child. "I can't betray my son," Arthur Yandow told the judge. "I couldn't live with myself … I'd lose him forever … I'd be the instrument of destroying my family and my son" said Geneva Yandow. In response, the judge jailed the Yandows for contempt of court. Only after their son was indicted, without his parents’ testimony, were the Yandows released. They spent 41 days in jail. See Barry Siegel, Choosing Between Their Son and the Law, LOS ANGELES TIMES, JUNE 13, 1996 AT 1. Bernard and Odette Port were subpoenaed to testify before the grand jury investigating their son for murder. Prosecutors wanted the parents to testify about their conversations with and observations of their son. The Ports refused to testify and altogether spent four months in jail. Bernard Port stated, “I’ve worked so hard to be a father, I just couldn’t [testify]”. “A mother’s instinct is to protect. I would feel unnatural doing the opposite”, Odette Port said. The Ports were ultimately jailed for contempt of court. Peter Carlson, A Texas Murder Case Raises an Exquisite Question: Must Parents Testify Against Their Child? PEOPLE, October 15, 1984 at 146. In 1995, a former FBI agent was subpoenaed to testify about a conversation he had with his eighteen year old son, who was the target of a grand jury investigation. He refused to comply and the judge declined to quash the subpoena. The case was affirmed by the Third Circuit. See In Re Grand Jury, 103 F.3d 1140 (3rd Cir. 1997). The parents of eighteen year old Amy Grossberg, charged with the murder of her newborn baby were subpoenaed to testify about what their daughter had told them about the death of her son. See Doug Most, “A Court Has Ears Inside The Home; Parent Child Secrets Not Safe”, THE RECORD, Dec. 7, 1997 at A1. Parents of two teenagers charged with killing two Dartmouth college professors agreed to cooperate with investigators in turn for not having to testify before a grand jury. Police Talk to Dartmouth Suspects' Parents, N.Y. Times, Mar. 18, 2001, at A-28.
lack of published decisions as an important justification in rejecting a parent-child testimonial privilege.\textsuperscript{60}

Only one federal court in the U.S. has endorsed an evidentiary privilege for parent-child communications.\textsuperscript{61} \textit{In re Agosto} held that a parent-child privilege is fundamental in protecting the privacy of familial relationships and the inviolability and integrity of the family.\textsuperscript{62} The Court stressed the importance of intervening in matters that place an individual in a position of choosing between loyalty to his family and loyalty to the state.\textsuperscript{63} In a lengthy opinion in high praise for a common law parent-child privilege, the court opined that “the family has been traditionally recognized by society as the most basic human and psychological unit, and when the state intrudes with its vast resources in an attempt to disassemble that unit, then every safeguard under the law must be abundantly exercised by the Court to guarantee that the inherent imbalance of experience and expertise between parent and state is minimized to the greatest extent humanly possible.”\textsuperscript{64}

\section*{II. The Exemption for Parents and Children in Australia: the Restorative Approach}

\textbf{A. Law of the Commonwealth of Australia -}

The Evidence Act of 1995 (hereinafter “Evidence Act”) codified Australian evidence rules at the federal level. This Act is applicable to all federal courts and the Australian Capital

\footnotesize{\textsuperscript{60} See In Re Grand Jury, 103 F.3d 1140, 1158 (3rd Cir. 1997).
\textsuperscript{62} See 553 F. Supp. at 1328. “It would be unjust for society to teach that while a child should listen to his parents, he does so at the risk of being required to testify against them.” \textit{Id.}
\textsuperscript{63} See \textit{id} at 1331. “If the government in its zeal to pursue law enforcement goals steps into the realm of constitutionally privileged relationships, the courts must intervene. In our democratic system of justice which is based in part on respect for the law, if the law places family members in a position of choosing between loyalty to a special, life-long bond as opposed to involuntarily testifying to confidential and private matters, then the law would not merely be inviting perjury, but perhaps even forcing it. The reticence to testify or the fabrications which family members would invent to protect one another would bring the government no closer to the truth it so zealously seeks.” \textit{Id.} at 1326.
\textsuperscript{64} \textit{Id.} at 1330.}
Section 18 of the Act establishes a testimonial exemption for spouses, de facto partners, parents and children. The exemption applies only in criminal proceedings and entitles any person in one of the specified relationships with the accused to object to giving evidence as a witness for the prosecution. The Evidence Act of 1995 was conceived in response to a need to produce a comprehensive law of evidence among federal courts. Prior to the Evidence Act, federal courts applied the evidence laws in the state or territory in which the case was being adjudicated, causing a lack of uniformity among the courts.

During the 1980’s, at the request of the Attorney General, the Australian Law Reform Commission (ALRC) conducted an inquiry into the feasibility of including parents and children among those persons that could be excluded from giving evidence in a criminal proceeding. With the exception of Victoria and South Australia, all other states prior to 1995 limited non-
compellability of a witness to spouses. Nevertheless, upon the Commission’s review, it found that the principles underlying the spousal exemption were equally applicable to exemption of parents and children. The Commission’s concern was with procedures that could be used to disrupt familial relationships (more inclusive than spousal harmony) to a greater extent than the interests of the community really require. While bearing in mind the desirability of making available all relevant evidence to the courts, the Commission recommended a procedure by which a judge could weigh the necessity of the evidence against requiring a family member to betray confidences, and bring punishment to those they love.

Under the Act, a parent is defined as either a biological parent, an adoptive parent, or a person with whom the child is living as if the child were a member of the person’s family. A child is defined as an adopted child, biological child, an ex-nuptial child, a child living with the person as if the child were a member of the person’s family. The exemption must be asserted by the witness prior to or as soon as practicable after the prospective witness becomes aware of his right to do so.

A balancing test is used by the court to assess the appropriateness of compelling the witness to testify. The Court must relieve the witness of testifying in the event two conditions are met: (1) there is a likelihood of harm that would or might be caused (whether directly or

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70 Queensland abolished spousal non-compellability and privilege. See Evidence Act 1977 (Qld) s. 8. In Queensland, every person is competent to testify in any matter, regardless of their relation. Some scholars have argued that such an approach is the fairest, in that it denies any and all arbitrariness in pre-determining which relationships are more deserving than others. See Lee Struesser, (2009) JALTA Vol 2 No 1 73-84.


72 See id.

73 See Heydon, at 447.

74 See id.

75 See Evidence Act, 1995, s. 18(3) (Austl). See also, Evidence Act, 1929, s. 21(3) (S. Austl.). The court has a duty to ensure that a witness to whom this statute would apply is aware of their right to object to giving such evidence. See id.
indirectly) to the proposed witness, or to the relationship between the witness and the accused if the witness testifies, and (2) the nature and extent of the harm outweighs the desirability of having the evidence given. The Act provides criteria for courts to consider in determining the compellability of the witness. Such factors include the nature and gravity of the offense charged, the substance and importance of the proffered evidence, the existence of alternative evidence available to the government, the nature of the relationship between the witness and the accused, and whether upon giving the evidence the proposed witness would have to divulge information that was received in confidence from the accused. If the court finds that the nature and extent of the harm to the witness and/or the relationship between the witness and the accused outweighs the desirability of admitting the evidence, the court will exclude the witness from testifying. Otherwise, the proposed witness shall be competent and compellable to testify against the accused. Section 18 forbids the prosecution from commenting on the objection, the court’s ruling on the objection, or the witness’ failure to testify. The 1995 Evidence Act is modeled after the pre-existing Victoria Crimes Act and South Australia’s Evidence Act.

Also in 1995, Section 18 of the 1995 Evidence Act was adopted in its entirety in New South Wales. The Supreme Court of New South Wales issued one of its most notable decisions applying this relatively new provision in its Evidence code. In Fowler, the Crown sought to compel evidence from the defendant’s mother concerning statements he made to her regarding the alleged offense. Pursuant to Section 18 of the 1995 Evidence Act, defendant’s

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76 See id. at s. 6
77 The criteria are meant to provide a constructive assessment tool rather than an exhaustive list of factors. See id at sec. (7).
78 Id. at s. 7.
79 See Evidence Act 1995, Sec. 18 (6).
80 See Evidence Act 1995, Sec. 18 (8).
81 See Evidence Act 1995 No. 25(effective September 1, 1995 in all state courts in NSW).
mother objected to testifying on behalf of the government against her son. Having determined that the relationship between mother and son would be affected by requiring her to testify, the Court balanced the nature and extent of the harm to the parent-child relationship against the government’s need for the mother’s testimony. The court concluded that the desirability of Ms. Fowler testifying outweighed any harm that would be done to her relationship with her son, and required she testify against her son. In light of all the evidence presented, among it Ms. Fowler’s disclosure of her son’s statements to her about the crime, Mr. Fowler was convicted of armed assault. His conviction was affirmed on appeal.

*Fowler* is one of the few reported cases in which a parent is being compelled to testify against his child in a criminal proceeding. Among the reported cases, more common is the situation where a child is compelled to testify against his parent in a criminal proceeding. In Australia, federal and state criminal cases involving issues of evidence law are not frequently published. In addition, Australia does not report every appellate decision nor do they compile a

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83 The reported decision is sparse with details, however the decision indicates that the accused’s mother testified at the hearing on the exemption of her testimony that she believed that forcing her to testify against her son would cause “tremendous strain on her relationship with her son”. See *Fowler*, [24].

84 See *Fowler*, at 24.

85 Regina v. Braun, NSWSC 507 (24 Oct. 1997) involved a nineteen year old defendant who admitted to her parents that she started a fire that killed her brother. The prosecutor in the matter elected not to compel either parent to testify against their daughter, anticipating that the parents would likely invoke Section 18 and the court would exclude the parents from testifying.

86 Regina v. Raad Fajloun and Mikel Fajloun [2007] NSWDC 367 (12 November 2007)(son called as a government witness and raised Section 18 objection because his father was the accused. The Court performed the balancing test and found that no harm would be done to require the son to testify against his father.); R v. YL [2005] ACTSC 115 (10 October 2005)(child witness’s attorney made a Section 18 objection to the 17 year old child being forced to testify against his step-mom. The judge found that the child was compellable but would not require the child to be brought to court against his will); Regina v. Newland, Matter No. Cca 60119/97 [1997] NSWSC 621 (5 December 1997)(trial judge erroneously instructed the jury that the son of the accused was not a compellable witness, rather than conducting a balancing test according to Section 18); ASP v. R [2007 NSWSC 339 (13 April 2007)(The judge compelled the daughter to testify against the defendant during his parole hearing regarding his alleged sexual abuse of her when she visited him in jail when she was 5 years old. When she testified that she had misidentified the defendant as the abuser, the prosecution moved to treat her as an unfavorable witness under Section 38 and admitted testimony of her prior sworn statements to the police that the defendant had in fact sexually assaulted her).

87 See Dietrich Fausten & Ingrid Nielsen, *A Century of Citation Practice on the Supreme Court of Victoria*, 31
collection of reported decisions made available electronically or in print. An infractions of
criminal laws handled in youth court are not commonly, if ever, published. This makes it
difficult to assess how frequently parents or children in Australia seek exemption from testifying
under state or federal law.

B. The South Australia Evidence Act

The South Australia Evidence Act of 1929 was created to codify common law
evidentiary rules, such as the absolute spousal privilege and consolidate certain acts relating to
evidence in South Australia. Part II of the Act relates to witnesses, and Section 21 states that a
close relative of a person charged with a crime shall be compellable to give evidence for the
prosecution subject to the provisions of this section. In 1983, the Act was amended to recognize
a privilege for “close relatives” as well as spouses to object to giving evidence when the effect of
giving such evidence would be damaging to the individual or to the relationship. The amended
Act states, where a person is charged with an offense and a close relative of the accused is a
prospective witness against the accused in any proceedings related to the charge, the prospective
witness may apply to the court for an exemption from the obligation to give evidence against the

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88 See id. In recent years about one-fifth of all Full Court decisions in Victoria have been reported. This means that
only a relatively small number of cases are actually reported in the Victorian Reports.
89 See id.
90 Interviews with lawyers who practice in youth and criminal court could help determine whether or not compulsion
of parental testimony is occurring and under what circumstances. To date no such study in the United States or
Australia has been conducted.
If, by giving this evidence, there would be a substantial risk of serious harm to the relationship between the prospective witness and the accused, or serious harm of a material, emotional, or psychological nature to the prospective witness, the court may decide to grant the exception. The judge will weigh this potential harm with the nature and gravity of the alleged offense and the importance to the proceedings of the evidence that the prospective witness is in a position to give and determine if there is sufficient justification for exposing the prospective witness to the risk.\(^\text{93}\)

In 1983, the legislature recognized the need to, “make a provision for circumstances where the close relative of an accused, for example a young child, may not be able to fully appreciate their right to apply to be exempt from giving evidence against the accused.”\(^\text{94}\) The Supreme Court Justices echoed this recognition in their 1991 Annual Reports, recognizing that the procedure for exemption might need to be modified when the witness is a young child or mentally ill.\(^\text{95}\)

“The Supreme Court Judges in their 1991 Annual Report adumbrated that the procedure is inappropriate where the close relative is a young child or mentally impaired. The Judges recommended that the section be amended to give the court a discretion to dispense with the section’s requirements, wholly or in part, where by reason of the prospective witness’s immaturity or impaired mental condition, the court considers it proper to do so. The section is amended as recommended by the Judges.”\(^\text{96}\)

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92 Evidence Act 1929, s. 21(2) (S. Austl.).
93 Id. at s. 21, s. 3.
95 See id.
96 South Australia, Parliamentary Debates, House of Assembly, 25 March 1993, pp 2662-2663 (Hon GJ Crafter, Minister of Housing, Urban Development and Local Government Relations).
The justices recommended that the court eliminate the need for such witness to apply for an exemption, and the court should decide whether or not there should be an exemption without the witness submitting an application or formally objecting. This recommendation was adopted, altering the Act to declare that if the prospective witness is a young child, or is mentally impaired, the court should consider whether to grant an exemption even if no application for such exception has been made. If the proceeding is a jury trial, the objection to testifying must be heard only by the judge in the absence of the jury. This section defines “close relative” as spouse, domestic partner, parent, or child.

The 1929 South Australia Act, although similar to the Evidence Act of 1995, provides more detailed protections for a potential witness. The South Australia Act specifies the criteria that the court should consider, specifically the potential for serious harm of a material, emotional, or psychological nature to the prospective witness. In contrast, the Federal Act outlines more general criteria such as, direct or indirect harm to the person. Practically, the difference in language may produce the same result, however, the south Australia legislation recognizes/acknowledges that forcing persons in relationships defined by love, support, nurturance to testify against one another may produce tangible and intangible harm.

The South Australia Act offers a more detailed description of how the court should ensure that individuals who may not be aware of this privilege are informed of their right to object to giving evidence against a close relative. The Federal Act contains only one sentence that alludes to the possibility of a judge ensuring they are aware of the privilege: if it appears to the court that a person may have a right to make an objection under this section, the court is to

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97 Evidence Act 1929, s. 3(a).
98 See Evidence Act 1995, Sec. XX
satisfy itself that the person is aware of the effect of this section as it may apply to the person.\textsuperscript{99} Comparatively, the South Australia Act requires the court to consider whether an exemption should be applied, even if the individual has not applied for an exemption. If an individual is mentally impaired or is a young child and is unaware or unable to claim privilege, there does not seem to be a duty under the Federal Act to consider an exemption. Under the South Australia Act, there is such a duty. According to section 3, “if the prospective witness is a young child, or is mentally impaired, the court should consider whether to grant an exemption under subsection (3) even though no application for exemption has been made and, if of opinion that such an exemption should be granted, may proceed to grant the exemption accordingly.”\textsuperscript{100} In addition, case law interpreting the South Australia Act suggests that certain individuals should be given representation when presenting a potential exemption to a judge.\textsuperscript{101}

\textit{C. The Victoria Crimes Act of 1958}

The compellability exemption for parents and children originated in the 1958 Crimes Act, Section 400.\textsuperscript{102} Section 400 applies to any proceeding against an accused, and allows the presiding judge to exempt the accused’s wife, husband, mother, father or child from giving evidence on behalf of the prosecution.\textsuperscript{103} Any person included in one of these categories who wishes not to testify must make an application for an exemption to the judge, a balancing test then ensues.\textsuperscript{104} The assessment by the court is threefold: 1) to determine if the community’s interest in obtaining the evidence of the proposed witness is outweighed by the likelihood of damage to the relationship between the accused and the proposed witness; or 2) the harshness of

\textsuperscript{99} \textit{Id.} at s. 4.
\textsuperscript{100} Evidence Act 1929, s. 3(a) (S. Austl.).
\textsuperscript{102} Victoria also had an Evidence Act 1958 in place, but the compellability exemption is not mentioned in that Act.
\textsuperscript{103} Crimes Act 1958, Sec 400(3).
\textsuperscript{104} \textit{Id.}
compelling the proposed witness to give the evidence; or 3) the combined effect of the two measures. Similar to the Commonwealth’s 1995 Evidence Act, the Victoria Crimes Act contains factors to be considered as part of the balancing test. The factors include the nature of the offence charged; the importance in the case of the facts which the proposed witness is to be asked to depose; the availability of other evidence to establish those facts and the weight likely to be attached to the proposed witness’s testimony as to those facts; the nature, in law and in fact, of the relationship between the proposed witness and the accused; the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence; and any breach of confidence that would be involved. If a judge finds that any of these concerns singlehandedly or in combination with one another outweigh the community’s interest in having the witness compelled to testify, then he must exempt the witness.

For example, in *R v. Ngo*, the applicant was found guilty of one count of robbery and appealed his conviction and sentence. At the time of the offense, he was thirty years old. The Crown planned to call the applicant’s mother as a witness at trial, but the judge excused her from providing evidence pursuant to s400 of the Crimes Act. Although the appellate opinion does not go into detail about how the trial judge came to exclude the mother’s evidence, this case shows that there are situations where the community’s interest in hearing the evidence is

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105 See id.
106 Id. at 400(4).
107 Id.
108 See *R v. Ngo* [2002] VSCA 188 (Unreported, Winneke, P, 1 Nov. 2002) [1&2] (2002 WL 31667981). Defendant was charged with armed robbery. He was thirty years old at the time of the offense. See id. The Crown planned to call the defendant’s mother as a witness at trial, but the judge excused her from providing evidence pursuant to s400 of the Crimes Act. See id at [3]. No findings of fact from the trial court are available.
110 Id. at [1].
111 Id. at [3].
outweighed by considerations for preserving the relationship between a child and his mother.
Similarly, the mother of the defendant applied for exemption under s400 of the Crimes Act when
the prosecution sought her testimony in an attempted robbery trial against her daughter. In
opening statements, the government told the jury that the defendant’s mother would testify about
a conversation she had with her daughter concerning the composite sketch of the alleged
assailant that was published in the local newspaper. The Court granted the mother’s request to
be exempt from testifying and despite the omission of the evidence the defendant was
convicted.

Although Section 400 of the Crimes Act does not categorically exclude certain crimes
from the compellability exemption, as does its federal counterpart, for all intents and purposes
the criteria relevant to the balancing test allows a judge to assign whatever weight he deems
appropriate to the seriousness of the offense in his determination. Case law demonstrates that
judges do not always grant parents compelled to testify against their children exemption, even
though being forced to give evidence against their child is an experience that will likely alter the
parent-child relationship. In R v. GAM the defendant was charged with seven counts of
sexually interfering with his thirteen year old step-daughter. The grandmother of the victim, also
being the mother of the accused, was called to give evidence at trial. The evidence sought by
prosecution was statements made by victim to grandmother attesting to sexual abuse by the
defendant. As might be expected in such a case, the judge rejected the grandmother’s request
for exemption finding that “the interests of the community in obtaining the grandmother’s

113 See id.
114 See id.
115 See Evidence Act 2008 s19.
117 See e.g. “I don’t want you to tell anybody else about this Gran, but Dad has been sticking his penis up my
evidence was paramount and outweighed the prospects of further damaging the relationship between the proposed witness and her son.”

In *R v. Peter Andrakakos*, the twenty four year old defendant was on trial for murder. The Crown subpoenaed the accused’s father to give evidence against his son. When asked, the father said that if he was forced to give evidence against his son, there is a fifty-fifty possibility of psychological damage and damage to the father-son relationship. In opposition, the Crown argued that the proffered testimony was critical because the father could place the son’s whereabouts minutes after the murder. Additionally, the Crown submitted that there was no other manner in which this evidence could be obtained. The judge rejected the request for exemption but commented in relation to the circumstance that “it is a harsh thing to compel a father to give evidence against his son,” and “[i]f there were nothing more to it than that, or perhaps even if there were, but the matters in issue were not as serious as they are, I would be inclined to allow the application.”

D. The Victoria Evidence Act 2008

As part of a national effort toward the establishment of uniformity among the laws of evidence in Australia, the Victorian Law Reform Commission (VLRC) began a

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118 See id.
120 Id. at [4]. The father conceded on cross examination that his son would probably understand that it was not his choice to do so, and that he would continue to keep in contact with his son.
121 Id. at [5].
122 Id. at [7].
123 Id. at [10&11].
124 The VLRC was established in 2001, under the Victoria Law Reform Commission Act 2000 as a central agency to propel law reform in Victoria. It is an independent, government-funded organization. Like the ALRC, the VLRC researches issues the Attorney-General refers to it, but may also recommend minor changes to the law without a reference. The Commission’s purpose is to solicit community input and advise the Attorney-General on how to improve and update Victorian Law. See http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Utility/Home/, last visited February 7, 2010.

The Evidence Act 2008 brought about slight modifications to the compellability exemption to reflect uniformity with its corresponding federal section. Perhaps the most relevant change broadened the former exemption’s coverage, the 2008 act includes the giving of evidence, as well as evidence of a communication. This modification allows a court more options in terms of exclusion. For instance, a judge may compel a parent to testify against his child but permit the witness to refrain from testifying as to any communications between the parent and child. Protecting the confidences between parent and child may be viewed as more socially vital than compelling a parent to testify as to observations, even if they might have the effect of convicting the child. A child may disclose incriminating information to his parent for

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126 The push for uniformity among the laws of evidence derived as a desire to create a more predictable and structured evidence law and to eliminate the uncertainties and inconsistencies inherent in common law. See Id. at 3.
127 Id. at 217.
128 Evidence Act 2008 s18(2). A few less significant differences between the 1958 Crimes Act and the 2008 Evidence Act are: the 2008 Act allows a de facto partner to invoke the exemption, whereas the Crimes Act did not; under the Crimes Act, a person seeking exemption had to make an application to the judge; whereas in the 2008 Act, a person seeking exemption must make the objection before giving any evidence or as soon as practicable after becoming aware of this right; the Crimes Act specifically states one of the circumstances to consider is, “the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give evidence.” Id. at s400(4)(e). This factor is omitted, but is more or less implicit in the Evidence Act’s balancing test. Evidence Act 2008 s18(3).
129 Cf. Application of A&M, 61 A.D. 2d 426 (N.Y. App. Div. 1978)( New York appellate court finds communications within the context of the family relationship may be protected according to the constitutional right of privacy). “It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps
the purpose of seeking guidance, counsel, and support. A parent’s knowledge of criminal culpability may often be gained only after the communication has occurred. The possibility of exemption of those communications allows a parent to prospectively rely on the law’s recognition that communications between parents and children are deserving of protection and will be carefully weighed against their necessity before being compelled. A child may more readily accept a parent’s compliance with a court order (especially after seeking exemption) and testimony as to observations made or facts known about one’s child than the divulgence of words shared with one’s parent during a subjectively private exchange.\textsuperscript{130} In contrast to the United States, where forty five states offer no legal protection for these communications, the fact that judicial discretion exists is significant.

Perhaps to a lesser extent, but nevertheless worthy of mention, is the slight variation in the balancing test a judge employs under the new Evidence Act than under the old Crimes Act. Under the Crimes Act, a judge was explicitly instructed to consider the interest of the community in obtaining the evidence.\textsuperscript{131} This language is entirely omitted from the Evidence Act. Instead, the judge’s focus is on the likelihood of harm that may be caused to the witness or the relationship between the witness and the defendant.\textsuperscript{132} The judge must also find that this likely harm outweighs the desirability of having the evidence given.\textsuperscript{133} In the Crimes Act, the exemption requirement could be met if a judge found the likelihood of damage to the relationship between the witness and the defendant outweighed the community’s interest, or the

\footnotesize{\textsuperscript{130} See supra note X.}\textsuperscript{131} Crimes Act 1958 Section 400(3).\textsuperscript{132} Evidence Act 2008 s18(6).\textsuperscript{133} Id.
harshness of compelling the witness outweighed the community’s interest, or a combined effect of both of these factors.\textsuperscript{134} Thus, the exemption requirements could be met in more ways under the Crimes Act than in the current Evidence Act.

Unlike the Commonwealth and New South Wales Evidence Acts, Victoria elected not to codify an equivalent s19, which allows for spouses, parents and children to be compelled to give evidence in certain criminal proceedings, into its Evidence Act 2008. Through an inquiry process conducted by the VLRC, Victoria Legal Aid, along with other advocacy groups, voiced their opposition to an exemption provision explaining that “in its experience the court’s discretion in these matters was appropriately exercised and that even when a witness is not ultimately exempted from giving evidence, the process of applying for exemption had significant benefits.”\textsuperscript{135} For example:

The witness has an opportunity to explain the nature and importance of their relationship to the defendant and the judicial officer has an opportunity to explain the policy reasons compelling the witness to give evidence. This dialogue often reduces the stress for the witness and minimises damage to the relationship between the witness and defendant (a victim, in relevant cases). This beneficial process would not occur if s.400 applications were prohibited for particular offences.\textsuperscript{136}

Similarly, the Victoria Police did not advocate for any exceptions to the non-compellability rule because they believed that it could result “in children being automatically compelled to give evidence, [and] may endanger both the child and the family unit.”\textsuperscript{137} Furthermore, the VLRC found that the certainty of the compellability of a witness that Section

\textsuperscript{134} Crimes Act 1959 s400(3).
\textsuperscript{135} VLRC, Victorian Law Reform Commission, Implementing the Uniform Evidence Act Report, Victoria Law Reform Commission, Melbourne, 2006 at 2.32.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 2.33.
19 would provide does not provide assurance to prosecutors because they will always face
difficult witnesses who are unwilling to confirm statements. Given these inquiries, the
commission concluded that, “section 18 provides an adequate means for ensuring that witnesses
are required to give evidence in appropriate circumstances and excused when there are greater
overriding concerns,” thus making section 19 superfluous.

III. The Juvenile Justice System as Fertile Ground for a Parent-Child Privilege

A. The Australian Example

In the beginning of the twentieth century each Australian state or territory established
separate courts for children. These courts are termed Children’s Courts, and all hearings,
including trials, are conducted by a magistrate or judge, without a jury. Children’s courts have
exclusive jurisdiction over all summary offences. For more serious offenses (e.g. car theft,
burglary), the accused can elect to be adjudicated either in the Children’s Court or a higher court,
however, the Children’s Court reserves the right to decline jurisdiction and refer the case to a
higher court. Generally, the most common offenses in Children’s court are non-violent
offenses such as burglary, motor vehicle theft and offenses against public order. For the most
serious offenses such as homicide, where the offense might result in a sentence of life

\[138\] Id. at 2.35.
\[139\] Id. at 2.37.
\[140\] See e.g., New South Wales: Neglected Children and Juvenile Offenders Act 1905; Victoria: Children’s Court Act 1906; Queensland: Children’s Court Act 1907; Western Australia: State Children Act 1907; Tasmania: The Children’s Charter 1918; South Australia: State Children Act 1895. Cunneen at 19.
\[141\] See Chris Cunneen & Ron White, supra note X at 248. In Victoria, Queensland, Western Australia, and South Australia, the Children’s Court is headed by a judge. In states where the court is headed by a judge, the judge conducts the appellate review for the matters determined by magistrates. See id.
\[142\] Summary offenses are the less serious offences in the Criminal Code, such as those that are generally heard in a magistrate’s court. See Chris Cunneen & Ron White, at 248.
\[143\] See id.
imprisonment, a minor is automatically tried in the Supreme Court.\textsuperscript{145} Criminal responsibility begins at 10 years of age in all Australian states and territories, except for Tasmania and ACT.\textsuperscript{146}

Over the past decade, the volume of cases in Children’s courts throughout Australia has declined significantly. This is due in large part to diversionary practices utilized by police with great effectiveness.\textsuperscript{147} The police divert young people from the juvenile justice system by using warnings, informal and formal cautions, and referrals for juvenile conferencing.\textsuperscript{148} In New South Wales during 2007-8, half of all juveniles who were considered “persons of interest” who came into contact with the police were diverted by either a warning, caution, or a youth justice conference.\textsuperscript{149} In 2005 police data for South Australia indicates that nearly half of all juveniles apprehended are dealt with through diversionary means, whereas forty two percent are referred to the Youth Court.\textsuperscript{150} One of the most widely used anti-recidivist measures is a diversionary

\textsuperscript{145} See id.
\textsuperscript{146} Criminal Code, 2002, § 25 (ACT); Children (Criminal Proceedings) Act, 1987, § 5 (NSW); Criminal Code, § 43AP (NT); Criminal Code, 1899, § 29 (Queensland); Young Offenders Act, 1993, § 5 (SA); Children, Youth and Families Act, 2005, § 344 (Victoria); see also Australian Institute of Health and Welfare (AIHW) 2009. Juvenile Justice in Australia 2007-08 p.7. Juvenile justice series no. 5. Cat. No. JUV 5. Canberra: AIHW available at http://www.aihw.gov.au/publications/juv/juv-5-10853/juv-5-10853.pdf. But See Crimes Act, 1900, § 252A&B (ACT) (when a police officer may arrest a child under 10 years of age). In Victoria, the Children’s Court can hear cases where the young offender is 18 years old, but also has the discretion to deal with a person over the age of eighteen. Courts, Tribunals & Registries, Department of Justice, Victoria, Australia, Children’s Court Statistics, Victoria 1995 Caseflow Analysis Section. There are situations where young people aged 18 years or older are under juvenile justice supervision. First, if a young person commits an offence at 17 years of age but subsequently turns 18 thereafter, s/he may be under supervision in a juvenile justice center. Second, if a juvenile offender enters supervision at 17 years of age or younger, s/he may continue to be supervised by the juvenile justice system once s/he turns 18. However, s/he may also be transferred to an adult correctional system. Lastly, if a young person who is 18 years of age is vulnerable or immature for his age, he may be supervised by juvenile agencies. It is worthy to note that in Victoria, a person aged 18-20 may be sentenced to detention in a juvenile detention center rather than an adult center at the court’s discretion. See AIHW, supra note X at 7.

\textsuperscript{147} See Australian Institute of Criminology (AIC), Juveniles’ Contact with the Criminal Justice System in Australia, 67 (2007). According to the SCRGSP, the proportion of juvenile diversions is defined as the number of juveniles who would otherwise be adjudicated via formal court proceedings but who are diverted by police, as a proportion of all juvenile offenders formally dealt with by police. See AIC (2007).

\textsuperscript{148} See id.
\textsuperscript{149} AIC (2007) at 54. Approximately twenty six percent of all juveniles of interest were proceeded against in court. Id.
\textsuperscript{150} See id at 55.
tactic called juvenile conferencing.\textsuperscript{151} Juvenile conferencing involves participation from the offender, the victim, their respective families, friends, and teachers who convene for the purpose of facilitating a discussion that leads to reconciliation, appropriate reparations, and support to assist the juvenile so he will not re-offend. The conferencing process is quintessential restorative justice. The practice brings together all stakeholders involved in the alleged crime, and collectively the group discusses reasons for the crime, impact of the crime, and ways to mitigate or resolve the harm caused.\textsuperscript{152} The conference or meeting is facilitated by a trained professional.\textsuperscript{153} Proponents of restorative justice argue that this type of face to face interaction most effectively helps the young offender to recognize the impact his actions had on others.\textsuperscript{154} Furthermore, participating in determining the reparations most appropriate for the victim and the community gives the offender a stake in the outcome.\textsuperscript{155}

In South Australia, police and judges can make referrals for conferencing, if \textit{either} considers that a matter should not be formally prosecuted.\textsuperscript{156} Conferences are convened by youth justice coordinators who are either magistrates of the youth court or persons appointed to the position.\textsuperscript{157} In Western Australia, conferences are organized by juvenile justice teams, comprised of a youth justice coordinator, police officer, Ministry of Education officer, and an Aboriginal community worker. Ordinarily, juvenile justice teams convene family meetings to

\textsuperscript{151} Juvenile conferencing is also referred to as family group counseling.
\textsuperscript{152} For a more comprehensive overview on conferencing in Australia \textit{see} Kathleen Daly, Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects, \textit{Youth Crime and Juvenile Justice}, Vol. 2 (Barry Goldson and John Muncie eds., Sage Publications 2009).
\textsuperscript{153} Some populations refer to the conferences as circles, after the native/indigenous custom.
\textsuperscript{156} Id.
\textsuperscript{157} Young Offenders Act, 1993, § 9(1); \textit{see also} ALRC, Rpt. No. 84, \textit{ supra}, at 481.
deal with juveniles who have been apprehended for minor offences. Recent studies show that in Western Australia, conferencing had a dramatic affect on reducing the number of cases in the Children’s Court. In 1995, formal charges against youth dropped 22% and admissions to detention centers dropped 30%.

Cautioning is another diversionary method used by police to deal with young offenders who commit offences. An informal caution involves minor intervention with the juvenile such as taking the child home or calling their parents, ending with a warning to cease the suspicious behavior. A formal caution is administered at the police station with a parent present and record of the incident that involved police contact remains on file with police. Each jurisdiction’s process for issuing a caution, whether informal or informal, operates differently. In Queensland, a caution may only be given to a child who admits to committing the offence and consents to being dealt with through this process. The caution must be given in the presence of another person of the child’s or his/her parents choosing. The child must be given notice, including substance of the offence, the police officer’s name and rank and the nature and effect of a caution.

In Western Australia, an oral or written caution can be administered for minor offences and a cautioning certificate must be issued. In South Australia, police officers have statutory power to give an informal caution to a person who admits the commission of a minor offence.

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158 ALRC, Rpt. No. 84, supra, at 481.
159 See id.
160 See AIC at 27 (2007)
161 Cunneen at 230.
162 See id.
164 Id.
165 Id.
166 Young Offenders Act, 1994, § 22 & 23A.
167 Young Offenders Act 1993, § 6(1)
Thereafter, no further proceedings may be taken against the child regarding this offence, and no official record is kept.\textsuperscript{168} In New South Wales, police can formally caution any child who admits an offence and consents to being cautioned.\textsuperscript{169} An officer must consider the degree of violence involved and harm caused to victim.\textsuperscript{170} In addition, a caution must be expressed in language readily capable of being understood by children.\textsuperscript{171}

Whether police elect to use warnings, informal cautions or formal cautions is largely within the officer’s discretion. In Queensland between 1995-6, 15,681 formal cautions were issued to children.\textsuperscript{172} During the same period in South Australia, 3,161 informal police cautions were issued, 2,511 formal police cautions were issued and 1,180 family conferences were issued.\textsuperscript{173} In Western Australia, 8,268 cautions were given to 7,021 children in 1995.\textsuperscript{174} There was no data on diversionary programs in Victoria, but approximately 9,000 children receive police cautions annually.\textsuperscript{175}

The use of diversion as an effective tool among law enforcement officials and judges is indicative of a justice system that finds support for a parent child exemption. Diversion places a large responsibility on the juvenile and his family to identify the root causes for the delinquent behavior and find appropriate ways to address it in a relatively short time frame. Because Australia’s juvenile justice paradigm strives to achieve reconciliation, reparation, and reintegration\textsuperscript{176} it follows that open and honest communication between parent and child is an important ingredient in addressing the underlying issues that initially led the juvenile to have

\begin{footnotes}
\item[168] See id at §(6)(2) & (6)(3).
\item[169] Young Offenders Act, 1997, § 19
\item[170] Id. at §20.
\item[171] Id. at §20.
\item[172] ALRC, Rpt. No. 84, supra, at 479.
\item[173] See id.
\item[174] See id.
\item[175] Id.
\item[176] Cunneen & White, at 332.
\end{footnotes}
contact with the police. Moreover, parental oversight is necessary and expected in all of these
diversionary schemes. Logically, a legal paradigm which places responsibility directly on the
family unit to assist the juvenile from being formally processed in Children’s court should ensure
that its rules and procedures do not undermine the role of family.

Another reason the parent child exemption is a necessary part of Australia’s juvenile
justice paradigm is that the parent-child exemption weighs the present and potential harm caused
to the person and/or to the parent-child relationship against the desire for the evidence in the
proceeding. Such a balancing test favors exemption in the juvenile justice context because
the significance of harm (present and future) to the parent child relationship is even greater when
it involves a minor child and his parent. Forcing a parent to divulge personal information shared
with him by his minor child in order to assist the government in securing a conviction against the
child has a strong probability of fracturing the family unit, causing severe psychological strain,
and furthering deep feelings of betrayal on the part of the child. Furthermore, forcing a parent to
testify against his child undermines the primary objective of prosecuting the child in juvenile
court – restoring the order upset by the juvenile and emboldening the family unit to help the
juvenile not reoffend. Naturally, this would include repairing, nurturing and maintaining a
supportive community for the offender to return. For a juvenile, one’s family is often the key
component for ensuring a successful transition to becoming a productive member of society.

B. The American Example

There are historical parallels to development of the juvenile justice system in the United
States and Australia. The first juvenile courts in Australia and the US were established in the

177 See e.g. Evidence Act 2008 s18.
late nineteenth century. Both have their origins in the doctrine of parens patriae, where the best interests of the child are paramount. Courts acted in loco parentis, where judges treated the children that came before them like sons and daughters in need of guidance. From its inception, delinquency proceedings were deemed civil, not criminal, and many of the due process protections afforded to adult criminal defendants were unavailable to children.

Beginning with the birth of the civil rights movement in the United States, the American juvenile justice system gradually evolved into a rights based, autonomous system where due process superseded informality and benevolence. Following the landmark case of In re Gault, those adjudicated in juvenile court were guaranteed many of the same procedural protections that applied to adults in criminal proceedings. Most notably, Gault granted to juveniles the right to counsel and the right against self incrimination. Justice Fortas, writing for the majority, explained that the juvenile justice system in the United States had taken on a

179 Defined as “parent of his or her country”. Black’s Law Dictionary 511 (2d pocket ed. 2001). See also, Cunneen at 19.
180 Judge Julian Mack, set forth the predominant philosophy of the juvenile court in an influential law review article:

[The criminal court] put but one question, “Has he committed this crime?” It did not inquire, “What is the best thing to do for this lad?” It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act. . . . Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen. See Julian W. Mack, The Juvenile Court, 23 HARV. L. REV. 104, 107 (1909).

181 Because rehabilitation was the goal, dispositions were necessarily open-ended rather than time-limited. In most jurisdictions, commitments to juvenile corrections departments were indeterminate, extending until the child turned 21, or until the juvenile corrections department made a determination that the youth had been rehabilitated.
182 In re Gault, 387 U.S. 1 (1967).
183 Gault, 387 U.S. at 55
184 See id.
different character since its inception. He described a system where judges have unbridled discretion as inferior to a system with principle and procedure at its core.\textsuperscript{185} \textit{Gault} affirmed that “[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”\textsuperscript{186} Three years later in \textit{In re Winship},\textsuperscript{187} the United States Supreme Court determined that the beyond a reasonable doubt standard should apply to juvenile proceedings.\textsuperscript{188} \textit{Gault} and \textit{Winship} mandated procedural parity for juveniles largely because of the liberty interest at stake in both juvenile and adult criminal proceedings.

Interestingly, at the same time that due process rights were being instituted into juvenile adjudications, there was a rise in the number of children arrested and prosecuted in the American juvenile justice system. Never has juvenile crime in the United States risen to the level that it did in the 1990’s. From 1985 to 1997, the number of juvenile delinquency cases rose by sixty one percent.\textsuperscript{189} The murder arrest rate among juveniles was at its highest in 1993 at 14.4 murder arrests per 100,000 juveniles.\textsuperscript{190} The spike in juvenile crime caused major revision to the policies and penalties imposed on children in the juvenile justice system. A number of states enacted legislation that imposed harsher penalties on juvenile offenders, including being adjudicated as an adult in the criminal justice system.\textsuperscript{191} The number of delinquency cases

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\item \textsuperscript{185} See id at 18.
\item \textsuperscript{186} Id at 20.
\item \textsuperscript{187} 397 U.S. 358 (1970)
\item \textsuperscript{188} Id at 369.
\item \textsuperscript{189} See Melissa Sickmund, \textsc{Office of Juvenile Justice and Delinquency Prevention, Delinquency Cases in Juvenile Court, 2005 at 1 (June 2009)}. Between 1997 and 2005, delinquency cases declined by nine percent. See id.
\item \textsuperscript{190} See Charles Puzzanchera, \textsc{Office of Juvenile Justice and Delinquency Prevention Juvenile Justice Bulletin, Juvenile Arrests, 2008 (Dec. 2009)}, available at: \url{www.ojp.usdoj.gov/ojjdp}.
\item \textsuperscript{191} According to national news media sources, the number of juveniles who were tried as adults was on the rise during the 1990s. See, e.g., \textit{Number of Juveniles Sent to Adult Prisons Skyrocketing, Study Shows}, CNN.COM, Feb. 28, 2000 (stating more than twice the number of youths under 18 committed to adult prisons in 1997 than in 1985), at \url{http://www.cnn.com/2000/US/02/27/juveniles.in.jail/#2} (last visited May 6, 2004). Within 40 of the nation’s
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handled in the juvenile courts remained virtually unchanged from 2000 through 2005. In 2005, juvenile courts handled an estimated total of 1.7 million delinquency cases, 46% more cases than in 1985. In 2008, an estimated 2.11 million arrests of persons younger than age 18 were made by law enforcement agencies in the U.S.

The adversary nature of the American juvenile justice system and a parent child privilege are not mutually exclusive. The Australian experience demonstrates that institutionalization of a parent child privilege is not at odds with reducing and treating juvenile crime. In the United States, evidentiary privileges already exist for certain relationships. Federal common law recognizes privileges between lawyers and client, spouses, psychotherapists and patients, clergy and communicant. Some states have expanded their evidentiary privileges to include relationships between domestic violence counselor and victim, journalists and their sources.
The relationship between parents and children is equally deserving of a legal privilege. The parent-child relationship shares many of characteristics with those relationships that have been accorded an evidentiary privilege. For example, the spousal privilege, which is recognized in all fifty states and under federal common law, protects an intimate personal relationship. As one commentator notes,

“The child-parent relationship resembles the husband-wife relationship in that both involve a fundamental and private family bond. The child-parent relationship ideally encompasses aspects found in the marital relationship -- mutual love, intimacy and trust. . . The fact that the child-parent relationship is part of the institution of the family that it is hoped is promoted by a marital privilege makes the protection of children's private conversations with parents even more appealing.”

At the heart of the psychotherapist-patient and attorney-client relationships is a commitment of trust and privacy that if eroded, harms the patient/client and threatens the integrity of the profession. The virtue of both of these professional privileges is that patients and clients will reveal honest and accurate information to their therapists and lawyers, without fear of recrimination. Similarly, children share some of the most personal information with their parents in order to receive the benefit of their parents’ counsel. Children rely on parents to support and guide them through an oftentimes complicated and frightening legal process.

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198 See Hillary Farber, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 Loy. L.A. L. Rev. 551 (2010).
199 See George Fisher, *Evidence*, 839 (2002). From its inception under English common law it was felt that “the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosures of confidential communications between husband and wife would be a far greater evil than the disadvantages which may occasionally arise from the loss of light which such revelations might throw on questions in dispute.” Fisher supra note ___ at 840, (quoting Commissioners on Common Law Procedure, Second Report 13 (1853).
202 See Farber, supra note 198 for a fuller discussion of the comparison between the parent-child privilege and many of the common law and statutory privileges.
203 Waiver of counsel among juveniles is significantly higher than their adult counterparts. One third of public defender offices surveyed in a 1993 national study on the issues pertaining to juvenile representation reported that some percentage of youth waive their right to counsel at the detention hearing. Twenty-one percent say it happens 1
Parents sometimes work in conjunction with the child’s attorney, assisting in the legal decision making. The essence of inter-generational loyalty is under attack when the government is permitted to force parents and children to divulge confidences shared between them. Perhaps, the Australian example can offer one more reason for recognition of a parent child privilege in the United States.

**IV. Conclusion**

An exemption for parent-child communications is a logical extension of Australia’s restorative approach to juvenile justice. Much of the success that Australia has experienced with respect to a decline in the number of children prosecuted in the juvenile courts is testament to the diversionary practices that rely on parents as active participants. Most often for diversion to be successful parents need to have accurate and truthful information in order to assess their children’s needs, know whether their child is complying with requirements, and access the appropriate services when needed. A restorative approach depends upon open and honest communication between stakeholders. Parents are stakeholders in their children’s social, physical, and moral development. The restorative model is designed to allow parents, among others, to see and hear how their child’s actions have affected other members of their community. It provides an opportunity for parents and children to speak candidly about the child’s conduct without fear of incrimination and gives parents ample opportunity to participate in reconstituting a parent-child relationship that can assist the rehabilitative effort. For all of

these reasons, a rule which exempt parents and their children from being compelled to provide information against one another fits with a restorative approach.

The American model embodies the virtues of autonomy and due process. The juvenile justice system, not unlike the adult criminal justice system, is decidedly rule based, which ensures a certain degree/level of procedural conformity. A parent-child testimonial privilege is consistent with the framework utilized by the American criminal justice system. This Article offers the Australian experience as a lens through which to view the legal and social utility of a parent-child privilege. A parent child privilege will not be a panacea for juvenile crime, but it is one more resource that can aid families in assisting wayward youth. The Australian experience teaches us that the fewer barriers we erect to intra-family communication the more resilient and successful the efforts toward rehabilitation will be.