I. INTRODUCTION

Traditionally, what a person told a priest in a confession setting was absolutely protected by the "seal of the confessional". A Catholic priest could not break this seal on pain of excommunication from the Church and, consequently, spiritual rejection. This led to the law of religious advisor privilege, one of the oldest privileges known to the common law, and one that can be traced back to the fifth century. However, with political and religious change in England, its importance diminished over time, and it is no longer recognised there.¹

Religious advisor privilege has had statutory recognition in New Zealand for over 100 years, but has rarely been invoked. In 1999, the Law Commission recommended reform and modernisation of the privilege. The purpose of this article is to examine the current privilege to determine which areas need reform, to analyse reform attempts, and to suggest alternative solutions. In so doing, it must be considered whether the "seal" protecting confidential communications should be cracked, or whether the cracks in the seal which have been made over the last 1400 years should be sealed to provide greater protection for ministers and those seeking their professional assistance.

Part II of this article introduces the concept of legal privilege, and looks at the history of the religious advisor privilege and the current privilege in New Zealand. Part III examines the justifications for the privilege, and this assists in forming the basis for the critical analysis that follows in the rest of the article. In Parts IV to VI, the article looks at the three main aspects of the privilege and, for each, examines how the current privilege is deficient, and the implications of those deficiencies. These aspects are: the definition of "minister"; whether confessions or communications should be protected; and ownership or waiver issues. These headings represent the areas in which problems typically arise. The Law Commission's recommended privilege will be

¹ For the historical origins of the privilege, see Part II.3.
critically examined against the justifications for the privilege to see how it assists in meeting certain policy goals. Where necessary, alternative provisions are suggested.

In this article, the term “religious advisor privilege” is used to describe what may be called the priest-penitent, clergy-penitent or religious communications privilege. The term reflects the conclusion of this article insofar as it does not restrict the privilege to clergy nor to penitential communications. Similarly, the terms “minister” and “individual” are used where “priest” and “penitent” might be used. “Confidential” refers to anything said in private between religious advisor and advisee, without others present – except in furtherance of the communication – or able to hear, and carries with it the expectation that the religious advisor will not disclose what has been said.

II. BACKGROUND

1. What is a Privilege?

As a general rule, all persons who are compellable witnesses \(^2\) in court proceedings must answer all questions put to them or risk being held in contempt. However, for policy reasons, the law has recognised certain exemptions that allow people to refuse to answer certain questions without legal penalty. These exemptions are called privileges.

A privilege arises in respect of certain relationships whose protection is considered more beneficial to the community than the access by the courts to information flowing from those relationships. In the case of religious advisor privilege, some reasons for this policy decision are given in Part III. Examples of other recognised privileges are those protecting solicitor-client and doctor-patient relationships, spouses (marital privilege) and other confidential relationships which it is in the public interest to protect (such as informants, psychologists, nurses, and counsellors).

2. Privilege and Compellability

The question of whether a person has a privilege must be distinguished from the question of that person’s compellability as a witness. \(^3\) Compellability relates to who the person is; privilege relates to that which their evidence concerns. Compellability determines whether a person can be required to give evidence at all. A privilege does not entitle a compellable witness to refuse to take the stand, but allows them to refuse to answer certain questions where to do so would infringe the privilege. For example, a minister would be a compellable witness and would have to give evidence about anything except what the accused may

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\(^2\) See the Evidence Act 1908, ss 3-5.

\(^3\) For an extended discussion of the differences, see McNicol, Law of Privilege (1992) 11.
have said in a confidential communication. While the minister is still compellable, he or she is entitled to refuse to answer – without legal penalty – any questions touching on the confidential communication. The existence of a privilege has no effect on compellability, and a witness whose testimony is privileged is still a compellable witness.

Privileges are often characterised as being class privileges or discretionary privileges. A class privilege – such as the solicitor-client, doctor-patient and marital privileges – protect all communications within the class. A discretionary privilege leaves the exclusion of evidence up to the trial Judge on a case-by-case basis. The Judge has a discretion to exclude evidence according to certain criteria, such as whether the communication was given in confidence, whether confidentiality is essential to the maintenance of the relationship, and whether the costs of disclosure to the relationship would exceed the benefits of the evidence. An example is the privilege in section 35 of the Evidence Amendment Act (No 2) 1980.

3. Religious Advisor Privilege

Religious advisor privilege grew out of the teachings of the Roman Catholic Church: that what is said to a priest in the confessional is absolutely protected and cannot be disclosed under any circumstances. This is based on the doctrine that a minister “should by no means give evidence on matters secretly communicated to him ... because he knows such things ... as God’s minister”. A priest who so discloses faces dismissal and excommunication from the Church. The practice of confessions and the requirement for absolute secrecy was formalised as early as the fifth century. The secrecy of the confession became known as “the inviolability of the seal of confession”, from which the title of this article is derived. Catholicism was the national religion of England until the Reformation in 1535, and many aspects of religious practice were recognised by the common law. The common law of England recognised that a priest could not be forced to testify about what he had heard in the confessional, which is what is now known as religious advisor privilege. However, after the Reformation, the Anglican Church in England rejected Catholic teachings and Canon law, and in the seventeenth century the doctrine of the seal of the confessional was officially abandoned. The common law then ceased to recognise the privilege. However, jurisdictions around the world have

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5 St Thomas Aquinas, Summa Theologica, translated by Fathers of the English Dominican Province (1929), Part II (Second Part), vol 10, q 70, art 1, 266; see also “Seal of Confession” in New Catholic Encyclopedia (1967) vol 4, 134.
8 Ibid.
recognised the value of protecting confidential communications and have given the privilege statutory recognition.

4. The Privilege in New Zealand

(a) History

New Zealand first recognised a religious advisor privilege in section 7(1) of the Evidence Further Amendment Act 1885, and has done so ever since. A significant change was made in 1895 when the privilege was amended to remove the requirement that the confession be made “in the course of discipline enjoined by the law or practice of such denomination, or under sanction thereof”, thereby including non-ritual confessions.

(b) Current Situation

The privilege has remained materially unchanged for the last 105 years, being incorporated into the Evidence Act 1908 and later into section 31 of the Evidence Amendment Act (No 2) 1980. It provides:

31. Communication to minister –

(1) A minister shall not disclose in any proceeding any confession made to him in his professional character, except with the consent of the person who made the confession.

(2) This section shall not apply to any communication made for any criminal purpose.

The term “minister” is defined in section 2 of the Evidence Act 1908 as “a minister of religion, and, in relation to a religious body the constitution or tenets of which do not recognise the office of minister of religion, includes a person for the time being exercising functions analogous to those of a minister of religion”.

(c) Law Commission’s Proposed Provision

In August 1999, the Law Commission released Report 55 Evidence, which recommended an Evidence Code to codify existing statutory and common law rules of evidence. It recommended the following privilege:

59. Privilege for communications with ministers of religion -

(1) A person has a privilege in respect of any communication between that person and a minister of religion if the communication was

(a) made in confidence to or by the minister in the minister’s capacity as a minister of religion; and

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(b) made for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit or comfort.

(2) A person is a minister of religion for the purposes of this section if the person has a status within a church or other religious or spiritual community which requires or calls for that person to receive confidential communications of the kind referred to in subsection (1) and to respond with religious or spiritual advice, benefit, or comfort.

This proposed provision will be discussed further in Parts III to VI.

(d) Case Law

The privilege has been the subject of judicial interpretation in New Zealand on only three occasions, the first being in 1983, almost 100 years after the privilege was first introduced.

The first of these cases, \textit{R v Howse},\(^{10}\) dealt with the definition of a "confession" in section 2. The Court of Appeal upheld the trial Judge's definition, which focused on an acknowledgment of sin and the seeking of a spiritual response. Fifteen years later, the second case, \textit{Re Leading Aircraftman F},\(^{11}\) considered the content of the communication and whether it needed to be spiritual in nature. The Courts-Martial Appeal Court, applying \textit{Howse}, held that it did. That same year, \textit{R v L}\(^{12}\) considered the circumstances of the communication and whether they needed to be confidential and directed towards the minister in his professional capacity. The Court of Appeal held that they did.

These cases will assist in an assessment of why a privilege is justified and what its terms ought to be. The following Parts of this article will examine who should be protected, what policy issues surround communication and the need for confidence, and whether and by whom the privilege may be waived.

III. JUSTIFICATIONS AND RATIONALES

All evidentiary privileges are the result of a balancing act between competing principles. In the case of the religious advisor privilege, these are the interests of justice and the need for the court to hear all relevant evidence on one hand, and issues of privacy, religious freedom and Church-State relations on the other. This Part examines how these competing principles interrelate, and what concessions need to be made on both sides.

An examination of the justifications for the privilege and its underlying rationales is important in laying the foundation for a critical analysis of the privilege. Such an analysis will also assist in deciding what a privilege should

\(^{10}\) [1983] NZLR 246 (CA).
\(^{11}\) [1998] 1 NZLR 714 (Courts-Martial Appeal Court).
\(^{12}\) [1998] 2 NZLR 141 (CA).
ideally achieve, and the various attempts at reform can then be measured against these objectives. An analysis also assists in determining whether a privilege is even justified on principle.

1. Arguments For and Against the Privilege

The general principle is that there should be no limit on the court’s ability to hear relevant and probative evidence, from whatever source, unless there are compelling policy reasons against its admission. A privilege will inevitably deny the courts access to some evidence. Proponents of the privilege argue that the justifications in its favour outweigh the possible loss of evidence and that, in any case, loss of evidence will only be slight. Opponents reason that the arguments in favour of the privilege are insufficient to justify an exception to the general principle.

(a) Justifications for the Privilege

There is no evidence that the existence of a religious advisor privilege in the past has hindered the courts or frustrated justice by denying access to valuable evidence. The privilege has existed in New Zealand since 1885. It is also recognised in four Australian states, the Commonwealth of Australia, and in all 50 states of the United States of America. Many of these privileges have existed for almost a century. The Australian Law Reform Commission was “not aware that law enforcement authorities in any of these jurisdictions, whether Australian or American, have been heard to complain that the existence of the privilege has hampered law enforcement in any significant way”. In any event, the benefits of any evidence lost to the privilege are likely to be small. The New Zealand Law Commission observed that the “clergy [are] an unlikely source of relevant and admissible evidence ... [and] the benefits of access to the information are at best marginal”.

The arguments in favour of a privilege, which are said to outweigh the State’s interest in obtaining all relevant evidence, can be broadly described as privacy considerations, the desire to foster the minister-individual relationship, and freedom of religion. To some extent these principles overlap. As will be discussed below, the privilege is also justified on practical grounds: that forcing ministers to testify would cause tensions between the Church and the State and would ultimately prove counterproductive, especially as there is evidence that ministers would simply refuse to testify.

13 Colombo, supra note 6, 226-227.
14 McNicol, supra note 3, 333.
15 Colombo, supra note 6, 231 n 39.
(i) Privacy Considerations

The common law has recognised the relationship between a minister and an individual seeking the minister’s professional assistance as one of great confidence that is worthy of protection. Someone “who seeks out a member of the clergy for confession and counsel draws on or establishes a soul-baring relationship as deeply intimate as any among family members ... [and there] is a general repugnance at the law’s intrusion into such a relationship”. The New Zealand Law Commission referred to the “extremely personal nature of the relationship and the special quality of religious beliefs and experiences”.

However, this argument could lead to a proliferation of privileges: there are many confidential relationships which are worthy of protection, and yet are not protected. For example, there is no privilege for family members outside the limited marital privilege: should there be a parent-child privilege? Perrella argues that the relationship between a minister and individual:

[I]s unique in that it deals with matters of the conscience, of acknowledging guilt and seeking spiritual absolution – it is not concerned with physical or material welfare or temporal punishment. It exists on a different level to [sic] a privilege protecting marital communications and ... may even be considered a privilege of greater importance.

The minister-individual relationship is so intensely personal and private that it is unlike all others, and it is arguable that the State should not force disclosure of its contents. The Court of Appeal in Howse stated that “a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief”.

(ii) Fostering the Minister-Individual Relationship

Society as a whole arguably benefits from people being able to confess wrongdoing, or being able to discuss their problems and seek spiritual comfort from a minister. The New Zealand Law Commission noted that “[g]uilty persons can be helped by religious advisors to become reconciled with themselves, their family and society. This process may even involve a confession
to law enforcement authorities”. The English Criminal Law Revision Committee observed that:

"It is in the interests of ... society generally that a person who is willing to confide in a minister about his wrongdoing or his wicked propensities should be encouraged to do so in the hope that the minister will be able to persuade him to lead a better life.

The relationship would be seriously threatened if individuals knew ministers could reveal in Court what had been said in confidence. This would arguably have a “chilling effect” on the quality and quantity of what was said to ministers in confidence. This issue arose in *R v Gruenke*, a Canadian case in which a woman made incriminating statements during a conversation with her pastor about whether a murderer could be spiritually forgiven. Madame Justice L’Heureux-Dube dissented from the majority decision of the Supreme Court, which recognised a discretionary rather than a class religious advisor privilege. Her Honour stated that:

If our society truly wishes to encourage the creation and development of spiritual relationships, individuals must have a certain amount of confidence that their religious confessions, given in confidence and for spiritual relief, will not be disclosed. Not knowing in advance whether his or her confession will be afforded any protection, a penitent may not confess, or may not confess as freely as he or she otherwise would.

Her Honour evidently felt that there would be detrimental effects on the minister-individual relationship and on society as a whole if people felt that they could not speak freely with their minister or religious advisor because they would not be sure that anything said was absolutely protected.

(iii) Freedom of Religion

The absence of a privilege would threaten the free exercise by ministers of their religion. Most major Christian Churches require as a matter of discipline that their ministers keep confidential what they hear as religious advisors. Unauthorised disclosure is likely to result in disciplinary action, possibly leading to excommunication or dismissal. A minister whose Church teaches that what is heard in confidence must remain confidential is arguably denied the free practice of their religion if they are forced to disclose such communications against the teaching of their Church.

25 NZLC PP23, supra note 17, para 269.
27 Perrella, supra note 21, paras 21-22.
30 ALRC R38, supra note 16, para 204.
If an individual believes that seeking spiritual comfort is an essential part of his or her religion, then the absence of a privilege could prevent them from freely practising that religion. The "free exercise of religion . . . could not be freely carried out if it were accepted that members of the clergy could be obliged to give evidence of confidential communications they have received from persons consulting them for spiritual purposes". There would be a "chilling effect" on people's willingness to confide in a minister if it was known that ministers could disclose what was said to them in confidence. If a person "cannot freely confide in a priest or member of the clergy when seeking remission of sin or seeking spiritual aid and comfort in the context of a confession, this would strike at the concept of confidence in a most critical area". This would infringe an individual's right to freely practice and observe his or her religion.

Freedom of religion is recognised as a fundamental right in international human rights instruments, and in the Constitutions of many countries. It is protected in New Zealand under the New Zealand Bill of Rights Act 1990, which provides in section 15 that "[e]very person has the right to manifest that person's religion or belief in ... observance [and] practice". The absence of a privilege may result in a breach of both the individual's and the minister's freedom of religion. In New Zealand, however, these rights are not absolute, and are subject to contrary legislation (section 4) and "reasonable limits" (section 5). It is, therefore, unlikely that ministers could rely on section 15 to avoid disclosing confidential communications where there is a statute requiring disclosure, or where the communication in question falls outside a statutory privilege. However, the fact that freedom of religion is considered worthy of protection by the international community is an indication that the State should be loath to breach the right without good reason, and only after due consideration.

(iv) Church-State Relations and Enforceability

The absence of a privilege could cause tension in Church-State relations if the courts were to force ministers to testify. Ministers would have to choose between following the teachings of their church as to the maintenance of confidentiality – and risk being held in contempt by the court – or obeying the court and testifying – and thus breaching their ethical obligations and risking disciplinary action. The New Zealand Law Commission noted that "deference to the strong obligation that church law places upon the priest may also have been a factor" in deciding whether or not a religious-advisor privilege ought to exist.

31 Ibid para 209.
33 International Covenant on Civil and Political Rights, Art 18(1); Universal Declaration of Human Rights, Art 18; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 9(1).
34 See, for example, the First Amendment to the United States Constitution; see also Commonwealth of Australia Constitution Act 1900, s 116.
35 NZLC PP23, supra note 17, para 268.
The Australian Law Reform Commission found that: 36

Irrespective of their denomination, the members of the clergy to whom the Commission spoke were all adamant that they would refuse to give evidence of confidential communications and would go to jail rather than do so ... [B]y and large the clergy consists of a group of men and women who, when confronted with what they see as a choice between obeying a law of God and a law of man, will invariably assert the primacy of the spiritual as against the temporal. It will be a law which will be totally unenforceable.

Perrella and McNicol offer further evidence that there would be widespread non-compliance amongst Australian clergy with any requirement that ministers disclose the contents of confidential communications. 37 The New Zealand Law Commission has arrived at a conclusion similar to that of its Australian counterpart. 38 Mitchell regards the non-compliance argument as a valid reason for having a privilege, but warns that such an argument: 39

[Should not be] elevated to a justification, because it rests at bottom on the awkward assertion that the law should not impose a requirement on persons who will not comply. What is important is why some clergy would not comply and the strength of their reasons.

(b) Arguments Against the Privilege

McNicol notes that “the arguments against the creation of a priest-penitent privilege are few and those that exist are far from compelling”. 40 Two such arguments are, first, that the privilege favours the religious – especially Christians – and secondly, that the privilege is not required.

(i) Religious Favouritism

Opponents of the privilege assert that the privilege discriminates between different religious groups. However, when analysed, these arguments tend to focus on the specifics of the privilege, and not whether the privilege is appropriate at all. The concerns expressed can be resolved by careful wording so that the privilege does not favour one group over another.

The privilege arguably does not favour religious people over those with no religious belief because there is no requirement that someone need be religious in order to speak to a minister. While most people who do speak to ministers probably are religious, the privilege does not exclude those who are not: it protects anyone who wishes to talk about spiritual matters in confidence with a minister. Many non-religious people turn to ministers when they need spiritual

36 ALRC R38, supra note 16, paras 208, 212.
37 Perrella, supra note 21, para 20; McNicol, supra note 3, 328.
38 NZLC PP23, supra note 17, para 274.
39 Mitchell, supra note 7, 762 n 218.
40 McNicol, supra note 3, 330.
advice or comfort. Opinion polls have consistently ranked ministers the fifth-most respected occupation after nurses, doctors, police officers and teachers, suggesting a level of respect beyond the 63 per cent of New Zealanders who identified with a religious denomination in the 1996 Census.

(ii) Privilege is not Required

Opponents also argue that there is no need for a privilege because the likelihood of a minister being forced to testify is so remote. Attention is often drawn to the paucity of cases in New Zealand and Australia dealing with this issue. However, the lack of cases is no doubt partly due to the fact that ministers are not called as witnesses, because the Crown knows that the privilege applies and the minister will likely be excused from testifying. The evidence can usually be obtained more easily from another source, making the minister’s testimony superfluous. Perrella asks whether the existence of the privilege will cause any harm if it is so unlikely to be invoked. However, there are good reasons for the privilege, regardless of how often it may be required. Individuals need to be assured that confidentiality between themselves and their ministers will be respected and maintained: the privilege is one way of doing so.

(c) Recommendations

This article is of the view that the arguments advanced in favour of the privilege are sufficient to displace the general principle that the courts must have access to all relevant evidence. There are good policy reasons to withhold evidence of confidential communications. As noted above, there is likely to be very little evidence lost to the courts, as ministers are an unlikely source of relevant evidence, and such evidence can usually be obtained elsewhere. The Law Commission reported that submissions on its 1994 discussion paper “clearly supported” a religious advisor privilege.

2. Aims of the Privilege

The privilege has been justified on a number of grounds: it is intended to respect the privacy and confidentiality of the relationship between a minister and an individual, foster that relationship for the benefit of society, protect individuals and ministers’ freedom of religious practice, and avoid unnecessary conflict between the church and the state. An overlapping objective is to reassure individuals that they can speak freely to a minister in confidence.

Interestingly, it has not been argued that the New Zealand privilege is intended solely to protect the individual, although section 31 could be interpreted

43 Perrella, supra note 21, para 31.
44 NZLC R55, supra note 9, para 267.
in this way. The words “a minister shall not disclose” could imply that the intention is to prevent ministers from disclosing. However, this is arguably incorrect. The privilege exists to protect a minister from having to testify. None of the reported cases involves ministers who want to disclose: most invariably want to stay silent. The statutory wording has not changed since 1885, and it is possible that the apparently restrictive wording owes more to its age and the statutory phrasing of the time, than to any conscious policy decision to prevent willing ministers from testifying. It would, therefore, be incorrect to assume that the privilege exists to protect individuals from ministers. It is there to protect ministers and individuals from the state’s power to force disclosure and the effect that this would have on their relationship. It requires certainty of confidentiality.

3. Type of Privilege

One question that arises from the decision that a religious advisor privilege is appropriate is whether the privilege ought to be a class or a discretionary privilege. As discussed in Part II, a class privilege provides certainty of blanket protection for communications falling within its scope, whereas a discretionary privilege confers protection if the court considers it warranted on the facts of the individual case.

The Law Commission concluded that, because almost all religious communications – even those excluded by the stricter religious advisor privilege in section 31 – would be protected under the section 35 discretionary privilege, it would be more efficient to continue to recognise a class privilege. The Commission commented that “[c]lergy are entitled to say that if the courts are always going to protect such communications anyway, why go through the motions of exercising a discretion?” A class privilege would avoid the need for the courts to probe into what has already been recognised as a highly private and confidential relationship, and would avoid potential church-state tensions associated with a discretionary approach.

The justifications for the privilege show that an overriding objective is to give assurance that confidences will be respected. A discretionary privilege does not do this, as each case is assessed on its merits, and no one can be certain beforehand that the privilege will be upheld. A class privilege would provide this assurance of confidentiality, which the courts have accepted as fundamental to the relationship. A discretionary privilege would leave people uncertain as to what would and what would not be protected. It would leave the most private and confidential elements of religious practice up to the discretion of judges who, despite the best of judicial intentions, would arrive at varying and inconsistent results. Such a situation would not be ideal, and would fail to recognise the importance of the relationship and communications.

The justifications for the religious advisor privilege discussed in this part of the article are helpful in assessing the weaknesses of the current New Zealand

45 NZLC PP23, supra note 17, para 278.
privilege, and will also be of assistance in assessing the effectiveness of local and overseas law reform attempts. The remainder of this article is devoted to assessing the privilege under three broad headings: the definition of a “minister”; whether confessions or communications should be protected; and waiver and ownership.

IV. DEFINITION OF “MINISTER”

This part of the article is concerned with the issues arising from the definition of “minister”. These issues determine whether the privilege applies to Protestant denominations as well as to Roman Catholic, to non-Christian as well as to Christian, to established as well as to modern churches, and to lay-ministers as well as to ordained priests. The definition of “minister” given in section 2 of the Evidence Act 1908 raises some issues which are discussed below.

1. Former Ministers and Lay Ministers

(a) Former Ministers

The current New Zealand privilege, which refers to “a” minister, may not cover those who are no longer ministers, as it implies currency of position. Former ministers include ministers who have resigned, retired or been dismissed. The confidential relationship between ministers and individuals would be undermined if former ministers could later disclose what they heard in confidence. Individuals confiding in ministers do so knowing that, and partly because, what they say will remain confidential, regardless of the duration of the minister’s “employment”. This is consistent with the principle that a privilege continues beyond the relationship in which it arises. Given that the essence of the privilege is that what is said in confidence remains confidential, it is therefore inconsistent with the nature and rationale of the privilege for the confidentiality to end when the minister’s employment ends.

Only two jurisdictions surveyed in this article, the Australian Commonwealth and New South Wales, have addressed this issue. Their statutory privileges refer to a person “who is or was a member of the clergy”. This formulation would ensure that individuals’ confidentiality is protected beyond the term of the minister’s employment.

The New Zealand Law Commission’s proposed privilege, which defines a minister in the present tense, is unsatisfactory. The privilege should recognise the need for the ongoing confidentiality of what is said to a minister, and extend confidentiality beyond the minister’s employment as such. The draft statute recommended in this article refers to a minister as “any person who holds, or held

46 McNicol, supra note 3, 81.
47 Evidence Act 1995 (Cth), s 127(1); Evidence Act 1995 (NSW), s 127(1).
at the time the protected communication was made, a recognised position”. This wording includes former ministers, and is consistent with the rationales underlying the privilege.

(b) Lay Ministers

Lay ministers are people who are not ordained ministers, but who exercise similar functions in churches and secular organisations. While not ordained, they are invariably licensed or officially sanctioned by their controlling religious organisation. Many are chaplains in hospitals, schools, and workplaces, while others exercise counselling and pastoral care functions in parishes. A number of churches have lay ministers who work alongside ordained ministers, taking responsibility for certain groups such as young people.

The current New Zealand privilege arguably excludes lay ministers, because they can not be regarded as falling within the statutory definition of a “minister of religion”. Churches that ordain ministers under a hierarchical structure would not necessarily regard lay ministers as “ministers of religion”, a term that only describes ordained priests. The courts may be unable to interpret the definition so as to include lay ministers. The definition in section 2 is linked to the definition of a marriage celebrant, and has been amended as the class of people empowered to act as marriage celebrants has changed. As lay ministers are not, by virtue of that position alone, marriage celebrants, the court’s interpretation would be constrained by legislative history. The court would also find it difficult to include lay ministers if the Crown attempted to rebut the assertion of privilege by calling expert evidence from the church authorities that they did not regard the lay minister as a minister of religion.

If the definition of “minister” excludes lay ministers, it fails to take into account the modern nature of New Zealand religious practice in which there is an increasing emphasis on the work of lay ministers. In the Anglican Diocese of Auckland there are nearly as many licensed lay ministers as there are ordained ministers.

It would be anomalous for lay ministers to be excluded from the privilege, because the nature of their work means they are at least as likely to receive confidential communications for spiritual advice and comfort as ordained ministers. In some cases they are more likely to receive such communications, because a lay minister may be an individual’s only contact with a religious advisor. School children may know no religious advisor other than their school chaplain if they have no family church. Hospital patients may see only a hospital chaplain during their hospitalisation. It would be anomalous for lay ministers to be denied the protection of the privilege. They have similar functions to ordained ministers in the pastoral care and counselling areas and should, therefore, be entitled to the protection of the privilege. Individuals seeking their assistance

48 For a discussion of the differing United States authorities on this issue, see Mitchell, supra note 7, 744 n 120.
49 Anglican Diocese of Auckland, 1999 Year Book, 198.
should likewise be entitled to invoke the privilege in respect of what they might tell the lay minister.

In section 59(2) of its Evidence Code,\textsuperscript{50} the Law Commission recommends that a minister be defined as:

\begin{quote}
[A] person [who] has a status within a church or other religious or spiritual community which requires or calls for that person to receive confidential communications ... and to respond with religious or spiritual advice, benefit, or comfort.
\end{quote}

This definition "is intended to extend beyond persons ordained under a traditional organisational structure",\textsuperscript{51} and goes a long way towards extending the privilege to lay ministers. However, the references to "status" and "call" may still exclude them, because traditional church hierarchies do not recognise lay ministers as having any status. The privilege would also exclude hospital and school chaplains whose status is in a secular rather than religious organisation.

\textbf{(c) Recommendations}

While substantially endorsing the Law Commission’s definition, this article recommends that a minister be defined as:\textsuperscript{52}

Any person who holds, or held at the time the protected communication was made, a recognised position of religious leadership or ministry in, or accredited to, a bona fide, recognised religious organisation, whose position involves the making or receiving of protected communications.

This wording focuses on the minister’s position rather than status, and removes the phrase “requires or calls”, thus covering positions which do not require the hearing of confidential communications but which, nevertheless, involve it. The reference to a "a recognised position" would exclude self-appointed ministers, and requires official sanction or endorsement. The reference to accreditation would include chaplains who are accredited by a religious organisation but who work at a secular organisation such as a school, hospital or military base. This avoids the possibility of such people being excluded because they do not hold the position of minister in a religious organisation, and removes any doubt as to whether or not a lay minister is covered, thus providing reassurance to individuals.

\textsuperscript{50} NZLC R55, supra note 9; s 59 is reproduced in Part II.4(c).
\textsuperscript{51} Ibid para C249.
\textsuperscript{52} The recommended privilege is set out in full in Part VII.
2. Religious Tolerance

(a) Non-organised Religious Groups

The privilege has been criticised for favouring Christian churches and organised religion over other religious groups. At the same time, concern has been expressed that non-religious groups may fall within the definition.

The current New Zealand statute makes provision for ministers from non-organised religions by including:

"[I]n relation to a religious body the constitution or tenets of which do not recognise the office of minister of religion ... a person [who] for the time being exercis[es] functions analogous to those of a minister of religion.

Legislation from other jurisdictions arguably excludes non-organised religious groups by using terms that only apply to established religions. Australian statutes refer to a “clergyman” or “member of the clergy”. United States statutes use a variety of descriptions, mainly “priest” or “minister”. It is arguable that some of these terms exclude Jewish, Muslim or Hindu “ministers” as well as the pastors of more modern churches.

As a matter of public policy, the privilege should be available to all religious groups, irrespective of denomination. There is no justification for restricting it to Judeo-Christian or organised religions. Whatever words are used to refer to religious organisations must be broad enough to include all recognised faiths, and yet narrow enough to exclude groups not meeting its justifications. While taking care not to exclude religious groups, the privilege should not be so broadly worded as to include non-religious groups or cults.

The Law Commission’s recommended statute refers to a “church or other religious or spiritual community”. The Law Commission believes that this would not include “rationalist systems of ethical conduct which do not depend on the belief in some god, divine force or other spiritual basis for life”. However, some submissions on the Law Commission’s preliminary paper expressed the concern that the definition was too broad and “might include many fringe groups for whom the privilege may not be appropriate”. This comment is pertinent because a “spiritual community” may not necessarily be a religious one, and may include the very groups the Law Commission intends to exclude. The justifications for the privilege and the rationales underlying it are confined to religious organisations and do not apply to spiritual ones. If the privilege is to be in response to the arguments raised in Part III, it should be restricted to religious organisations.

53 Evidence Act 1958 (Vic), s 28.
54 Evidence Act 1995 (NSW), s 127; Evidence Act 1995 (Cth), s 127. The Commonwealth statute applies to the Federal Courts and the ACT.
55 See Colombo, supra note 6, 232-233 n 41-43.
56 NZLC R55, supra note 9.
57 NZLC PP23, supra note 17, para 284.
58 NZLC R55, supra note 9, para 267.
rather than spiritual organisations. Therefore, the Law Commission’s privilege is too widely cast.

(b) Recommendations

This article recommends that the definition of “minister” and “religious organisation” be inclusive and not favour organised religious groups or Christian churches. The most effective way of doing this is to refer to a “bona fide, recognised religious organisation”. The “bona fide” requirement should be sufficient to exclude non-religious groups that claim a religious pretext for criminal activities. The requirement that groups be “recognised” would allow the courts to use the broad and flexible test for religion used in taxation cases to determine charitable status. The restriction to “religious organisations” rather than “religious and spiritual” stresses the religious nature of the privilege, which best accords with the arguments in Part II, and excludes spiritual or lifestyle groups that lack sufficient justification for protection within the scope of a religious advisor privilege. It also would include groups that are not “churches”, such as Jewish or Muslim congregations.

V. COMMUNICATIONS OR CONFESSIONS

One of the Law Commission’s major recommendations was a shift from protecting religious confessions to protecting confidential communications of a religious nature. This Part examines some of the issues surrounding this decision, and looks at how the communication must be made.

1. Confessions or Communications?

(a) Definition

The current New Zealand and Australian privileges protect only confessions, whereas the majority of United States privileges protect confidential communications. “Confession” is not defined in statute, but in R v Howse, the Court of Appeal held that:

‘Confession’ in [section] 31 does not mean a confession in the legal sense. It means a confession in the religious sense and that ... requires that the person making the confession is seeking some spiritual response for himself. In the ordinary sense that

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60 See, for example, Evidence Act 1995, s 127 (Cth & NSW), which refer to a “religious confession”.
61 Supra note 10.
62 Ibid 249, citing with approval Greig J in the High Court.
means an avowal of penitence and a request for forgiveness or absolution. That may not apply in the forms and beliefs of all churches but, at the least, there must be a request for spiritual help in the person making the confession.

The Court also observed that a confession must involve “a seeking of spiritual response for the person making the confession … [and it is] essential that the person confessing should be at least partly impelled to do so by his own religious belief or practice”. 63

However, such a definition arguably fails to recognise that confessions are no longer commonly practised beyond the Roman Catholic Church. 64 Ministers often hear communications – for example, in counselling or in giving general religious advice – in which people say things that are intended to be confidential and protected, but which fall short of a confession. 65 The Law Commission recognised this, stating in its discussion paper that:

[Confessions] may not be wide enough to cover the range of communications which may take place with a religious advisor, and which, like confessions, are understood to be made for purely spiritual purposes, to involve a high degree of intimate revelation, and hence to need absolute secrecy.

Such communications should be covered by the privilege if they are made in confidence to the minister. The general rationales for a privilege are found in Wigmore’s classical test: the communication must originate in confidence that it will not be disclosed, because confidentiality is essential to the full and satisfactory maintenance of the relationship. The relationship must be one which is in the public interest to protect, and the injury caused to the relationship by disclosing the communication must exceed the benefits gained. 67

In this article, the term “confidential” refers to anything made in private, without others present or able to hear – except for people who are present in furtherance of the communication, such as a counsellor or support person – and with an expectation that the minister will not disclose what is said. 68 This is consistent with R v L, 69 the third and most recent discussion of section 31 in New Zealand. The defendant, Ms L, was part of a prayer and counselling group in which members told the group, facilitated by a minister, about their personal problems and the group responded with suggestions for resolution. Ms L’s statements were held not to be privileged, as they were not made “in confidence”. The meetings were open for anyone to attend, and “although discretion was no doubt anticipated, in communicating their problems to an open group they were

63 Ibid 250-251.
64 See Mitchell, supra note 7, 748.
65 Ibid 748-750.
66 NZLC PP23, supra note 17, para 280.
68 Mitchell, supra note 7, 752 n 163.
69 Supra note 12.
not divulging sins to the minister with the expectation of permanent confidentiality on his part". ⁷⁰

In the case of confidential communications to a minister, the first criterion of Wigmore’s test is satisfied. It has already been established that it is essential to the relationship that what a person tells a minister remains confidential, ⁷¹ and that it is in the public interest to encourage people to discuss wrongdoing and seek appropriate counselling and assistance. ⁷² For this reason, and the fact that ministers are unlikely to be a valuable source of information, the damage caused to the relationship between ministers and individuals would exceed the value of whatever information might be obtained from forced disclosure. Therefore, confidential communications to a minister meet Wigmore’s test, and should be privileged. Such communications would include counselling which involves religious comfort, pastoral care or general religious advice that falls short of a penitential confession.

In Re Leading Aircraftman F, ⁷³ the Courts-Martial Appeal Court held that conversations must be “religious or spiritual” in nature in order to attract the protection of the privilege. The Court held that a conversation between a leading aircraftman and an Air Force Chaplain was for “help and assistance … [and that there] were no religious or spiritual aspects associated with his approach”. ⁷⁴ The leading aircraftman told the Chaplain that he was having thoughts about killing a superior officer, and that he wanted these thoughts to stop; however, they did not discuss religious matters. The leading aircraftman spoke to the Chaplain, not for religious reasons, but because he felt she was trustworthy and would be of some assistance. ⁷⁵

The Law Commission recognised that restricting the privilege to “confessions” was no longer appropriate, and recommended that it be widened to include confidential communications. Section 59(1) of the Evidence Code provides that the privilege covers communications: ⁷⁶

(a) made in confidence to or by the minister in the minister’s capacity as a minister of religion; and
(b) made for the purpose of the person obtaining or receiving from the minister religious or spiritual advice, benefit or comfort.

This recommendation is a huge shift from the present privilege, and accords with the majority of United States privileges. It would broaden the privilege to cover “religious and spiritual communications in a general sense, whether or not they involve atonement for sin”. ⁷⁷ The Law Commission wanted to “include

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⁷⁰ Ibid 150.
⁷¹ See Part III.
⁷² Ibid.
⁷³ Supra note 11.
⁷⁴ Ibid 720 per Gallen J.
⁷⁵ However the communication was found to be privileged under the general confidential communications provision found in the Evidence Amendment Act (No 2) 1980, s 35.
⁷⁶ NZLC R55, supra note 9.
⁷⁷ NZLC PP23, supra note 17, para 283.
religious and spiritual communications in a general sense, but not communications for purely temporal purposes”, such as advice on budgeting or on the control of a wayward child. The Law Commission’s recommendation accords with the principles underpinning privileges, and the changing nature of religious practice now means that ministers are more likely to hear confidential communications than confessions in the strictest sense.

(b) Recommendations

While substantially endorsing the Law Commission’s definition, this article recommends that the privilege should be restricted to:

[A]ny communication, whether oral or written, made in confidence to or by a minister of religion in that person’s professional capacity as such, for the purpose of obtaining or giving religious advice, benefit or comfort, but excludes any communication made for a criminal purpose.

The requirement that the communication be to the minister in his or her “professional capacity” reinforces the requirement that the communication is for religious rather than secular advice. The communication must be made to the minister in that capacity rather than just as a friend. Consistent with the recommendation in Part IV that the privilege be restricted to religious rather than spiritual groups, only communications for religious advice are to be protected.

2. Communication Issues

(a) Definition of “Communication”

If the privilege protects communications rather than confessions, the issue arises whether “communication” covers that which the individual says to the minister, or that which is said in response as well. The current privilege only protects what the individual says because the minister is not making a confession. This could expose the minister to being questioned about what he or she said to the individual – which would not infringe the privilege – in order to elicit by deduction what the individual said to the minister. It is unclear whether the court could be able to prevent such questioning.

The Law Commission’s recommendation recognises this anomaly, and in section 59(1) protects “any communication between that person and a minister of religion if the communication was … made in confidence to or by the minister”. This specifically protects what the minister tells the individual in response, and closes any potential loophole which may have existed.

Another issue is whether “communication” covers written as well as oral communications. It is not clear whether this is so; the Law Commission doubts

78 NZLC R55, supra note 9, paras 265, C249.
79 The recommended privilege is set out in full in Part VII.
80 NZLC R55, supra note 9.
that it includes documents. If an individual writes a letter to a minister requesting a meeting to seek religious advice, that letter should be treated as an oral communication, provided that the letter was sent to the minister in a confidential manner. The letter should be privileged whether or not there is a subsequent face-to-face meeting, as the letter was written “for the purpose of obtaining ... religious advice, benefit or comfort”. A minister may also make written notes of a conversation that he or she has had with an individual in order to assist in giving that person religious advice, and these notes should also be privileged.

The Law Commission’s recommendation protects only “communications”, without any further definition or expansion. It appears that a communication does not include a document because section 54, which explains the effect of privileges, deals with privileges in respect of communications separately from privileges in respect of documents. This is consistent with the Law Commission’s earlier view that a document is not a communication. In this respect, the recommendation is deficient, and should be amended to protect written confidential communications.

The current privilege specifically excludes, in section 31(2), “any communication made for any criminal purpose”. Examples of such communications include a threat against a minister in the course of a confidential communication, or a request that a minister assist the individual in destroying evidence.

The Law Commission does not refer to this exclusion in its final report. Presumably, it considered that such communications would be excluded as not being for “religious advice, benefit or comfort”, thus not requiring specific exclusion. This conclusion may be valid and the courts may well interpret section 59(1) to exclude such statements. However, it may be prudent to retain this express exclusion both to ensure that such statements are included, and to reinforce the fact that the privilege only protects religious communications.

(b) Recommendations

This article recommends that the privilege protects communications made to or by a minister, whether written or oral. It also recommends that communications made for a criminal purpose be expressly excluded from the privilege. This is done expressly in section 59(2) which provides that a “protected communication” means “any communication, whether oral or written ... but excludes any communication made for a criminal purpose”.

81 NZLC PP23, supra note 17, para C7.
82 Ibid.
VI. WAIVER AND OWNERSHIP

This part addresses the issue of when ministers may lawfully disclose to the courts information that has been communicated to them in confidence. There are situations in which an individual may wish a minister to testify and, equally, there will be situations in which a minister is unwilling to do so. There will also be times when the communication ceases to be privileged or where disclosure can be required or resisted. This part examines what happens when these situations occur.

1. Ownership

(a) Who “Owns” the Privilege?

A crucial issue is ownership of the privilege. This determines who can waive the privilege and who can seek its protection. McNicol argues that only the holder of the privilege can waive it and consent to disclosure by the minister. Therefore, the individual must be the holder of the privilege, because it would be contrary to the justifications for the privilege if the minister could waive the privilege and testify against the individual’s wishes.

However, there will be times when the minister’s interests are threatened by being forced to disclose a confidential communication, and would be best served by the minister remaining silent. To do so lawfully, the minister must be able to assert the privilege independently of the individual’s wishes. The individual who made the communication might not be present in court when the minister is giving evidence, and so cannot assert the privilege. The communication may concern someone other than the individual making the communication, and so the individual may not be a party, or even a witness, to the proceedings and is therefore unable to assert the privilege. If the individual making the communication is not able to assert the privilege, the minister should be able to assert it to protect the confidential relationship. If the minister is not the holder of the privilege, he or she cannot assert the privilege and lawfully remain silent, unless he or she has an interest in the privilege.

It can be argued that ministers have an interest in the communication. The earlier discussion of the justifications for the privilege shows that the privilege protects the minister’s privacy and freedom of religious practice, as well as the relationship between the minister and the individual. Therefore, it is not solely the individual’s communication. The minister has an independent interest in the communication because he or she is a party to it. Therefore, it is as much the minister’s communication as it is the individual’s. This is recognised in the Law Commission’s recommendation – endorsed in this article – that the privilege protect communications made “to or by” a minister, recognising that what the minister says is privileged.

83 McNicol, supra note 3, 21.
In *Cook v Carroll*, the Irish High Court held that “the parish priest, like [his] ... parishioners, had a lawful interest of his own in the maintenance of the secret.” The minister was permitted to stay silent even in the face of waiver by the individual. The individual sought the minister’s assistance partly because of his obligation of confidentiality. It would be unfair for the individual to then require the minister to testify when it suited the individual. The Court was concerned about possible exploitation of the minister:

> If in a crisis his extraordinary prestige as parish priest is utilised, we cannot afterwards, having got his aid in closest secrecy, treat him as a cipher, a mere onlooker, whose determination to have the secret guarded may be ignored as soon as one of the contestants seeks to get the better of the other by broadcasting it.

Thus, the minister is not a pawn who can be required to testify or remain silent according to the whim of the individual, but a party to the communication, whose rights as such must be respected.

Colombo and Mitchell argue that, because the privilege is partly founded on the free exercise of religion, the minister must have some independent right to the privilege. As already discussed, the justifications for the privilege are not solely to protect the individual. They also protect the minister from being forced to act contrary to his or her church’s teachings, from having the freedom of religious practice restricted, and from having confidential communications to which he or she is a party forcibly disclosed. Therefore, there are policy justifications for allowing an independent assertion of the privilege by the minister.

The Law Commission’s recommended Evidence Code does not allow the minister to assert the privilege: the privilege belongs to the individual, and can therefore only be asserted by the individual. This is unsatisfactory because it denies the minister the right to assert the privilege independently.

**(b) Recommendations**

The privilege should expressly allow the minister to independently assert the privilege to protect his or her own interests in maintaining the confidentiality of the communication. This article recommends that the privilege provide that:

1. A person has a privilege in respect of any protected communication to which he or she is a party, and

   a. a Minister of Religion shall not disclose in any proceeding any protected communication to which he or she is a party, unless the privilege is waived.

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84 [1945] IR 515 (HC).
85 Ibid 523.
86 Ibid 524.
87 Colombo, supra note 6, 249.
88 Mitchell, supra note 7, 760, 776-777.
This would allow the minister to remain silent unless and until the privilege is waived, and would protect ministers who do not wish to testify in situations in which the individual is not available to assert the privilege. The minister could, therefore, independently assert the privilege and lawfully remain silent. Such a provision would also protect an individual in the unlikely situation whereby a minister wished to testify without seeking waiver of the privilege.

2. Waiver by the Individual

(a) Who can Waive the Privilege?

There may be occasions in which the individual wishes the minister to testify about what was discussed between them. The discussion may have concerned people other than the individual; the individual may not be the defendant; or the individual may be the defendant, but does not wish to give evidence. There may also be occasions where the individual can no longer rely on the privilege because he or she has acted inconsistently with the confidentiality that he or she seeks to assert. As McNicol notes, it is “fundamental to the law of privilege that a privilege-holder may waive that option and hence may release or disclose the privileged information”.

There is provision for waiver by the individual in all 50 United States privilege statutes, the current New Zealand privilege, and in three of the five Australian privileges. The Commonwealth and New South Wales privileges make no provision for waiver by the individual, which is unsatisfactory.

The Law Commission’s recommended Evidence Code provides in section 69 that an individual may waive the privilege, either by express consent or by implication – for example, by disclosing the communication to someone in a manner that is inconsistent with confidentiality.

(b) Recommendations

Waiver by an individual should be expressly provided for so that individuals who want a minister to testify are able to do so. This article therefore endorses the Law Commission’s recommendation in section 69 of its Evidence Code, and considers that no further provision relating to waiver by the individual is required. Section 69 adequately provides for express waiver and for the situations in which the privilege is deemed to be impliedly waived by conduct inconsistent with maintaining its confidentiality.

89 McNicol, supra note 3, 13.
3. Effect of Waiver on the Minister

(a) Should the Minister be Bound by a Waiver?

Unless the minister at least partially owns the privilege, its waiver means that the minister is legally required to testify. The minister can only lawfully stay silent if there is a privilege which allows or requires this. However, there may be times when the minister wishes to remain silent even though the individual has waived the privilege. It may be against the teachings of the minister’s denomination to disclose a confidential communication in any circumstances, waiver or court order notwithstanding. Alternatively, it may be against the minister’s personal religious beliefs to disclose, waiver notwithstanding. A minister may not wish to testify because he or she feels manipulated by the individual as, for example, in a *Cook v Carroll* situation. If the individual has waived the privilege, the minister is in the same position as if there were no privilege. Arguments for a privilege are just as applicable in such a case, because the minister is still being forced to disclose a confidential communication.

Therefore, the minister should be able to remain silent even if the individual has waived the privilege. If the individual wishes the minister to disclose exculpatory information, the individual is always free to enter the witness box, albeit risking cross-examination. This controversial issue centres on the grounds on which the minister may stay silent: namely, the teachings of the minister’s denomination or the minister’s own personal religious beliefs.

Colombo recognises that there should be some right to silence, but only if the minister’s denomination requires it. He advocates a “clergy testimonial accommodation”, which would “permit a religiously motivated cleric to refuse to testify in court on the ground that testifying would be against the dictates of his religion”, even in cases where the individual has waived the privilege.

However, such a restriction is inappropriate. It fails to appreciate that forcing ministers to testify against their personal beliefs, because their denomination does not require confidentiality, infringes the free exercise of their religion. The fact that the privilege is in part based on protecting freedom of religion suggests that a minister should be entitled to stay silent based on his or her personal religious beliefs. There is no justification for limiting acceptable grounds for refusing to testify to official teachings rather than personal beliefs: freedom of religion relates to individuals’ beliefs, not just “official” beliefs. The United States Supreme Court has held that “the guarantee of free exercise is not limited to beliefs which are shared by all of the members” of the religious group.

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90 For example, Roman Catholics under the Code of Canon Law (1993), Can 983 § 1, Can 984 § 1.
91 He or she may feel that parts of the communication are so religious that disclosure is inappropriate; supra note 5 and accompanying text.
92 Colombo, supra note 6, 248-249.
59. Privilege for Religious Communications -

(1) A person has a privilege in respect of any protected communication to which he or she is a party, and

(a) a Minister of Religion shall not disclose in any proceeding any protected communication to which he or she is a party, unless the privilege is waived;

(b) notwithstanding that the privilege has been waived, a Minister of Religion shall be entitled, on the grounds of his or her religious beliefs, to refuse to disclose any part of the communication in any proceeding.

(2) In this section

“protected communication” means any communication, whether oral or written, made in confidence to or by a Minister of Religion in that person’s professional capacity as such, for the purpose of obtaining or giving religious advice, benefit or comfort, but excludes any communication made for a criminal purpose;

“Minister of Religion” means any person who holds, or held at the time the protected communication was made, a recognised position of religious leadership or ministry in, or accredited to, a bona fide, recognised religious organisation, whose position involves the making or receiving of protected communications.

The Law Commission’s Report does not satisfactorily achieve the policy objectives of the privilege, and some provisions will create additional problems. The Commission’s definition of “minister” is much more inclusive than at present, and does not favour certain religious groups over others. However, it still fails to include former ministers or lay ministers and is cast so broadly as to potentially encompass non-religious and fringe groups.

The Law Commission very sensibly recommended that the privilege should cover confidential communications, rather than sacramental confessions, rarely practised today. However, the Law Commission’s privilege does not include written communications; nor does it exclude communications made for a criminal purpose. The Commission’s recommendation does not allow a minister to refuse disclosure, even if the individual has waived the privilege. This fails to recognise that the privilege in part protects the minister, and that the minister has an independent interest in the communication.

The privilege recommended in this article seeks to remedy the shortcomings of the Law Commission’s proposal. Specifically, this recommendation restricts the privilege to religious ministers, and excludes the broader category of spiritual advisors. It also recognises the modern nature of religious practice, and extends
the privilege to non-ordained or lay ministers. The recommended privilege expressly covers written communications, but excludes communications made for a criminal purpose. The principal difference from the Law Commission’s privilege is that the privilege recommended in this article allows a minister to refuse to disclose a confidential communication even if the person making the communication has waived the privilege.

To return to the title of this article, the “seal” which preserves the confidentiality of what individuals tell ministers should not be cracked; rather it should be strengthened and the cracks in it sealed. Many years of political and religious change have created cracks in the seal that preserves the confidentiality of religious communications. The recommendations contained in this article aim to seal these cracks, in order to strengthen the privilege, preserve the relationship between minister and individual, and protect religious freedom.
Upon landing on the moon, 21 July 1969 Neil A Armstrong said:

“That's one small step for man, one giant leap for mankind”

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