

Preliminary Paper No 23

EVIDENCE LAW: PRIVILEGE

A discussion paper

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May 1994
Wellington, New Zealand

The Law Commission welcomes your comments on this paper and seeks your response to the questions raised.

These should be forwarded to:
The Director, Law Commission, PO Box 2590,
DX 8434, Wellington
by Thursday, 1 September 1994

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Preface

The Law Commission's evidence reference is succinct and yet comprehensive:

Purpose: To make the law of evidence as clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes.

With this purpose in mind the Law Commission is asked to examine the statutory and common law governing evidence in proceedings before courts and tribunals and make recommendations for its reform with a view to codification.

The evidence reference needs to be read together with the criminal procedure reference, the purpose of which is:

To devise a system of criminal procedure for New Zealand that will ensure the fair trial of persons accused of offences, protect the rights and freedoms of all persons suspected or accused of offences, and provide effective and efficient procedures for the investigation and prosecution of offences and the hearing of criminal cases.

Both references were given to the Law Commission by the Minister of Justice in August 1989, shortly after the Commission published a preliminary paper on options for the reform of hearsay.

This is the seventh in a series of Law Commission discussion papers on aspects of evidence law. Papers on principles for the reform of evidence law, codification of evidence law, hearsay evidence, and expert and opinion evidence were published in 1991. The Commission has also published *Criminal Evidence: Police Questioning*, a major discussion paper jointly under the evidence and criminal procedure references. Further papers dealing with topics such as evidence of character and credibility, and competence and vulnerable witnesses will be published as the reference progresses.

In preparing this paper the Law Commission consulted with a wide range of people. At an early stage, the Commission held seminars in conjunction with Bell Gully Buddle Weir and Russell McVeagh McKenzie Bartleet at the offices of Bell Gully Buddle Weir, which focused on directions for reforming privilege law. The Commission would like to thank Chris Finlayson, Les Taylor, Stephen Kos and Terry Sissons for speaking at the seminars. The Commission received helpful comments on a draft of this paper from members of the legal profession, members of various professional associations and bodies, legal academics, and representatives from some Churches and community agencies. The Commission also consulted with the Law Reform Division of the Department of Justice and the New Zealand Police. We would like in particular to acknowledge the valuable assistance of Dr D L Mathieson QC, Ms D Buckingham, and Mr R M Mahoney who provided detailed comments on various drafts of the paper. In addition, the Commission was assisted by an advisory committee, comprising the Hon Sir John Jeffries, Judge J D Rabone, Dr R S Chambers QC and Mr S B W Grieve. The draft code provisions were

prepared by Mr G C Thornton QC, legislative counsel.

This paper does more than discuss the issues and pose questions for consideration. It includes the Commission's provisional conclusions following extensive research and considerable preliminary consultation. It also includes a complete draft of the privilege provisions for a code and a commentary on them. The intention is to enable detailed and practical considerations of our proposals. We emphasise that we are not committed to the views indicated and our provisional conclusions should not be taken as precluding further consideration of the issues.

Submissions or comments on this paper should be sent to the Director, Law Commission, P O Box 2590, Wellington, if possible, by Thursday 1 September 1994. Any initial inquiries or informal comments can be directed to Sachin Zodgekar (0-4-473 3453).

PART I

INTRODUCTION

General review

Normally courts can compel disclosure of any information, whether confidential or not. When should a witness have a "privilege" not to testify about secret matters? What arguments can be made for privileges? Do they apply equally to the disclosure of information which the state requires from its citizens?

THE SCOPE OF THE LAW OF PRIVILEGE

1 In the law of evidence, a person who is entitled to withhold relevant evidence from a court is said to have a "privilege". At first sight, allowing people to have a privilege appears inconsistent with the Commission's basic approach to the law of evidence - all relevant evidence should be available to a court or other judicial decision-maker (*Evidence Law: Principles for Reform* (NZLC PP13 1991) para 13). But the desire to obtain complete information has to be balanced against other public and social interests. The need to protect a situation of confidence may sometimes be more important than the need to place all relevant information before the court. The result will be a privilege. Of the law of privilege, the Commission said in its *Principles* paper, "these rules reflect important social values and are a legitimate constraint on the truth-finding function of the trial" (para 52).

2 The basic purpose of this discussion paper is to consider critically the existing heads of privilege in New Zealand law, and to develop a series of legislative provisions for inclusion in the proposed evidence code. The Commission stresses that the paper's proposals are tentative at this stage. We welcome discussion of the proposals in the following chapters. Nevertheless, we have expressed them as firm recommendations. They have already been given considerable thought and could well represent the

recommendations which will be made in the final report. First, however, they must be submitted to informed debate.

3 In developing the proposals in this paper, a considerable amount of research has been done within the Commission. In the interests of making the text of the paper reasonably brief and concentrated, however, we have been sparing in our citation and discussion of the present case law. Nor have we in general made reference to the numerous articles and books that have provided guidance through an intricate area of law, and helpful insights on how it might effectively be reformed. A full bibliography is included at the end of the paper.

4 The paper is divided into four major parts, including this introduction. Part II deals with privileges associated with the conduct of legal practice and litigation. The relevant privileges are

- legal professional privilege (chs 3-6), and
- the "without prejudice" rule in settlement negotiations (ch 7).

5 Part III discusses the protection which the law currently affords particular confidential relationships. Those relationships comprise

- husband and wives (ch 9),
- ministers of religion and those in their spiritual care (ch 10),
- doctors and clinical psychologists and their patients (ch 11),
- law enforcement agencies and informers (ch 12), and
- journalists and their sources (ch 13).

6 Part IV considers the more general doctrines of privilege which have developed in recent years under the head of privilege now known as "public interest immunity". There are two aspects:

- confidential relationships generally (ch 15); and
- Crown privilege (ch 16).

7 There is one significant omission from this paper - the privilege against self-incrimination. That topic has close connections with the general principle of criminal procedure, that the Crown must prove the case and cannot force a defendant to supply missing links in its own case. The subject is therefore being separately considered as part of the Commission's work on the rules governing criminal evidence.

8 A brief mention should be made here of the implications of New Zealand's law of privilege for international transactions and litigation. It can happen that a relationship of confidentiality - for example, that of solicitor and client - is governed by the law of one country, but the solicitor is called upon to testify in litigation in another country. The privilege claimed by the solicitor on behalf of the client is a matter of procedure, which will be governed by the law of the country where the litigation takes place (the *lex fori*). So we envisage that in general the law considered in this paper will apply in New Zealand courts, irrespective of the origin of the confidential relationship. It will have no application where

New Zealanders litigate matters in other countries.

WHEN IS A PRIVILEGE JUSTIFIED?

9 There are two aspects to the evaluation of legal rules governing privilege. It is necessary to enquire, first, whether the privilege is justified at all, and second, whether the legal requirements for invoking the privilege are appropriately related to the justification. In approaching that task, it is important to bear in mind that the mere fact that information is confidential does not justify refusing to disclose it in court proceedings.

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| What arguments can be made to support a privilege? |
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One who possesses confidential information is normally under a duty to keep it secret. But if the information is relevant to a legal dispute, there is a strong countervailing concern that courts should be fully informed about the matters they must decide. Something more must be established than confidentiality. The following paragraphs deal in general terms with the arguments often made when supporting or opposing an evidentiary privilege.

Public benefit

10 The most common argument used to support a privilege is that it is necessary in the social interest to have one. There may be costs for the legal system through not getting all the information. But these are outweighed by the damage caused to society when it becomes known that communications of certain kinds must be divulged in court proceedings.

11 This type of argument was put into a particular form by the American jurist, Dean Wigmore, whose approach has been extremely influential. His "four conditions" for recognising a privilege are:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be *sedulously fostered*.
- (4) The injury that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. (Wigmore, *Evidence*, McNaughton rev (1961) para 2285)

12 Anyone who supports a privilege on this ground immediately confronts a problem. The case depends upon a proposition of fact, namely, that if no privilege is granted people will act in certain ways which are detrimental to society. Often there is no very clear evidence that this is so, and it is impractical to institute social research which will accurately quantify the costs and benefits. It is always difficult to tell whether people would act differently under changed legislation, and still more difficult to say how often, and to what extent, they would do so, or whether the results of that action would on balance be beneficial or harmful to society (see Note, "Developments: Privileged Communications")

(1985) 98 Harvard LR 1450).

13 In the absence of cogent empirical evidence, proponents of a privilege are often forced to resort to intuitive assessments of what they think others are likely to do with or without the privilege. They use these to set up an initial presumption which an opponent (similarly bereft of evidence) is obliged to refute. It is said, for example, that clients who know that their lawyer will, or may, be obliged to testify in court are likely to be less forthcoming about what they tell the lawyer, with the result that the lawyer's task of representing the client will become more difficult and courts will in general become less informed about litigants' cases. The Commission considers that this argument has some force (see ch 3). But it needs further support: intuition alone may not be enough. An opponent could well argue that it is unreasonable to think that clients would damage their own prospects by leaving their lawyer ill-informed. In any event, it will be said, lawyers are skilled enough in fact-finding to overcome any initial reluctance the client may have to tell the whole truth.

14 The point is not that intuitive assessments are unpersuasive. The form of argument proposed by Wigmore, provides a useful framework for considering these matters. But use of the right form of argument does not guarantee that the case for a privilege will be clear or compelling.

Privacy and human rights

15 In recent years, particularly in the United States, a somewhat different justification has emerged for certain privileges. The basis for the privilege in these cases is privacy, and the fact that it is undesirable to intrude on privacy or to force anyone to break a confidence. That does not imply that in every case privacy must prevail. There is still a balance to be found between respect for privacy and the needs of the administration of justice. But where the intrusion is unnecessary or even where it would be helpful for a court to have the information but the particular confidence is extremely sensitive and personal, privacy considerations may prevail (see McCormick, *Evidence*, (1984) 186-187).

16 As an additional point (which may be made, also, when supporting a social benefit claim), the proponent of a privilege may also refer to some special quality conferred on the confidential relationship by the New Zealand Bill of Rights Act 1990. The relationship between journalist and source can be related to the right of freedom of speech; that between priest and penitent to the exercise of freedom of religion. The purpose is to show that damage to the relationship should be viewed very seriously. This is certainly a matter to be given weight, though sometimes the link between the guaranteed freedom and the asserted privilege may not be clear.

The Commission's approach

17 Each claim to privilege must be evaluated on its own merits. These depend on the particular public interest which is advanced as the basis for the privilege. The Commission accepts that the Wigmore criteria are often helpful, in that they point to the

underlying requirements of a confidential relationship and a specific public interest which calls for protection. But whether the process should be one of weighing respective harms and benefits, or giving due respect to privacy and human rights, will differ with the nature of the interest which is to be supported. For example, the former considerations are important, perhaps decisive, in the case of legal professional privilege, whereas the latter are more significant for religious privilege.

18 The critical question is, who should do the balancing, and what form the law should take as a result. Traditionally the balance has been struck by court decisions, at least in relation to legal professional privilege. Late last century, however, the legislature took a major role in defining medical and religious privilege. The attempt that was made to express the law in mandatory statutory rules was less than successful (see chs 10 and 11). Some still argue that these efforts should be renewed, and any privilege which cannot be clearly defined in advance should be abolished. But in 1980, the legislature submitted the whole of the law on the subject (with some notable exceptions) to the discretion of the courts. The Commission discusses and supports this development in part IV of the discussion paper.

GIVING EFFECT TO A PRIVILEGE IN COURT PROCEEDINGS

19 Once it has been decided that some form of protection from compulsory disclosure ought to be conferred on a particular confidential relationship, the question becomes how that should be done. A choice may be made from a number of different legal techniques.

20 First, it will be useful to explain how questions of privilege usually arise. In civil proceedings, privilege is invoked at one of three critical points:

- × *Interrogatories or discovery*: These procedures, usually sought at a fairly early stage of litigation, allow each party to compel the other to state facts and to disclose and produce documents relevant to the case. A request for particular material may be objected to on the grounds of privilege.
- *Directions for trial*: A judge has the power to make directions as to the conduct of the trial, including directions that the parties give each other details of evidence from the witnesses who will be called. The law of privilege has been invoked at this point, although it is doubtful whether it should be. (see paras 95-97)
- *Witness evidence*: During the course of examination of a witness at trial, a witness will ordinarily be asked to testify about everything he or she knows which is relevant to the case. The witness may refuse to testify about privileged matters, or to produce privileged documents.

21 In criminal cases, the first two pre-trial procedures described in the previous paragraph do not generally apply. There are disclosure obligations on the prosecution at common law. In trials on indictment much of the prosecution case is disclosed at the preliminary hearing. More recently the Official Information Act 1982 has served as a vehicle for a criminal discovery regime (see *Criminal Procedure: Part One: Disclosure and*

Committal (NZLC R14 1990)). But these seldom involve privilege issues. The defence has virtually no corresponding obligation. Claims of privilege therefore arise much more rarely in the pre-trial process, although they are occasionally asserted if the police execute a search warrant which may affect privileged material (eg, *Rosenberg v Jaine* [1983] NZLR 1).

22 A person who has a privilege may refuse to disclose the information protected by the privilege and the court will respect that decision. Further, the court will also order other people, to whom the information has been entrusted, not to volunteer it. The relevant provisions of the proposed evidence code (s 2) are set out at the end of this chapter.

Privilege or some other form of protection?

23 According information a "privilege" is not the only way of protecting confidential material. Other methods can be used to prevent disclosure, or limit its adverse effects. Depending upon the circumstances, one of several alternative techniques may be effective:

What other kinds of protection can be given?

- Admission of the evidence may be declined because it is of little or only marginal relevance.
- The evidence may be admitted or disclosed, but an order made limiting its use, so that, for example, it is available in civil but not in criminal proceedings. (eg, Companies Act 1955 s 263(4A))
- The evidence may be admitted, but no publication permitted. (eg, Family Proceedings Act 1980 s 169)

These are examples where the difficulty can be met without invoking a privilege and depriving the court of important information. Conversely, there may be cases where even a privilege will not be enough. It may be considered that the relationship between two people ought to be fully insulated from the damage that could be caused if one of them was obliged to testify in court proceedings. The rule might then be adopted, that neither can be compelled to testify against the other. That is the present law governing the testimony of the husband or wife of a defendant in a criminal case (see ch 9). The protection of a privilege is something of a middle road, allowing particular classes of information to be kept confidential.

An absolute privilege, a qualified privilege or a discretionary power?

24 If some form of privilege is considered appropriate, the next question is whether the privilege is to be "absolute" or "qualified". First, an "absolute" privilege,¹ as the term is used in this paper, is one in which there is a clear right¹ not to testify about the protected information (subject to the general exceptions discussed in ch 6). Second, a "qualified" privilege is one where it is generally understood that testimony will not be given, but a court may in its discretion decide that in the circumstances of the particular case the privilege ought not to apply. The privilege might be overridden if the witness, or the person the witness was protecting, no longer has a sufficient interest in the privileged material to justify the claim. For example, a lawyer may have collected information on behalf of a client for a particular lawsuit, but it happens that the litigation is all settled, so the client has no further need to keep the preparations secret. Or it may be that the information is very important to the proceedings (and not merely marginally helpful to one side) so that it would be unfair to allow the witness to decline to produce the information. It is arguable as a matter of policy (though not, it seems, as a matter of law) that privilege should be overridden in these cases.

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| Should a privilege be absolute, qualified or discretionary? |
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25 There is a third type of privilege which is perhaps better described as a discretionary power. Opinions will differ about whether it is truly discretionary, or whether it is more an exercise of judgment in accordance with defined statutory criteria (see ch 14, paras 366-368). It will be described as a "discretion" in this paper since, by comparison with the other privileges already mentioned, it is considerably less structured. The person seeking protection need not point to any particular relationship, or any closely defined category of information, as the basis of protection. Rather, that person must prove that the relationship is confidential or the information secret, and then persuade the court that protection is justified in the particular circumstances of the case. This kind of protection is discussed in part IV.

26 In cases where the court is required to weigh up the importance of the information to the case at hand, it will be desirable for the court, in some cases at least, to look at the document containing that information before making a decision. That practice is well recognised in the present law, although it should be exercised with discrimination. As Cooke J observed in *Guardian Royal Exchange Assurance Ltd v Stuart* [1985] 1 NZLR 596, 599,

High Court Judges now appear to be adopting this practice quite commonly in disputed privilege claims. Experience suggests that its advantage in being likely to lead to a more just decision outweighs the disadvantage that only the Judge and not the other side sees the documents if the claim to privilege is upheld. Accordingly, in the field of legal professional privilege at least, I think that in general a Judge who is in any real doubt and is asked by one of the parties to inspect should not hesitate to do so.

¹ The term "right" as applied to the witness seeking not to testify, is often not strictly accurate. The witness will be protecting the person whose secret it is (ie, the client or patient). That person is the one with the "right". However, the important point here is that *someone* can claim the privilege as of right.

A functional or relational test?

27 Once it has been decided that information does warrant the protection of one of these types of privilege, the question becomes how to define it. Again there are two different approaches. One is to define the particular confidential relationship to which privilege will attach. The other is to define the "function" carried out by the person entrusted with the confidence. For example, it is possible to have a privilege which is based upon the fact that the person in whom confidence is placed is a qualified lawyer, or a registered medical practitioner. That is a "relational" definition. Or that person might be defined in terms of the function they are to perform, that is, lawfully to assist another to conduct court proceedings, or to give treatment for a health complaint. The latter method of definition tends to cover a wider range of persons, and to relate more closely to the purposes for which privilege is accorded. The former tends to emphasise status. Only fully qualified persons can receive privileged communications. It is also simpler, so that it is more conveniently applied in routine matters.

How should a privilege be defined?

28 At a more general level, an important question is whether privilege should attach to particular defined relationships at all. Should it be open to the court to recognise a privilege wherever any confidential information is entrusted to another person? It would be possible, if that approach were adopted, to subsume all of the particular privileges (discussed in part III) into the broader general protections for confidential information (considered in part IV).

The Law Commission's view

29 The Commission does not consider that any particular method of defining a privilege is inherently preferable. The choice between these various methods of protecting confidential information has to be made according to the needs of the situation. They become apparent only as one looks at the particular relationship. However, it would be fair to say that historically the law has tended towards *absolute privileges*, defined in terms of *particular relationships*, whereas the judicial and legislative trend in the last 30 years has been more towards *qualified* and *discretionary* privileges defined in terms of *general confidentiality*. The Commission has taken this development into account and, in dealing with well-established privileges (if change is recommended at all) has tended to propose that they become qualified privileges, defined in functional rather than relational terms. However, this tendency has in fact produced only modest changes to the general direction of the law.

GIVING EFFECT TO A PRIVILEGE IN OTHER SITUATIONS

30 In the previous sections, the Commission has discussed the law of privilege as it applies in court proceedings. However the law of privilege is also relevant in other contexts. In particular, it may affect the operation of statutory provisions under which a person must furnish information to a government department or agency. The power of the

Should statutory disclosure requirements be limited by the law of privilege?

government and its agencies to acquire information by compulsion is an important and topical issue. It has strong links with matters under consideration in this paper. Information which cannot be obtained in court proceedings should not be available in government inquiries either, unless the government is relying on the same strong and compelling circumstances which would impel a court to override the privilege. Any obvious discrepancy between the two systems can have serious effects on public perception of the law. No matter how well-justified a claim to privilege may be, if it is effective in court proceedings but not in routine government investigations, serious questions will be raised in the public's mind about its validity.

31 The Commission believes, therefore, that the approach we will adopt in balancing the public interests at stake where privilege is claimed has significant implications going well beyond the legal requirements for testimony in court proceedings. The injury to the public interest, and the invasion of privacy or human rights caused by ill-judged governmental intervention is no less when protected information is forced to be disclosed by legislation or by a government official than when it is divulged by order of a court. The same criteria should be applied in both cases. Indeed, the standards should be even more stringent where no judicial officer stands between the government and the citizen from whom information is demanded.

32 Such powers or obligations should not be imposed without an appropriate justification. Assuming that is established, the criteria developed in this discussion paper can then be applied. These questions may be asked:

- What limits (if any) should there be on the statutory obligation or power?
- What limits (if any) should be placed on the use of information obtained through the obligation or power?

33 As to the first, it is apparent that there are many provisions which require the disclosure of communications or information which are or could be covered by a privilege. Some of these provisions expressly protect or override a relevant privilege, others do so only partially. At least these provisions are clear. But where the provision is silent on these matters, or does not adequately deal with all the privileges which could apply, there is uncertainty. Such statutory provisions are sometimes held to be implicitly limited by the general law of privilege. In the absence of any conclusive indication from the relevant provision, the Commission suggests that this is useful presumption. But, ideally, the question of whether any relevant privileges apply should be addressed at the time of formulating the provision so that there is no room for doubt.

34 As to the second issue, if privileged information or material is acquired under these provisions, it is reasonable to suggest that the information or material retain its privileged character so that it cannot be used in subsequent proceedings unrelated to the original enquiry. Often it will be appropriate to impose certain limits on how the information can be used. This may be necessary to safeguard important interests such as the privacy of the persons who provided the information, the confidentiality of the information, and any privileges which apply.

35 The Law Commission believes that the conclusions it reaches in this preliminary paper can and should be used as a starting point in that much wider inquiry. For the present, however, we are content to concentrate on the operation of the law of privilege in proceedings before courts and tribunals which have judicial functions. The Commission is undertaking a study of compulsory disclosure provisions as part of its work on self-incrimination, and this work will lead to the identification of problems and further issues in this area. When we have completed that work and have received replies to this preliminary paper, we will be in a better position to assess the competing public interests and to offer views on appropriate standards for compulsory disclosure provisions. While these matters are, in part at least, the responsibility of the Privacy Commissioner under the Privacy Act 1993, we too have a general concern to see that enacted law holds the rights and legitimate claims of citizens in a proper balance.

36 The Commission would therefore welcome comment, not only on the specific proposals put forward here, but also on the wider principles involved. We would especially value comments from those who have experience of the impact of compulsory disclosure provisions on the relationships mentioned in this paper.

CONCLUSION

37 The Commission's immediate task, arising out of its evidence reference, is to prepare provisions dealing with the law of privilege in court proceedings. These will be incorporated in due course into an evidence code. (As to the proposed code, see *Evidence Law: Codification* (NZLC PP14 1991).) But the law cannot be adopted as it stands, without enquiring whether it is still appropriate. Indeed, there are good reasons why a review of the law of privilege should be undertaken at this time. The Torts and General Law Reform Committee last reviewed the law in 1977. The law of privilege, and in particular the law of public interest immunity, has changed considerably since then. These developments ought to have brought about a reappraisal of the policies which underlie any claim to privilege. But they have not had much impact on the long-established statutory privileges, which have received little judicial consideration (as to the relevant provisions see Appendix C). And so far they have had only a marginal effect on the traditional common law privileges, especially legal professional privilege.

38 It is therefore appropriate to review each of the existing privileges to see whether it is still justified, and whether the purposes it serves cannot be achieved by better means. It is also necessary to consider how clients of those professions which have not so far attracted privilege for their confidential information should be dealt with. Above all, the task of providing a statutory code governing privilege brings with it the need to simplify the present law, and assemble its separate parts and policies into a coherent whole. The Commission considers that the proposals it puts forward in the following chapters are consistent with those goals.

Draft section:

2 Effect and protection of privilege

(1) A person who has a privilege conferred by this Part in respect of a communication has the right to refuse to disclose in a proceeding

- (a) the communication; and
- (b) any information contained in that communication; and
- (c) any opinion formed by a person which is based upon that communication or information.

(2) A person who has a privilege conferred by this Part in respect of information or a document has the right to refuse to disclose in a proceeding that information or document and any opinion formed by a person which is based upon that information or document.

(3) A person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document may require that the communication, information, opinion, or document must not be disclosed in a proceeding

- (a) by the person to whom the communication is made or the information given, or by whom the opinion is given or the information or document prepared or compiled; or
- (b) by any other person who has come into possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege.

(4) **Where a communication, information, opinion, or document, in respect of which a person has a privilege conferred by this Part, is in the possession of a person other than a person referred to in subsection (3), a court may, of its own initiative or on the application of the person who has the privilege, order that the communication, information, opinion, or document must not be disclosed in a proceeding.**

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PART II

PRIVILEGES ASSOCIATED WITH LEGAL ADVICE OR LITIGATION

Introduction

There are two well-established types of privilege which encourage the effective conduct and settlement of litigation. One protects communications made with legal advisers. The other protects settlement negotiations.

39 This part of the discussion paper considers those privileges which are associated with the practice of law and the conduct of litigation. There are two such privileges, legal professional privilege and the "without prejudice" rule protecting settlement negotiations.

LEGAL PROFESSIONAL PRIVILEGE

40 Legal professional privilege protects a wide range of communications made by, to or for lawyers. It is firmly entrenched in the New Zealand legal system, and closely associated with the adversary system of litigation. Its importance and usefulness are seldom questioned. Several law reform bodies have considered the privilege in recent times, and nothing has emerged from their reports, or our own studies, which suggests that it should not remain part of New Zealand law.

41 Three distinct categories of information are protected by legal professional privilege under existing law:

- communications between clients and their legal advisers where litigation is in progress or contemplated (ch 3);
- communications between either client or lawyer and third parties, when

preparing for litigation (ch 4); and

· communications between the clients and their legal advisers where no litigation is contemplated (ch 5).

Chapter 6 deals separately with limitations and exceptions to the law of legal professional privilege.

42 In all three cases listed in para 41, the privilege under the present law is "absolute". Information protected by the privilege cannot be divulged, no matter how important the information may be to an issue before the court (subject to the exceptions discussed in ch 6). Where a client is engaged in litigation and is discussing the case directly with the lawyer, then it seems to the Commission that an absolute privilege has merit. But in other cases, the need for an absolute privilege is a great deal less clear. The Commission believes that serious consideration should be given to an alternative approach. A court should be able to look at the circumstances of each case. It should balance the need for the information to be kept secret against the need to obtain information for the purposes of the litigation where the information is being sought. If the second outweighs the first, then the information should be disclosed in court. The Commission does not foresee this power being exercised at all commonly, but injustices may arise under the present law where, according to the present understanding of the law, it cannot be exercised at all.

43 It should be stressed that nothing we propose will affect the general rule of lawyer-client confidentiality. Except as required by rule of law or order of the court, a lawyer will continue to have a duty to preserve all secrets entrusted to the lawyer by the client, or learnt in the course of acting for that client. The basic question is whether (like most other confidential information) information acquired by a lawyer should sometimes be made available when it is needed for the proper disposition of a case coming before a court of law.

SETTLEMENT NEGOTIATIONS

44 The law protecting settlement negotiations is considered in ch 7. It allows a privilege for communications made "without prejudice" between parties to a dispute, with a view to settling that dispute. It too is an important and useful doctrine, and the Commission proposes that it be retained largely in its present form. We are suggesting, however, that the many rather nebulous exceptions and limitations to the rule not be enacted in codified form. Instead, the court should have a general power to order disclosure where that is required by the public interest. Again, we anticipate that the power would be used only occasionally.

Legal professional advisers:
current or contemplated litigation

Where legal proceedings are contemplated or have commenced, communications between the parties and their lawyers about those proceedings should generally be protected as they are now. But who is a "legal adviser" - should that term include those not qualified as lawyers? Where the "client" is a company or government department, can it claim protection for communications made by its employees?

45 This chapter examines the first category of privilege which applies to communications - that for communications between lawyer and client relating to litigation. It covers four matters:

- the justification for the privilege;
- the requirements for protection;
- the advisers who may receive protected communications; and
- the clients who may make protected communications.

THE JUSTIFICATION FOR THE PRIVILEGE

46 The privilege was recognised in English law very soon after the practice developed in the sixteenth century of compelling witnesses to testify. A solicitor or counsel was excused from answering questions about the "secrets of his client's cause". This was first justified as a matter of respect for the lawyer's solemn oath of secrecy. But eventually the courts came to prefer a different philosophy, which still prevails today. The philosophy is that legal privilege, by protecting the client's information directly, works indirectly for the greater benefit of the legal system as a whole.

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| Should there be any privilege for communications between clients and their lawyers? |
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47 The law prohibits the compulsory disclosure of communications between lawyer and client so that clients will be encouraged to consult lawyers freely. If clients know their communications with their lawyers are protected, they will give more information to the lawyers. Lawyers will then be able to better prepare for litigation. This will improve the quality of information coming before the courts, and in that way promote better administration of justice.

48 No great amount of information is lost to the legal system in this way. If the client knows of particular damaging facts, then (assuming the client testifies) these facts can, in theory at least, be elicited when the client is called as a witness and is cross-examined. Anyway, in the majority of cases normal pre-trial enquiries will reveal any information which is vital for the opposing side's case.

49 While this reasoning appears persuasive, there is still room for debate about the social value of legal professional privilege. The privilege is based on the fact that people involved in litigation need lawyers. Particularly in a modern society, where legal demands on citizens can be complex, this is not seriously in doubt. It is generally recognised that there is a right to retain counsel in civil cases. As regards defendants in criminal cases, that is specifically provided for in ss 23 and 24 of the New Zealand Bill of Rights Act 1990. But that observation alone does not establish the case for a privilege. The right to employ counsel does not automatically imply that statements made between client and counsel ought to be privileged. It must also be demonstrated that lack of a privilege would diminish the effectiveness of counsel, and therefore impair the right to counsel.

50 Some distinguished writers have disputed all claims that the privilege is in the best interests of society. The English legal philosopher, Jeremy Bentham, for example, suggested that in criminal cases only a guilty person will be protected by such a rule (see Wigmore, *Evidence*, McNaughton rev (1961) para 2291). Innocent people will be helped if their lawyers could, if called upon, testify to their innocence. So too, civil cases might be quickly settled if lawyers had to tell all they knew. But this argument does not sufficiently take into account the client's right to counsel, and overlooks the adverse impact on the administration of justice if counsel cannot carry out their task effectively.

51 Modern analysis has suggested an important reason why there would be such an adverse effect and why the privilege is likely to be found essential to the lawyer's work. A client is likely to possess both favourable and unfavourable information. Without the privilege, the client will be inclined to furnish the lawyer with only the favourable

information, for fear that any other information will eventually come out in court. But apparently unfavourable information may, to the skilled lawyer, hold the key to some unexpected claim or defence for the client (a "contingent claim"). If, on the other hand, the clients know that there is a privilege, they will give their lawyers all the available information. Lawyers will then be better able to judge whether there are any "contingent" claims, and to assess the client's prospects of success (see further: Allen, Grady, Polsby and Yashko, "A Positive Theory of the Attorney Client Privilege and the Work Product Doctrine" (1990) 19 J Legal Studies 359).

52 This theory has its critics, and, being only a theory, does not in itself provide an empirical foundation for the claim that the privilege is socially beneficial. The Commission is unaware of any empirical research conducted in New Zealand on the point. An intuitive view suggests, however, that the privilege must have an appreciable effect on what is told to lawyers. Certainly, the lawyers with whom we have consulted believe that this is so, and see the privilege as important to their relationship with their clients.

53 This is borne out by the few academic studies which have been undertaken in the United States (see Alexander, "The Corporate Attorney-Client Privilege: A Study of the Participants" (1989) 63 St John's LR 191). Alexander's findings are not conclusive as they are directed mainly towards corporate clients. However, they suggest that no great social damage may be caused if the privilege is not absolute in the case of "non-litigation" advice or advice on "routine matters" (268-269). (The Commission takes up this suggestion in ch 5.) The study further suggests that "to the extent the corporate privilege does result in a loss of relevant information, it does so in only a limited number of cases" (260). The study provides some, albeit limited, empirical support for the view that making lawyer-client communications privileged has an effect on the quality of information which is passed on to lawyers.

54 Modern analysis also introduces the helpful notion of the "cost" of disclosure. This cost is represented by the difficulty an opponent has in getting the privileged information for the court proceedings. If the privilege is absolute, then questions of "cost" do not usually arise; the information is simply unavailable. (There is still, however, the chance of invoking the standard exceptions to the privilege, referred to in ch 6.) But where the privilege is qualified or subject to exceptions, there is a cost which may deter the opponent from seeking the information unless it is really necessary: that is, the cost of applying to a court for an order of disclosure and proving the facts which provide the basis for such a claim.

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| Should protection for communications with lawyers be absolute, or subject to the court's discretion? |
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55 This deterrent factor, which will be known to the client giving information to the lawyer, may be sufficient to encourage full candour between lawyer and client because it is unlikely the opponent will ever get the information which passes between them. Thus, a privilege can have an effective social role in ensuring that lawyers will be better prepared, even if there is no guarantee that the extra information they get will never be compulsorily disclosed. This is an important consideration which will be taken up again in the following chapters. In the context of client communications made in anticipation of litigation, however, a client could be exposed to considerable personal risk and it is important not to make any provision which could impair the effectiveness of counsel when dealing with the

client. The Commission considers that the privilege should continue to be an absolute one.

56 The considerations referred to here, among others, have sustained the courts over a long period in the view that legal professional privilege in its various forms is beneficial to society and ought to be maintained. The Commission sees no reason why this privilege, in so far as it applies to communications between client and legal adviser in respect of current or anticipated litigation, should be disturbed or modified.

REQUIREMENTS FOR ASSERTING THE PRIVILEGE

57 The above arguments justify legal professional privilege for communications between lawyer and client in relation to court proceedings affecting the client's interest. That is the only category of legal professional privilege which will be considered in this chapter, and the definitions which follow apply to it alone.

58 The basic requirements for asserting legal professional privilege generally are well settled, and can be readily incorporated into the proposed evidence code. Under the present law a *communication* between lawyer and client must be

- fairly referable to the relationship between lawyer and client,
- intended as confidential, and
- made to obtain or give legal advice or to conduct litigation.

59 The Commission proposes that these existing requirements be incorporated into the provisions of the proposed code. They are well established and have proved viable. The only reservation we have relates to the terms "lawyer" and "client". Although normally these terms can be readily applied, there are some situations - to be considered later in this chapter - where difficulties can arise. Before dealing with these, however, brief comment should be made about the way in which privilege attaches to "communications" and not to other things which may occur in a lawyer's office.

60 The term "communication" is important. Under present law the privilege does not apply to what the lawyer observes (as opposed to what the lawyer is told); nor does it cover acts done by the lawyer under the client's instructions, for example moving funds in accounts. Trust account records are not in general protected. There may be unusual cases where inspection of trust account records will reveal a communication between lawyer and client, in which case the record may be protected.

61 The concept of a "communication" is flexible. Documents prepared with a view to being used as a communication, and notes relating to information sought by a legal adviser in order to give advice or conduct litigation, may also attract privilege (*TPC v Sterling* [1979] ATPR 40-121)². Drafts of pleadings and agreements, and working papers

² See, however, the comments of Cooke J, in *Guardian Royal Exchange Assurance v*

produced by the lawyer but not communicated to the client, may also in appropriate circumstances be protected (*Kupe Group v Seamar Holdings*, unreported, High Court, Auckland, 8 March 1993, CP 2826/88, Master Kennedy-Grant).

62 However, the scope of protection available for these documents is unclear. It may well be that the documents are not protected in their own right, but only because disclosure will reveal the contents of a past or future privileged communication. Alternatively, it may be argued that a lawyer's undisclosed drafts belong to the lawyer and not the client, and therefore need not be disclosed in a discovery of all the documents in the client's power or possession. It is reasonably clear that, while there is some extension of the literal concept of a "communication", it remains central to the law of legal professional privilege.

WHICH ADVISERS MAY RECEIVE PROTECTED COMMUNICATIONS?

Lawyers

63 Traditionally, the privilege has been confined to communications between lawyers and their clients. A communication may, however, also be made by or to an agent of either the client or solicitor. So too, it may be between members of a litigation team, or between solicitor and barrister, or lawyers acting in two different countries.

64 Can an employee be a "lawyer" for these purposes? Large corporations and institutions will often employ legally qualified persons on their staff. Under the present law, communications between in-house counsel and others in the organisation will be protected if the other requirements for the privilege are established. As has been pointed out, such advisers should be scrupulous in recognising the independence of their position when giving legal advice; work done in an executive character is not protected merely because of their professional status (*Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102, 129). With the Commission's proposals, the same principle would apply in determining whether there is an absolute privilege.

Non-lawyers

65 There are two issues which are not fully addressed by the present law. The first is whether privilege should be accorded to communications with persons conducting a case or giving legal advice in respect of a case who are not qualified lawyers. This can happen through inadvertence. There is a suggestion that even in existing law there will be a privilege where legal advice is sought from someone who is not so qualified (*Phipson on Evidence* (14 ed, 1990), 501 citing *M W Glazebrook Ltd v Wallens* [1973] ICR 256). Frequently, though, advocacy work is permitted by the relevant legislation, as for example before the Planning Tribunal, and in patent cases or employment disputes. Or a person may take part in proceedings as a

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| Should protection be confined to advice given by qualified lawyers? |
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Stuart [1985] 1 NZLR 596, 601, on the classifications adopted in that case.

"McKenzie friend", whose official role is to assist a litigant to conduct his or her own case.

66 The Commission can see no distinction in principle between a qualified lawyer and any other person properly engaged in a similar activity. In the case of employment disputes the same point has been made and a privilege recognised in *Fahey v Attorney-General* (Employment Court, Wellington, 25 February 1993, CEC 9/93 C 72/92, Chief Judge Goddard). It is true that lawyers have certain ethical duties, both to their clients and to the court, which may mean that privileged material can more safely be entrusted to them. But that is not the point. The privilege is based on the litigant's need for protection, not the ethical standards of those who provide it.

67 We are aware of only one specific provision protecting advocates other than lawyers: s 34 of the Evidence Amendment Act (No 2) 1980, which applies to communications to patent attorneys. One way of dealing with the problem is to specify other appropriate persons in the proposed code. But this is cumbersome and will always lag behind as new tribunals and litigation practices develop. The Commission prefers a general provision conferring privilege on all those who perform the same function as lawyers and patent attorneys. It would cover all persons who, on behalf of a client or employer, conduct or help conduct proceedings.

68 This provision will apply to communications with advocates. But they are not the only people who will tender legal advice in relation to contemplated proceedings. The privilege should extend to legal advisers in this wider sense. It would need to be demonstrated that the person tendering the advice has sufficient expertise to give legal advice of the type given.

69 In particular, the provision would extend the privilege to communications with accountants specialising in tax matters. They often give tax advice specifically in contemplation of litigation (see ch 5, paras 0-0). Presently such advice tends to be channelled through a lawyer so as to gain the benefit of privilege. But that is circuitous and may involve needless extra cost and time. Our provision would enable the advice to be given directly to the client.

70 The advice should, however, be of a legal character. This leads to the second issue. We would not include communications made to experts who are called in to assist in other ways with the conduct of the case. They may or may not be intended ultimately to act as witnesses (as to which see *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18 1991)). Examples include economists called in to assist in proceedings under the Commerce Act 1988, psychiatrists invited to investigate a client's sanity, and accountants asked to estimate the amount of a business loss. Under present law, communications between the client and an expert are protected under the privilege discussed in ch 4. However, this does not prevent the other side from calling the same expert as a witness and requiring the expert to give his or her independent opinion.

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| Should protection be extended to advice based on non-legal expertise? |
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71 Some of the arguments which justify the privilege for communications with lawyers would appear to apply to other experts in whom the client puts trust when dealing with

some aspect of the litigation. There is the same possibility that the client possesses apparently unfavourable information which can become valuable to the client's case when told to the expert.

72 However, there are difficulties in providing an absolute privilege for communications from the client to the expert. Experts seem to be used in two roles in relation to litigation. An expert may be called in to advise counsel on how to prepare and argue the client's case. More commonly though, an expert is called with a view to giving evidence when the case comes to trial. In this latter role the expert is expected to provide an independent and honest opinion. Many experts are themselves committed to independence and impartiality (see PP18 para 89). An absolute privilege for communications between the expert and the client would seem to be inconsistent with the role the expert is expected to play as an independent witness. Furthermore, one party may be able to effectively monopolise all the relevant experts by seeking advice from them and not using it. In New Zealand, there are fields of expertise where only a small number of competent experts are available.

73 In practice, the value of any privilege for non-legal experts would be confined to a comparatively small group of cases. There are several reasons for this. One is that experts are often briefed directly by lawyers, who receive the client's version of the facts and pass it on to the expert. These communications would be protected as communications with the lawyer, who has passed them on only to a person assisting with the litigation (see ch 4). Another is that, as soon as it is decided that the expert will give evidence, based on what the client has said, the privilege will be treated as having been waived (see ch 6). The evidence will become subject to the disclosure regime discussed in PP18.

74 On balance, the Commission inclines to the view that communications in such cases should not be absolutely protected. Instead these communications will receive qualified protection under the privilege for trial preparations discussed in ch 4. Although it may sometimes be the case that more is involved here than simple preparations for trial, there are problems with providing an absolute privilege. The Commission is, however, interested in comments on whether there is a need for communications between clients and experts called in to assist with the case to be absolutely privileged, and also whether such a privilege would cause difficulties in practice.

WHICH CLIENTS MAY MAKE PROTECTED COMMUNICATIONS?

Corporate clients

75 Companies and other corporate bodies can, of course, instruct lawyers and it has been generally accepted by the courts that the policies apply in the same way as they do to private clients. This, however, is not self-evident (see Alexander, "The Corporate Attorney-Client Privilege: A Study of the Participants" (1989)). In particular, where a corporation is sued, it may be much more difficult for an opposing litigant to find the appropriate employee of the company who is in possession of the facts

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| Should companies be protected in respect of communications made by their employees? |
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the litigant needs. By contrast, employees will volunteer information readily to the lawyer acting for the corporation. Although legal professional privilege can be justified as a matter of privacy or fundamental human rights, that justification seems to apply with considerably less force to a business organisation whose main purpose is to make a personal profit for shareholders, many of whom are not actively involved in the business.

76 The Commission nevertheless takes the view that these considerations, though important, are insufficient to justify depriving companies of the protection normally afforded to persons engaged in litigation. Moreover, it notes that commercial organisations are more likely to commit confidential matters to paper than are private individuals, and so may have a stronger need for protection from discovery.

77 Applying the law of privilege to companies, however, is not simple. There are unexplored questions about whether communications made by different classes of employee should be considered as communications "by the client". It seems that communications with the directors, collectively at least, are privileged under existing law. But no clear test has emerged to deal with communications made by employees generally. The following examples provide a useful comparison:

- A junior employee of a company is employed to collect outstanding debts and, where necessary, pass on files to the company solicitor for action. Is a statement contained in a letter written by the employee to the solicitor protected as a client communication?
- The directors of a company suspect that senior management may have been involved in activities harmful to the company and others, and instruct a solicitor to interview each person who may have taken part. Is the statement made by such a person to the solicitors protected as a *client* communication in a later case brought against the company by other persons, who claim the company is vicariously liable for the management's actions?
- A company vehicle is involved in an accident, and the company's lawyer interviews a passenger in the car, who happens to be an employee of the same company. Is that interview to be treated as being one with the client, or with an independent witness?

In the first example, the communication should clearly be protected, notwithstanding that the employee is a junior one. In the second, the interests of the company and the senior employees are adverse, and perhaps the communication should not be absolutely protected. In the third, the employee who is not the driver is a witness and nothing more. The privilege for lawyer-client communications should not apply.

78 The Commission considers that these results would probably be reached if the current law were applied. In cases of statements by agents of the client, the accepted test is whether the agent has been appointed by the client specifically to provide information to the solicitor on behalf of the client in relation to the particular matter at hand. If so, the communication is treated as a "client" communication (*Kupe Group v Seamar Holdings*, unreported, High Court, Auckland, 8 March 1993, CP 2826/88, Master Kennedy-Grant,

and *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* [1985] 3 NSWLR 44). This test, it seems to us, can conveniently be applied where a company is the principal and one of its directors or employees is its agent, although it may require some judicial discrimination in cases where employees act on their own initiative, or where (as in the second example) the company has mixed purposes.

79 The Australian Law Reform Commission recommended, to the contrary, that the term "client" extend to every employee of the client company. That definition would cover all the above examples (ALRC *Report on Evidence* R38 (1987) s 108 draft Evidence Act; Evidence Bill 1993 cl 117). In the context of our own proposals, such a rule would risk unduly broadening the absolute protection which would be conferred on lawyer-client communications. However, it is not easy to propose a workable definition of who is the "company" for these purposes. A possible response is to require the courts to look for the degree of "control" the employee has in respect of the litigation in question. But that test was rejected in the United States, in a case not unlike the second example (*Upjohn v United States* 449 US 383 (1981)).

80 The Commission's view is that the term "client" should not be defined. The position should be no different from any other case where the client, through illness or absence from the country, is obliged to obtain the services of another person to instruct the lawyer. It is not enough that the person concerned is an agent. The person must be entrusted, further, with the particular task of dealing with the lawyer as the client would. The question is one of fact. The court should determine in each case whether the communication is sufficiently analogous to a statement made by a client to a private solicitor to come within the absolute privilege conferred under this head. Tests based on seniority or degree of control divert attention from the more important issue of the purpose of the communication. (The question is, of course, seldom an acute one if the statement -even if not a "client" communication - is already given qualified protection. That will usually be the case under the proposals in ch 4.)

Government departments

81 Similar problems arise with employees of government departments. In the Commission's view they are best approached in the same way. There is, however, an additional factor which must be taken into account. The maintenance of legal professional privilege is a ground on which a request for personal or official information can be refused under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987. Protection under these Acts is not always absolute. In relation to requests for official information the reason for withholding must be weighed, in each case, against "other considerations which render it desirable, in the public interest, to make that information available" (Official Information Act 1982 s 9(1)).

82 The requirement that the competing interests be assessed on each request for official information is a central element of the regime for all official information. The terms of reference for the Commission's current review of the Official Information Act specifically preclude revisiting the principles underlying the Act. The review is restricted to fine-tuning specific provisions that are perceived to have caused difficulty in practice. We therefore

doubt whether it would be helpful for us to develop any proposals for the reform of the Official Information Act as part of the present review of the law of evidence.

Draft sections:

1 Definitions

(1) In this Part

adviser means a person who, whether or not the person is qualified to practise law,

(a) conducts or helps conduct a proceeding on behalf of a party to the proceeding; or

(b) is engaged to give legal advice as part of the normal duties of that person's occupation or employment; or

(c) gives legal advice in the course of performing duties for an organisation which provides legal advice to the public or a section of the public;

...

3 Privilege for advice concerning a proceeding

(1) A person who is a party to, or contemplates on reasonable grounds becoming a party to, a proceeding has a privilege in respect of any communication between that person and an adviser of that person if the communication was

(a) intended to be confidential; and

(b) made in the course of and fairly referable to the advisory relationship between the person and the adviser; and

(c) made for the purpose of giving or receiving advice concerning the proceeding or conducting, or helping to conduct, the proceeding.

(2) A reference in subsection (1) to a communication between a person who is a party to, or contemplates on reasonable grounds becoming a party to, a proceeding and an adviser of that person is to be taken to include a reference to a communication made between such a person and an authorised representative of the adviser.

Legal professional advisers:
other preparations for litigation

Communications made for the purpose of litigation are privileged. The justifications for "litigation privilege" are not as clear as is often assumed. It has value, but its inexorable application may cause injustice. The privilege could be more narrowly defined. Or it could be broadened as long as the courts can override it where the information is clearly needed for the proceedings.

83 This chapter deals with information gathered in the course of preparation for trial. The lawyer's preparation, of course, includes discussions with the client. That aspect of the law of privilege has already been considered in ch 3. Here the Commission considers all the other preparations for current or contemplated litigation. The focus is mainly on civil trials.

84 Under existing law, privilege attaches to some but not all preparatory material. The privilege applies to communications between

- legal professional advisers and third parties, and
- clients and third parties, made with a view to obtaining information to be submitted to a legal professional adviser.

Other information, such as draft pleadings, or counsel's notes for addressing the court, appear not to be within the scope of the privilege as they are not communications. This is so if the traditional formulation of the law is applied literally, although when the issue has arisen the courts have tended to find some ground on which disclosure could be refused (see para 0).

85 The privilege is intimately connected with the adversary system of trial, and is often termed "litigation privilege" to distinguish it from the privilege which attaches to communications between clients and legal professional advisers (for a summary of the basic principles, see *Harrison v AG* (1989) 4 PRNZ 122, 128-130). Its main function is to limit the process of discovery. In civil cases the general rule is that a party is allowed access to documents and other information possessed by the opponent which may assist in preparation for trial. The privilege is usually invoked to prevent discovery of material which is too closely connected with the way in which the parties intend to develop their case. For example, witnesses to an accident will be generally known and both sides have access to them. The brief of evidence taken by one party from a witness is confidential and, in civil cases, there is in general no reason why the other side should see it until the litigation is ready for trial.

86 In this aspect, the law of legal professional privilege has little if any application in criminal cases. Much of the material covered by it, such as witness statements, must be disclosed by the prosecution. There are developing common law disclosure obligations. And a request for details of the prosecution's witness briefs can be made under the Official Information Act 1982. Even for the defence the privilege is likely to be of little importance. Presumably it could arise if the police obtain a search warrant in respect of the defence lawyer's files, or if the prosecutor attempts to examine a defence witness on what the witness has said or been told when evidence was being briefed. Neither of these are common practices. It could arise more commonly when the prosecution has subpoenaed a witness to give oral testimony or produce documents (eg, see *R v King* [1983] 1 All ER 929).

87 This chapter therefore concentrates on the function of privilege in civil cases, where both the High Court and the District Court have extensive power to require parties to discover documents, produce documents to the other side, and submit to interrogatories which will reveal information about the case. It is here that litigation privilege is most likely to be relied upon. Nevertheless, we would welcome comment on whether the proposals in this chapter provide, where it is needed, adequate protection in criminal cases.

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| <p>Is litigation privilege needed in criminal cases?</p> |
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88 The Commission's general view is that litigation privilege serves a useful purpose, but that the present "absolute" nature of it cannot be

justified. We therefore propose a modified version of the present law. This chapter deals with

- the justification for the privilege,
- options for reform,
- the requirements for invoking the privilege in its modified form, and
- two related privileges which are now obsolete.

THE JUSTIFICATION FOR THE PRIVILEGE

89 In general, there is little benefit in litigants being obliged to reveal to the other party their tentative and unshaped thoughts about how their case should be conducted. An adversary is not likely to profit much from sifting through such material, or through successive briefs of evidence, in order to score points which can easily be refuted by the response "we understand our case better now". Even if such information were not given privileged status, the court would be unlikely to exercise its general discretionary power to order production. So the privilege serves a demonstrably useful purpose, though perhaps one which could be achieved by other means.

90 The case for it, however, is not nearly as strong as that for the privilege which attaches to lawyer-client communications. It does not protect private secrets, but only the process of collecting evidence. For example, the privilege does not help the witness who is being interviewed by the lawyer. Only the client has power to decide whether the material will be used or not. (The witness will have at best a qualified claim to confidentiality, which can be independently asserted if the material is used in an unexpected way.) The justification advanced in relation to lawyer-client communications does not really hold good when applied to litigation privilege, especially where litigation has not been commenced at the time of preparation. This view is reflected, at least partially, in the judgments of the courts. As Richardson J said in *Guardian Royal Exchange Assurance Limited v Stuart* [1985] 1 NZLR 596, 604,

. . . there is all the difference in the world between confidential communications between a client and his solicitor designed to encourage a candid flow of information and advice between them and the preparation by third parties of material for multiple purposes, only one of which is for consideration by the solicitor for apprehended litigation . . .

91 Not only that, it can be shown to be capable of leading to distinctly unjust results. It allows one party to litigation, who has collected

unfavourable information, to withhold that information from the court and from the other party. This may well be justified in cases where the other party is able to acquire the information by independent enquiry. But it is much less acceptable where the other party is able to satisfy the court that the information is not available by any other means except discovery of material in an opponent's possession.

The traditional view

92 Historically, the courts of equity (which shaped the discovery procedure) were reluctant to extend legal professional privilege beyond lawyer-client communications. But when the same procedure was entrusted to common law courts, they had no such difficulty. Decisions upholding the privilege appear to have been predicated, at least in part, on the fear that, once it was known what one side's witnesses would say, the other side would be tempted to influence them to change their minds. There was also the use of "surprise" as an approved method of showing up an opposing side's fraudulent witness.

93 This type of justification is becoming increasingly difficult to reconcile with the modern approach to litigation. The general scheme of the new High Court Rules (now also introduced into District Court procedure) has been described as eroding the "system of advocacy which kept `cards close to the chest'" (*Sunde v Meredith Connell & Co*, (unreported, High Court, Auckland, 19 September 1986, A1479/85, Barker J). It is also seen as encouraging the parties to sort out the issues before trial. This should lead to better preparation for trial and encourage settlement of disputes.

94 Following this philosophy, the practice has developed (though by no means uniformly in all regions) of requiring the parties to disclose fully their briefs of evidence to the other side before the trial takes place, regardless of whether the material disclosed is privileged. The Commission sees no theoretical difficulty with this new development. Once the parties have decided what evidence they are going to submit to a court, disclosure is a matter of timing. There may be cases where "surprise" will be a significant feature, and the courts have discretion to rule accordingly. Examples are cases of alleged fraud, and other cases where a witness's credibility is in issue. That is a tactical issue which needs to be dealt with in the circumstances of the particular case. It has little to do with wider questions of client confidentiality and privilege.

95 A different problem arises where a defendant does not believe that the plaintiff can establish a case. The defendant wishes to "put the plaintiff to the proof". At the end of the plaintiff's evidence, the defendant will move for a non-suit. Not knowing whether that application will succeed, the defendant prepares a brief of evidence.

Should that brief be exchanged? If it is, there is a risk that deficiencies in the plaintiff's case will be made good by admissions in the defendant's brief.

96 This is in part a privilege problem. The right asserted by the defendant is to defeat a claim when the defendant's own brief of evidence indicates that it is meritorious. In principle it seems little different from other examples which will be given in this chapter, where facts are withheld so as to defeat a valid claim. But in part it is also a procedural problem. The modern practice has reduced the efficacy of the defendant's right to move for a non-suit at the end of the plaintiff's case. That method of joining issues is now suspect as a tactical weapon. There is no need to encourage its use by those who fear the consequences of their own evidence. The law of litigation privilege ought not to be promoted (and possibly distorted) with that end in view.

Modern theory

97 If the privilege cannot be justified merely because it excludes material of little value, or because it preserves an element of "surprise" as a helpful method of testing the accuracy of testimony, how can it be justified? Modern theory suggests that a policy analogous to the "contingent claims" theory operates here too (see ch 3, para 0). The adversary system depends for its effectiveness on giving opposing parties an incentive to get as much information as they can and to bring it to court if it helps them. But to get this information, there will inevitably be a "joint production" of both favourable and unfavourable material. A party who realises that the search is as likely to produce unfavourable as favourable information, and knows that the other side will have access to whatever is produced, has no incentive to make any enquiries at all. The most rational course is to do nothing and wait to see what the other side turns up. But the same holds true for the other side. Unless both sides have a privilege to withhold the unfavourable information they obtain, neither has sufficient incentive to investigate the case. The likely result is that the court system will not get sufficient information to decide cases fairly.

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| Should litigation privilege be abolished in civil cases? |
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98 This theory has been vigorously criticised, on the ground that lawyers have many other incentives to prepare cases fully (see Thornburg, "Rethinking Work Product" (1991) 77 Virginia LR 1515). Foremost among them is the concern to do the best job possible. Less altruistic motives include fear of embarrassment in court, peer pressure, and lawyers' future credibility with clients and the courts before which they appear. The response which is made to this criticism is that it misses the point. Of course there are these other pressures too, but the privilege is justified if it can be shown that in a significant number of cases it will

encourage lawyers to go further than they otherwise would in investigating risky lines of enquiry. This is an empirical matter on which, at least in New Zealand, no studies appear to have been made. We have to say, though, that we are inclined to doubt whether such a study would provide any clear answer one way or the other.

The Law Commission's view

99 The Commission's view is that the privilege should remain. The reasons are that

- it provides additional encouragement to counsel to prepare fully for trial,
- it reduces the risk that counsel's strategy will be revealed prematurely, and even perhaps unhelpfully, to the other side,
- it allows counsel to commit their preparations to writing, which some may be tempted not to do if they fear compulsory disclosure,
- it leaves open the possibility of using "surprise" tactics at least up until the time briefs are exchanged, in cases where its use is reasonable, and
- it allows litigants to be flexible in preparing their strategies, so that they are not committed to a view formed early in the proceedings through fear that the other side will use any obvious changes of course as an indication of weakness.

The Commission nevertheless welcomes comment from those experienced in the conduct of litigation about whether these concerns are realistic, and about how trial practice might change if the privilege were abolished.

100 The Commission is not convinced, however, that the privilege should remain an "absolute" privilege, as it is at present. Material which has a significant bearing on the case can, if it is privileged, be withheld at the discretion of one party. So there is the possibility of the court reaching an unjust or incorrect conclusion in a particular case. We accept that material of this kind should not ordinarily be made available to the other party. But that does not mean that there should be an absolute privilege which prevails even if the party invoking it has information which is important to the case and cannot be obtained in any other way.

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| Should the court be able to override litigation privilege in its discretion? |
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101 In the following examples, it would seem that the courts should

consider whether privileged material ought to be discovered:

- A is sued by B for negligence. A's solicitors take statements from witnesses X, Y and Z. The briefs of witnesses X and Y show A's conduct in a favourable light; not so the brief of witness Z. A proposed to lead the evidence of witnesses X and Y but not Z. Z's statement is withheld from production on the ground of privilege. B cannot get a statement from witness Z because witness Z is dead.
- The same as above, except that Z is not dead, but simply refuses to be interviewed by B's solicitor. Z knows A and does not want to cause A any trouble.
- A, an experienced property developer, notices incipient signs of subsidence on neighbouring property owned by B. Anticipating a possible claim for loss of support, A consults A's insurer and a full dossier is prepared, including experts' reports. B knows nothing of this, but some years later subsidence becomes obvious and B wishes to bring a claim against A. A and A's insurers refuse to make the file available to B. Without this earlier information there may be insufficient evidence to bring proceedings.
- A sues B for fraud, outside the six-year time limit provided by the Limitation Act 1950. B alleges that A could have discovered the fraud more than six years before; if that is proved, it will be an answer to the claim (s 28(c)). A and A's lawyer will testify that neither had reason to believe there was a fraud. But they refuse to produce the lawyer's file on the matter. This is a serious problem, which can be exacerbated if the client consults a new lawyer, who instructs the former lawyer to say nothing. In some jurisdictions, it is overcome by a generous application of the doctrine of waiver. (see ch 6)

These examples, as might be expected, evoked sharply different responses among the lawyers we consulted when preparing the paper. But, in the Commission's view, they are all cases in which litigation privilege deprives the other party, and ultimately the court, of essential information. To order discovery in these unusual cases would not seriously compromise any of the objectives of the privilege set out in para 0. It should not be left to the uncontrolled discretion of A, in any of these examples, to decide whether the other party or the court should receive the information or not. If discovery is ordered, that will help B to decide whether or not to proceed with the case, and, if so, how to present the case in court.

OPTIONS FOR REFORM

102 There appear to be three options for reforming the existing law. These would reduce any adverse effect the privilege may have in cases where information is needed in court proceedings.

- Retain the privilege in its present form, but considerably reduce it in ambit. The privilege might, for example, be confined to cases where the conduct of litigation is the "sole purpose" for creating the material.
- Retain the privilege but make it a "qualified" privilege, which can be overruled by the court where information is not otherwise available, and its importance to the proceedings outweighs any harmful consequences of disclosure for the person possessing it.
- Abolish the existing privilege altogether.

103 For reasons already stated, the Commission is not at this time inclined to favour the last of these proposals. Nor does it consider that the first should be supported. It does not seem apt to meet the underlying problem. There are good reasons for casting the general privilege fairly widely, since by and large it serves beneficial purposes and it will only be in exceptional cases that it does harm. But, in the examples already cited, the need for the information has little to do with the way in which it was collated in the first place. The "sole purpose" test (used in Australia and in the Evidence Bill 1993 cl 119, but rejected by the New Zealand Court of Appeal in *Stuart*) does not address that issue at all. Nor, as will be seen (paras 116-123), does the "dominant purpose" test, which the court adopted instead.

Should the scope of the privilege be narrowed by adopting the "sole purpose" test?

104 There remains the second option. It has the disadvantage that those collecting information cannot be certain, at that time, what significance particular information will have for a future trial, or whether the other side will be able to get it elsewhere. However, the fact that most of it will be protected should be enough to encourage the continued collection of material.

105 As with the qualified privilege proposed in ch 5, there is the worry that the introduction of discretionary criteria will add to the cost of the discovery process. Indeed, it is more likely to be a problem here. The opponent knows that the material covered by the privilege will be broadly relevant to the litigation. Although often the material will be of no real assistance to the opposing party, there would seem to be a greater opportunity here for applications to be made for tactical reasons. But the tactics may well run the other way. If (as we propose) applicants must show they need information, this may disclose a weakness in their own case. This risk has to be balanced against the speculation that some useful material will be revealed as a result of the application. So it is

difficult to predict the extent to which the introduction of a discretion would affect the overall expense and length of trials. This is an area on which the Commission would welcome comment and discussion.³

106 The whole question of the expense of trials is complex, and it is difficult to discern the causes of the increase in cost which is generally perceived to have occurred over the last 20 years. It would be facile to isolate any one factor, such as the exchange of briefs of evidence before trial or the degree of judicial control now exerted over the processes of litigation, as "the cause" of increased expense. One might equally well point to increases in the time and legal effort which is now applied by teams of lawyers to significant litigation in which they are involved. Whatever the cause, a cheaper trial is not necessarily better than a more expensive one, if the quality of fact-finding deteriorates in the process. So the Commission is by no means convinced that the existing law should be retained solely on account of the fear that a new law might involve additional expense.

107 In the case of the changes the Commission proposes to the law of privilege, there may in fact be no increase in expenses. Under the present law there are lengthy arguments over whether information is legally privileged. These will be replaced by a decision based on whether the information is needed in court, and whether this need outweighs the privilege-holder's justifiable need for secrecy. The latter enquiry may be simpler and quicker than the former. So, even if the privilege claim is attacked more frequently under a new law, that does not mean that overall there will be greater expense. In a situation which is already confused, the Commission believes that fairness and principle are a better guide than speculations about increased expense.

REQUIREMENTS FOR INVOKING THE PRIVILEGE

108 Since the privilege which the Commission proposes to adopt is "qualified" in nature, the considerations we have just described will determine the outcome in difficult cases. This means that a somewhat

³ The Commission has already raised this issue with a number of lawyers experienced in litigation. There were differing assessments, though it would be fair to say that most, if not all, anticipated that the proposals would result in an increase in work associated with the discovery process, and a consequent increase in expense. Some thought that any problems would quickly diminish once it became apparent that speculative applications were being discouraged. Others thought there would be an enduring and significant cost effect. There were also differences in assessing the benefits to be gained. Some thought that additional useful evidence would rarely be discovered. Others said that they would find the provision useful, especially when acting for a less well-resourced litigant. Reference was made to the handicaps faced by a "small team" of lawyers engaged in litigation with a major firm adopting a "large team" approach.

more relaxed view can be taken of the requirements for invoking the privilege. These are the "threshold" rules which must be observed before privilege can be claimed at all. Nevertheless they are important. They will govern the great run of cases, and they will need to be applied by litigating parties when sifting through documentary material and deciding what should be discovered.

109 The central feature of litigation privilege is that it represents the fruits of effort on the part of the litigants in preparing for the case. So documents and other pieces of information which do not come into existence as a result of preparation are not covered by the privilege. This is generally recognised by the present law. There will naturally be borderline cases. For example, in *Lubrizol Corporation v Esso Petroleum* [1992] 1 WLR 957, documents were copied in preparation for litigation, but subsequently the originals were lost. It was held that the copies could enjoy no greater privilege than that which attached to the original, and therefore had to be produced. This decision is consistent with the policy which the Commission discerns behind the privilege. In this respect, there is no need to change the existing law. However, there are a number of areas where (if the privilege becomes a qualified privilege) there can be some relaxation of the present strict rules for invoking the privilege.

110 The basic requirements for invoking it should, in the Commission's preliminary view, be as follows:

- litigation must be in progress, or at least contemplated, when the material is prepared;
- the protected material must be work done or communications made in preparation for litigation; and
- the person preparing it should be a litigant or prospective litigant, someone conducting the litigation, or a third party preparing material at the request of one of the persons just mentioned.

111 This proposed definition broadens the existing law in two ways which are consistent with its underlying philosophy. First, the privilege will not be confined to communications, but will cover the entire process of preparing for trial. The extension may not be strictly necessary since, as has been pointed out (para 0), the other material will be difficult to obtain on discovery or in evidence anyway. But that is not always assured, and the general principle will be weakened if it is understated.

112 Second, the privilege will not be confined to work done by or for lawyers. Even where no lawyer is engaged, a "litigant in person" will still have to interview witnesses and carry out preliminary investigations. There seems no basis on which it could be argued that those who employ

lawyers should be able to take advantage of the privilege, whereas those who act for themselves cannot.

113 Three aspects of the proposed new law call for further consideration. They are

- the "contemplated litigation" requirement,
- the abolition of the "dominant purpose" test, and
- the exercise of the power to direct disclosure.

The "contemplated litigation" test

114 The first of the three requirements (referred to in para 110), that litigation be in progress or "contemplated", is drawn from existing law. The courts have held that the privilege applies to work done when there is a "definite prospect of litigation", but not when there is merely a "vague anticipation" of it (*Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102, 130). This requirement is particularly important, for example, in dealing with the practice of insurance companies after receiving an insurance claim. There is always the possibility that the claim will result in a lawsuit, either with the insured or with a third person who has been responsible for the loss. The business system of insurance companies is designed to prepare for that possibility. But the chances of a lawsuit, in any particular case, may well be remote. Is work by the insurance company at this time done "in contemplation of litigation"?

Is it sufficient to define the privileged preparations as those made "in contemplation of litigation"?

115 In such cases, where litigation is not in progress at the time the material comes into existence, the courts have had difficulties in determining whether litigation is in contemplation. The tendency has been to ask the question whether litigation was "reasonably apprehended" at the relevant time. This approach has been perceived by some courts as being too uncertain and not providing sufficient guidance in advance of any litigation as to the point from which the privilege applies. But there does not seem to be any satisfactory way of providing more certainty. Essentially, the question of whether litigation is in contemplation is a matter of fact or degree.

The abolition of the "dominant purpose" test

116 The issue can be approached in a different way, by applying the second requirement. It may be asked, what was the purpose of the work?

In New Zealand, the accepted legal test now is whether the work is carried out with the "dominant purpose" of preparing for litigation (*Guardian Royal Exchange v Stuart* [1985] 1 NZLR 596 and *General Accident Fire and Life Association v Elite Apparel Ltd* [1987] 1 NZLR 129). So, in insurance cases, it has sometimes been held that the company's preparation has not been done with that "dominant purpose". There have been instead two purposes (settling the claim and preparing for a possible lawsuit), neither of which is "dominant". The result is that the insurance company must disclose the work it has done.

117 This, in the Commission's view, is an unduly restrictive approach in deciding whether preparations are covered by litigation privilege. It discourages the carrying out of investigations when it is first realised that a loss has occurred, or may occur. Yet it is at this early stage that much important and reliable information can be obtained. Here it seems to the Commission that a qualified privilege has a useful role. It leads to completeness of enquiry, by assuring would-be litigants that most of what they uncover will be protected. But it does not surrender the court's ultimate power to order discovery of information which is important in deciding the case.

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| Should the scope of the privilege be broadened by abolishing the "dominant purpose" test? |
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118 One of the reasons given by the Court of Appeal for adopting the "dominant purpose" is perfectly consistent with what the Commission is now proposing. Richardson J observed in the *Guardian* case that this

more restrictive test than appreciable purpose is called for in balancing the relevant public interest considerations . . . the appreciable purpose test would allow the umbrella of legal professional privilege to protect reports obtained for ordinary business purposes so long as one factor in mind was that the report could assist in any apprehended litigations that might ensue. Any attempt to withhold relevant evidence should be jealously scrutinised and the appreciable purpose test tilts the balance too far against disclosure. (605)

The Commission supports that view. However, under the law we are proposing, the "appreciable purpose" test is only involved as a threshold requirement. The "balancing" process referred to by Richardson J takes place at the next stage, when the importance of the evidence is weighed against the need for disclosure. So there is not the same objection to the "appreciable purpose" test.

119 The other reason given by the Court of Appeal appears at first sight to have more force as an argument against our proposals. Richardson J

said, ". . . in terms of ease of application a dominant purpose test is both familiar to lawyers and more straightforward in its application . . . in some circumstances an appreciable purpose test would be much more difficult to apply than a sole or dominant purpose test". The approach proposed by the Commission is more difficult to apply in a routine way, not so much because of the "appreciable purpose" test, but because of the judicial discretion.

120 In the event, however, the "dominant purpose" test has not proved easy to apply in the context of the law of privilege, and has been the subject of adverse comment from some of those we consulted. It was suggested in particular that the subsequent case of *Elite Apparel* involved a noticeable reduction in the restrictive effect of the "dominant purpose" test (see Mahoney, "Evidence" [1992] NZ Recent LR 29, 52). Certainly, the grounds of distinction were very narrow, turning on little more than the apparently greater likelihood, in the *Elite* case, of ensuing litigation. The combined effect of these two Court of Appeal decisions has been to leave the law in a much less than straightforward condition. And while the concept of "dominant purpose" is indeed familiar to lawyers in the context of taxation and insolvency, in the latter case, at least, it has proved notoriously slippery and difficult. As regards the law of voidable preferences in company liquidation, the Commission recommended its abrogation in *Company Law: Reform and Restatement* (NZLC R9 1989 para 696; cf Companies Act 1993 s 292).

121 To allow for a more expansive approach to applying the privilege, the Commission proposes that the "dominant purpose" test be abolished. It seems to confuse matters and lead to a circular inquiry. Consider the following situation:

After receiving a claim in respect of a house fire, an insurance company employs an assessor. The assessor carries out a thorough investigation and produces a report for the insurance company.

122 In this situation there are a number of possible reasons for the insurance company seeking the report:

- To decide whether to accept the claim of the insured.
- To assess what the prospects of success are in litigation against the insured.
- To assess the extent of the damage.

For the privilege to apply, the second purpose (according to the present law) needs to be the dominant purpose. This would seem to depend on the extent to which litigation is anticipated. How is that to be proved? Presumably by looking at whether, and to what extent, the insurance

company suspects that there has been wrongdoing on the part of the insured or that the claim falls outside the terms of the policy at the time of seeking the investigation. This takes one right back to the "reasonable contemplation" test. To add a metaphysical enquiry about which is the "dominant" motive is somewhat artificial and unhelpful when in reality the company may have regarded them all as being equally important. It seems to the Commission that the better test is whether litigation was contemplated as a significant possibility in the particular case, and if so whether a substantial purpose for making the report was the possibility of litigation. Privilege should not be lost merely because there are other reasons for the creation of the report unconnected with litigation. Applying the "dominant purpose" test does not seem to add much that is useful to this inquiry.

123 In the Commission's view, little would be lost by replacing the "dominant purpose" test with a less restrictive test of "substantial purpose". That would probably have the effect of enabling a more expansive approach to be taken to deciding whether litigation was in contemplation at the relevant time. The only requirement needed here is that a substantial purpose for doing the work was because litigation was either in progress or in contemplation.

The exercise of discretion to order disclosure

124 This proposal to abandon the "dominant purpose" test means more material will pass the threshold for litigation privilege. The test filtered out some unmeritorious claims; that work will now have to be done by the court in the exercise of its discretion. In what circumstances then, should the court order disclosure of that material?

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| <p>Will a judicial discretion operate in a principled way?</p> |
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125 The opposing party cannot, under this proposal, gain access to this material unless the court is satisfied that it is required in the interests of justice. The need for the material to be disclosed in the proceeding must outweigh the need for the privilege. In order to reduce the risk of applications being made unduly frequently and decrease the opportunity for making applications purely for tactical reasons, the Commission offers the following guidelines on the requirements which should be met before the court orders disclosure. The onus will be on the applicant to show that

- the material sought is relevant to the case,
- the same or similar evidence cannot reasonably be obtained from another source, and
- the material is likely to affect the outcome of the case.

Once the applicant's need is made clear, the other party may be able to find other ways of dealing with the problem, without contesting a claim for privilege. Full and diligent disclosure of non-privileged material, or a skilfully chosen admission, may well provide the applicant with everything needed.

126 However, if a claim for privilege is to be contested, the court must then consider the effect of disclosure on the interests of the party in possession of the material. It will also wish to take into account the extent to which the type of material concerned needs to be protected in order to enable litigants to properly prepare for trial. Against this, it will be necessary to weigh the potential significance of the material to the case and the general requirements of justice in the particular circumstances. In the following types of situation the court would have to seriously consider ordering disclosure:

- One party takes a statement from a potential witness and that witness subsequently becomes unavailable, or the witness is unwilling to cooperate with the other party to the litigation.
- One party acquires material which is contemporaneous with an event that is significant to the litigation. The other party cannot obtain equivalent material because of the time which has elapsed since the event took place.

By way of contrast, the applicant may have other evidence on the same point, or perhaps the applicant could readily have obtained it in preparing the case. The information sought may consist of later commentary on the facts which may embarrass the other side tactically but not add much to the weight of evidence. In these cases, the court would be unlikely to order disclosure.

127 Applying these guidelines, the court may be required to exercise its discretion sparingly. Only in a relatively small minority of cases will there be any real issue about whether disclosure should be ordered.

TWO RELATED PRIVILEGES

128 It remains to deal briefly with two related privileges, both of which now appear obsolete in New Zealand. The first is the privilege which exempts from discovery, documents which relate solely to the case of the party who holds them, and contain nothing to support the opponent's case. In modern litigation there is no virtue in a rule which makes the party the sole judge of whether a document helps the other side or not. The rule appears to have been abolished in 1985 by r311(2) of the High Court Rules (see also the District Courts Rules 1992 SR 1992/109

r333(2)).

129 The second privilege concerns documents establishing title to land. This is an old privilege designed to prevent titles being at risk unnecessarily when they are only incidentally relevant in court proceedings, as their infirmity may be revealed if they are produced. A system of public land registration makes such a rule redundant, and there are doubts whether it applies in New Zealand. Neither of these obsolete privileges should be revived or brought forward into the proposed evidence code.

Draft sections:

1 Definitions

(1) In this Part

adviser means a person who, whether or not the person is qualified to practise law,

(a) conducts or helps conduct a proceeding on behalf of a party to the proceeding; or

(b) is engaged to give legal advice as part of the normal duties of that person's occupation or employment; or

(c) gives legal advice in the course of performing duties for an organisation which provides legal advice to the public or a section of the public;

...

(2) A reference in this Part to a communication made or received by a person or an act carried out by a person is to be taken to include a reference to a communication made or received or an act carried out by an authorised representative of that person on that person's behalf.

4 Privilege for preparatory materials for a proceeding

(1) A person who is a party to, or contemplates on reasonable grounds becoming a party to, a proceeding (referred to in this subsection as the "party") has a privilege in respect of

(a) any communication between the party, or that party's adviser, and any other person,

(b) any information compiled or prepared by the party or that party's adviser,

(c) any information compiled or prepared at the request of the party, or that party's adviser, by any other person, if a substantial purpose of making or receiving the communication or compiling or preparing the information

was to prepare for the proceeding.

(2) Notwithstanding subsection (1), a court may order the disclosure in a proceeding of a communication or information for which a person has a privilege under that subsection if the court considers that, in the interests of justice, the need for the communication or information to be disclosed in the proceeding outweighs the need for the privilege.

Legal professional advisers:
litigation not contemplated

There is a general privilege for any communication with lawyers. But on what basis can it be argued that general advice given by lawyers should be protected from disclosure? How do such communications differ from those made by other professionals? Should courts have power to override legal privilege and, if so, how should that power be exercised?

130 It is now settled law that legal professional privilege may be claimed for communications between lawyer and client, even though no litigation is current or contemplated. It is sufficient that the client is seeking legal advice, whether or not there is any prospect of that advice being relevant to court proceedings.

131 In a country governed by law, it is beyond question that people should be able to consult lawyers. They should be able to lay the facts out and obtain advice on how to proceed in a way which avoids or reduces any legal risk. This need may well be sufficient to justify some form of privilege for communications made on those occasions. However, the difficult question, in the Commission's view, is whether the privilege should be an absolute one.

Should the privilege for communications made with lawyers to obtain general legal advice be an absolute privilege?

132 The Commission is aware that, in raising this question, it is entering into new territory in which there are no very clear answers, or even bases for judgment. It is also

highly emotionally charged. Lawyers will speak of the sacred nature of the confidentiality between lawyer and client. So too, however, will priests and doctors, in respect of their congregation or patients. Other professionals take a similar view. Yet the privilege the law awards to those relationships is considerably narrower than legal professional privilege. And all professions are currently confronting profound issues about when their members are ethically or legally obliged to divulge what they know. Child abuse and marital violence are one type of example. Demands for information from the Commissioner of Inland Revenue are another type. These questions must be confronted by lawyers as well. In such areas the law of privilege, which for nearly 200 years has preempted most enquiries into communications between lawyers and clients, is no longer a satisfactory answer to current social and ethical issues. Indeed, it has become part of the problem, in the light of changes in the structure of the legal profession. In particular, any modern reformulation of the law must take into account the current practices of large commercial law firms and legal commercial consultants. They have in recent years taken a wider role in giving commercial advice and implementing clients' commercial strategies.

133 The problem with the law of legal professional privilege, as it is generally understood, is that even where lawyer and client engage in the most routine of transactions, everything related to the giving of legal advice is protected from disclosure. The danger is that the privilege could, in a particular case, lead to an unjust result because important material can be withheld from a court at the discretion of the client. This can happen even where the harm resulting from disclosure is minimal or non-existent.

134 Under the present law, it is commonly accepted that when some matter arises in later court proceedings, the court has no opportunity to enquire whether the client needs protection. The proceedings may have nothing to do with the reasons why the lawyer was consulted in the first place. It may be that any prospect of disadvantage to the client is remote. If it is much less important than the need for the information in the litigation which later comes before the court, the client will have no interest which can justify maintaining secrecy. It is difficult to see why, in that case, the decision to release the information should be solely that of the client.

135 The law on the matter is perhaps not as clear as is often assumed. Certainly the received view is that the privilege is an absolute one; the courts should not enquire whether the information ought, on balance, to be disclosed on account of its importance to the litigation in which it is sought. But there are decisions which appear to the contrary. A significant case is *Re Bell, ex p Lees* (1980) 146 CLR 141, where a solicitor, who had been secretly consulted on a property matter, was compelled to disclose the address of the client. In communicating her address to the solicitor, the client had expressly requested that it be kept confidential. The client had disappeared with her daughter shortly after a custody order had been made in favour of her husband, and the information was needed so the custody order could be enforced. The solicitor had not been told anything of the custody battle which had taken place. The court saw the importance of enforcing custody orders as a matter of special significance to the decision. As an authority the decision may be limited to that type of case.

136 But there is little merit in limiting the general rule by a series of *ad hoc* exceptions.

It is the general rule itself which needs to be re-examined. In this chapter the Commission advances proposals which would change the existing law, but not in any radical way. It is proposed that the client continue to have a privilege which in most normal situations would be conclusive. The client's legitimate interest in non-disclosure is still a matter which would be seriously weighed by the court. But in some cases, where the balance of interests goes the other way, the court will have power to order disclosure.

THE JUSTIFICATION FOR THE PRIVILEGE

137 The Commission's proposal is by no means a new idea. Originally, lawyer-client privilege was confined to communications relating to litigation. But early in the nineteenth century the scope of the privilege was extended to include communications made in other circumstances. Because the question was seen merely as a matter of logical development of existing law, no thought appears to have been given at that time to whether, as a matter of policy, protection ought to be given in a more limited form. Nor does the matter appear to have been raised since, except in the work of some law reform agencies.

138 The general justification for according privilege to communications between lawyer and client has already been stated. (ch 3) It applies, to a degree, where no litigation is contemplated. The client still needs advice, and may have to disclose unfavourable facts for the lawyer to deal with the problem effectively.

139 But for two reasons it is more difficult to justify an absolute privilege where there is no immediate prospect of litigation. First, if the prospect of litigation is remote, the likelihood of the information ever being relevant to court proceedings, and the lawyer ever being called upon to disclose it, is small. If that risk is minimal, there is no strong incentive to keep facts back from the lawyer. Thus the privilege, which encourages free and frank communication by protecting against that risk, is not so important.

140 Second, there is no direct connection between disclosure and the effectiveness of the workings of the court. It is of course important for the client to receive the best advice possible. But it cannot be said that the ability of the court to reach a correct decision will be significantly enhanced because of practices adopted by lawyers and their clients in everyday, non-litigious work. The most that can be said is that, if the lawyer does the job properly, a case may never be brought, with the consequent savings to the client and the justice system. This is a tangible, but hardly a decisive, consideration. Suppose the communication contains material which is important to a particular case coming before the court, relating to some quite different matter. There the balance of interests seems to be in favour of disclosure.

141 There is the contrary argument that legal advice is different from other forms of confidential enquiry, because litigation will always be a possibility (see, eg, Law Reform Committee (UK), Report on Privilege in Civil Proceedings 16th Report 1967, Cmnd 3472). But the analysis should begin not with the mere fact that there is a risk of litigation, however small. The question is rather, is there an appreciable social cost if the information is disclosed? A negligible risk of disclosure in future litigation is unlikely to

have an effect on the conduct of either lawyer or client. The cost of not disclosing the information in that litigation could, on occasion, outweigh the costs associated with the risk that other persons, knowing what the law provides, may in future reveal less to their lawyers.

142 A hypothetical example may serve to illustrate that analysis:

A client approaches a lawyer for routine advice about the meaning of a clause in a long-term lease which the client is acquiring. The clause deals with permissible uses of the property. During the interview, they discuss the possibility that the client may at some future time use the property as a bakery. Some years later, a dispute arises between the client and her partner in the bakery business, over the question of whether the lease was acquired for the purpose of the bakery business and hence is a partnership asset. The client claims that it was purchased as a private investment out of personal drawings from the partnership. It is relevant to the case to show that the lease was acquired with the bakery in mind, and naturally the partner wishes to know what indications the client gave of her intentions at the time.

143 In this case, any purpose that the privilege might originally have served (in potential proceedings with the landlord) has long since disappeared. The client would not have anticipated the present claim. Any harm caused in respect of future disclosures to solicitors by persons in a similar position to the client is minimal. The fact that the solicitor gave legal advice is irrelevant. A similar enquiry could have been made, for example, of a structural engineer consulted at the same time; no one would suggest that those communications should be privileged. The position of the solicitor in this example is no different.

144 The example given is one where a litigant needed proof of the client's intent. This was relevant to other proceedings involving the client. There are other facts too which might well be proved in that way, for example, that:

- the client had received advice about a matter;
- the client knew a certain fact;
- a document read by the lawyer and quoted in his or her advice, in fact existed or contained certain statements;
- events the lawyer witnessed, or actions the lawyer carried out, and which the lawyer recorded as part of the advice, did in fact occur.

Those events may be relevant to the client's affairs, or to the affairs of some third person. With the relaxation of the hearsay rule (see *Evidence Law: Hearsay* NZLC PP15 1991) written documentation on such matters will be an important source of information, especially for events which occurred a long time before proceedings are brought.

145 Under the present law, all of this information is protected, unless the client unwisely makes reference to the advice received from the lawyer, or otherwise puts the existence or

terms of that advice in issue. But what is a reference to that advice? In Australia, a finding of waiver has been made upon the basis of very slight, or merely implicit, reference to the communication between lawyer and client (see ch 6, para 174). Such decisions have introduced considerable uncertainty about the scope of the client's protection. They are perhaps inspired by a concern that the law of privilege would otherwise protect too much, in circumstances where it is important to the court to have the information.

146 The Commission considers that the problem should be tackled more directly. There are cases where the privilege ought, in the interests of fairness, to be overridden. These situations should be approached on their merits, not indirectly by invoking the doctrine of waiver. But we emphasise that communications between lawyer and client relating to general legal advice would only infrequently become relevant to proceedings. Even then it will be a small minority of those cases in which the importance of the communications is sufficient to justify overriding the privilege.

LAW REFORM PROPOSALS

147 We therefore propose that the existing law be amended to enable such communications to be made available in court proceedings if justice requires disclosure. That can be achieved in one of three ways:

- retain the present law but widen the exceptions to it;
- state the basic rule of privilege, but allow a court to order disclosure in its discretion if the need for the information in court proceedings outweighs the need to protect it; or
- abrogate the privilege and leave the matter to be determined under whatever rules apply to other confidential relationships (such as the current s 35 of the Evidence Amendment Act (No 2) 1980: see ch 15).

148 The Commission supports the second of these options. There is some virtue in the first, in that the future decisions of the court may be more predictable, and clients will be able to judge better how likely it is that the exceptions will affect them in the future. But this is true only to a limited extent. It is generally very difficult to predict what lawsuits one might be engaged in at some future time. Further, the proposed exceptions would need to take into account events occurring after the communications were made. Otherwise the balancing process would be very limited. That would make them unpredictable in operation, and defeat the basic object of the exercise.

149 The third option also has its attractions, and was proposed by the Law Reform Commission of Canada (*Report on Evidence* (1978) ss 41 and 42 draft Evidence Code). But one consequence would be that the need for the privilege would have to be demonstrated on its merits in each case. The Commission considers that this is unnecessary, since it may be reasonably inferred that wherever legal advice is sought, some protection may be needed against possible compulsory disclosure, if only for a limited purpose and a limited time.

150 Although there may be little difference in the end result, the second option provides an appropriate middle way. It is the option tentatively preferred by the Commission. We acknowledge, however, that this option may not be totally free from social cost. Lawyers giving routine legal advice may be influenced not to commit communications to writing so as to ensure that they will not be discovered subsequently. There are situations (for example, where taxation advice is given) where clients may find themselves in difficulty. Neither they nor their lawyers can be sure that the possibility of legal proceedings is clear enough to warrant absolute protection. These are legitimate concerns. But the consequences do not seem sufficiently grave to justify a rule which confers absolute privilege in all cases where legal advice is sought, irrespective of the need for the information and the client's inability to demonstrate any cogent interest in maintaining secrecy.

151 There is also a concern that a qualified privilege may give rise to frequent applications seeking to have the privilege overridden. This would result in the litigation process becoming more costly and expensive. Applications may be made purely for tactical reasons, the real purpose being to delay or prolong proceedings. The potential for this is, of course, less than with the privilege for trial preparations discussed in the previous chapter (see ch 4, paras 105-107). But, as already mentioned, it is difficult to predict what the effect of the change will be. We envisage that it would only be in a small minority of cases in which the court would seriously consider ordering disclosure. So, although there could initially be a growth in the number of applications to challenge a claim for legal professional privilege, this will settle down once the approach of the courts to exercising the discretion becomes clear.

152 It may be questioned whether introducing the discretion will lead to any real benefits, if it applies only to a very small minority of cases. The Commission considers, however, that in an individual case the effect of disclosure on the outcome of the case could be very significant.

153 As for the effect of the change on general legal practice, we accept that clients may be less certain about the degree of protection they have. On the other hand, as was pointed out in para 55, a privilege may still serve a useful purpose in encouraging a greater degree of candour, even where its protection is not absolute. It has been suggested to us that all lawyers would be duty bound to recite the court's powers in relation to disclosure. This could be inhibiting. However, other professionals seem to cope with similar problems under the present law without great difficulty. If the lawyer gave any account of the law of privilege in the form now proposed, that would provide some encouragement to candour. The client would know that it will be difficult for a potential opponent to force disclosure in most foreseeable cases.

REQUIREMENTS FOR A QUALIFIED PRIVILEGE

154 Apart from the modification we have proposed, very little change needs to be made in defining which communications are privileged. The basic requirement for the privilege, both under the existing law and under the Commission's proposals, is that the

communication be between client and adviser, to allow the latter to give legal advice. The courts appear to have been reasonably generous in their application of the requirement. A protracted series of communications relating to contract negotiation, for example, may be protected because at some stage the client expects the lawyer to give legal advice. But a merely commercial or administrative arrangement with a solicitor about, say, the collection of rents, would not normally attract privilege.

155 The other general requirements for legal professional privilege discussed in ch 3 - that the communication be fairly referable to the relationship between the parties, and intended as confidential - of course apply here too.

156 Once these requirements are satisfied, the communications are privileged. When will that privilege be overridden? The party seeking disclosure will have to show that, in the interests of justice, the need for the communication to be disclosed in the proceeding outweighs the need for the privilege. The communications must be directly relevant to the case. It should be shown that the outcome of the case could be affected if they are not made available. Otherwise the court is unlikely to consider ordering disclosure.

Is the exercise of judicial discretion an appropriate way to resolve questions about what a lawyer should disclose?

157 Once this is shown, the court will have to assess the need to maintain the privilege. This involves considering the effects that disclosure would have on the client and the extent to which protecting the type of communications involved serves a useful purpose. In particular the following facts would indicate a strong need to maintain the privilege:

- The communications are of a highly personal character and contain admissions of fact which if disclosed would cause considerable embarrassment to the client and have an adverse effect on the client's private, professional or business interests.
- The communications relate to a matter which is or could be the subject of a dispute involving the client that at the time of the communication could conceivably lead to litigation. Disclosure of the communication should not generally be ordered in later litigation involving the client which relates to the same dispute unless the client raises the advice he or she has received as an issue in proceedings.

If, on the other hand, the communication does not relate to personal matters or matters in respect of which legal advice is sought, or if no personal legal interest of the client is at risk, disclosure ought to be ordered.

158 In balanced cases, a number of other factors will come into play. The court will need to weigh the potential significance of the particular communications to the proceeding and the general requirements of justice in the circumstances of the case. This will involve looking at how important the aspect of the case to which the evidence relates is and the extent to which the evidence is likely to affect the ultimate outcome of the case. These matters could be difficult to assess and will ultimately require a judgement to be made by the court. The Commission envisages, however, that in the vast majority of

situations there will be no question of overriding the privilege since everything which the lawyer has been told can be proved by other means. It will be the rare cases in which the court will need to make a considered decision about whether disclosure should be ordered.

WHICH ADVISERS MAY RECEIVE PROTECTED COMMUNICATIONS?

159 Our proposals go some distance to addressing a perceived unfairness under the present law. The privilege is currently confined, however, to communications between lawyers and their clients. Other professionals have no clear status in this regard. The court would have power in its discretion to protect the information, exercising the wider statutory discretion conferred on it by s 35 of the Evidence Amendment Act (No 2) 1980. In practice, one would expect the discretion to be exercised the same way in both cases, so the difference in like cases would not be great.

160 But it may be argued that the law should recognise this similarity in a more formal way by extending legal professional privilege more widely. The accounting profession in particular has a strong case for privilege in respect of the legal advice and assistance which many accountants provide in relation to the tax affairs of their clients. It is claimed that in respect of tax matters the nature of the advice given by accountants is the same as that given by lawyers and therefore the privilege which protects communications with lawyers should also protect communications with accountants in this context. The present position is seen as providing a commercial advantage for lawyers in that they can point to an express privilege whereas accountants cannot.

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| Should the privilege be extended to other professionals who give advice on matters of law? |
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161 The Commission is not altogether convinced by the focus of that argument. The important point is not whether one group of professionals can obtain an advantage over another. The focus ought to be on the proper protection of the secrets of clients, and the needs of litigants and the court to get full information. However, it is important to treat like cases alike. We accept that much of the tax advice and assistance which accountants give should be covered by privilege. Many accountants specialise in taxation work. It is treated by large accounting firms as a specialised area of practice.

162 There are various situations in which accountants become involved in providing taxation advice. One common situation is where an organisation engages accountants to conduct an independent review of its affairs for the purpose of determining whether it is fulfilling its tax obligations. Such reviews usually uncover a range of tax issues. Another common situation is where an accountant is asked to advise on the taxation consequences of a particular course of conduct. The same reasons which justify protecting communications between lawyer and client connected with the giving of legal advice apply to these situations. The work involves detailed analysis of how the relevant tax legislation and case law impact on the affairs of the client. It is often the case that lawyers and accountants are engaged together in such situations.

163 There is, however, a problem of differentiation. Accountants also undertake tax

accounting work. This is more traditional accounting work which usually culminates in the preparing of tax returns. Here the use of legal skills, as opposed to general accounting skills, is much less significant. This type of work is considerably different in nature from the specialist tax advice work described above. It does not therefore deserve automatic protection under the law of legal professional privilege.

164 The Commission proposes that these issues are best dealt with by taking a functional approach in determining whether there is a qualified privilege. As we have already indicated (ch 3), communications with any type of legal adviser will be covered by "legal" privilege. The term "adviser" is not restricted to lawyers and patent attorneys. It includes those who are engaged to give legal advice as part of the normal duties of their occupation. This is not, however, as wide an extension as it may seem. It would be necessary to show that the nature of the advice given or sought is legal. Also, the adviser must have sufficient legal expertise to be giving that particular type of advice. For the most part, we envisage that only lawyers and patent attorneys would possess the required level of legal expertise. However, other advisers, in particular specialist tax accountants and maybe commercial and company advisers, would also come within the privilege when they do certain types of work.

165 It may be suggested that widening the privilege in this manner is not necessary because of the general power to protect confidential communications (currently in s 35). If the work is sufficiently analogous to that of a lawyer that discretion could readily be applied. The Commission has, however, concluded that leaving accountants to seek protection under the general discretion does not adequately recognise the strength of their client's claim for privilege. It seems to the Commission that there are certain clearly distinguishable areas of tax work in which accountants provide specialist services of a legal nature. In respect of these areas there are special features which, as in the case of the legal profession, call for express and automatic protection.

166 The Commission recognises that for accountants questions of privilege have the most practical relevance in relation to the Inland Revenue Department's powers, under the Inland Revenue Department Act 1974, to access information.⁴ We note that the powers in the Act generally override any privileges except to the extent that it preserves legal professional privilege (ss 16 and 20). Although we are aware that these powers have caused some concern in the accounting profession, as mentioned earlier (in ch 1), the consideration of such sections is beyond the scope of this paper. Nevertheless, the Commission plans to take it up at a future time (see paras 30-36) and would welcome comment.

167 In addition the Commission has defined the term "adviser" to include persons, such as law students, who give legal advice while performing duties for organisations like community law centres and citizen's advice bureaux. Members of the public who seek legal advice from such organisations should have the benefit of privilege.

⁴ Section 20 of the Inland Revenue Department Act 1974 uses the term "legal practitioner" which is defined to mean a barrister or solicitor of the High Court.

Draft sections:

1 Definitions

(1) In this Part

adviser means a person who, whether or not the person is qualified to practise law,

(a) conducts or helps conduct a proceeding on behalf of a party to the proceeding; or

(b) is engaged to give legal advice as part of the normal duties of that person's occupation or employment; or

(c) gives legal advice in the course of performing duties for an organisation which provides legal advice to the public or a section of the public;

...

(2) A reference in this Part to a communication made or received by a person or an act carried out by a person is to be taken to include a reference to a communication made or received or an act carried out by an authorised representative of that person on that person's behalf.

5 Privilege for general legal advice

(1) This section applies to all legal advice except for advice for which a person has a privilege under section 3.

(2) A person who requests legal advice from an adviser has a privilege in respect of any communication between that person and that adviser if the communication was

(a) intended to be confidential; and

(b) made in the course of and fairly referable to the advisory relationship between the person and the adviser; and

(c) made for the purpose of the adviser giving legal advice to the person or the person receiving legal advice from the adviser.

(3) Notwithstanding subsection (2), a court may order the disclosure in a proceeding of a communication for which a person has a privilege under that subsection if the court considers that, in the interests of justice, the need for the communication to be disclosed in the proceeding outweighs the need for the privilege.

Legal professional advisers:
limitations on claiming privilege

Legal professional privilege has always been subject to exceptions. Some are based on the client's own actions. Others are based on the paramount concern of the state to investigate crime and provide an accused with a fair trial. How should these be dealt with in the proposed evidence code?

168 If the Commission's proposals are accepted there will be less need for a series of specific exceptions to the law of legal professional privilege. Critical cases will be resolved by resort to the court's discretionary powers. Still, attention must be given to the exceptions which have come to be recognised by the courts, for two reasons. First, the standard exceptions will be required in those cases where the privilege remains an absolute one. Therefore, some list of exceptions must appear in the code. Secondly, the exceptions refer to the special circumstances where an otherwise valid claim to privilege may be lost. Courts will have to take these circumstances into account when exercising their discretion anyway. They can usefully be described in statutory provisions.

169 The current limitations on claiming legal professional privilege are for the most part specific and well-defined. The Commission is not inclined to recommend any great departure from the existing law. Modification may be called for in some respects however. In general, we do not believe the evidence code should go into any great detail on any of these matters.

170 Legal professional privilege may be lost:

- if the client waives the privilege;

- if privileged material comes into the hands of a third party;
- as between two or more persons who share a joint or successive interest in its subject matter;
- if the communication is made in furtherance of a criminal or unlawful act; or
- if privileged material is required for the defence of someone accused of a crime.

These limitations or exceptions may well be common to other parts of the law of privilege. However, they are most apparent in the law of legal professional privilege and will be considered in detail here. Reference will be made to this chapter where the same issues arise in relation to other privileges.

WAIVER

171 The privilege is lost if the client voluntarily waives the privilege. For example, a privilege may be waived by voluntarily disclosing part of a document in court proceedings. Then the other party can obtain discovery of the full document. The principle seems to be that it is unfair or misleading for the client to refer to one part of the document only. Waiver may also be implied where the document is disclosed, not to the court or the other party, but to the public. But there is no waiver where, for example, the client discloses a document to an associate or confidant, or where parties who have a common solicitor exchange information for limited purposes. The Australian Law Reform Commission proposed a more extensive rule of waiver. Privilege would be lost wherever there is voluntary disclosure to someone who is not a co-client or a person from whom legal assistance is sought (ALRC R38, s 107 draft Evidence Act; Evidence Bill 1993, cl 122). We are not persuaded that this proposal would be an improvement on the existing law, which we suggest should be retained.

Should any unnecessary disclosure result in loss of the privilege?

172 New Zealand courts seem to proceed on two grounds. Privilege will be lost if it is unfair for the client to take the benefits of disclosure while also seeking to retain the benefits of privilege. And it will be lost if what the client has done is inconsistent with a claim to keep the document confidential.

173 An important illustration of the latter is where the client puts the advice received from a lawyer into issue in legal proceedings. For example, the client sues the lawyer for negligence or malpractice. The lawyer may seek to use the content of conversations with the client in order to defend the claim (eg, *Lillicrap v Nalder & Son* [1993] 1 All ER 724). The client has put the facts of the relationship between lawyer and client in issue by bringing the claim, and privilege is seldom a problem in such cases.

174 Some Australian cases appear to have considerably extended this notion of waiver. In one case, a widow referred to the fact that she had received legal advice when making

an application for compensation (*Thomason v The Council of Municipality of Campbell Town* (1939) 39 SR (NSW) 347). During a hearing before a compensation commission the application form was tendered in evidence. The Court in this case held that the reference in the form to legal advice having been received involved a waiver of the privilege attaching to the communication between the widow and her lawyer. In another case, it was held that a witness had waived the privilege attaching to a document because the witness had used the privileged document to refresh his memory before giving evidence (*Trade Practices Commission v TNT Management* (1984) 56 ALR 647, 687). The Commission doubts whether waiver should be extended that far. Under our proposals the privilege in each of these cases would be qualified. The court can consider exercising its discretion in these situations to override the privilege. This would seem to be a more appropriate way of dealing with such cases.

175 No inference of waiver can be drawn, of course, where information has been produced solely as a result of a court or administrative order. Provision should be made, in the draft legislation, permitting a court to preserve the secrecy, and limit any potential use which might be made, of information tendered to a court or official under such constraints. The same principle applies where a person, observing the ethical duties of his or her profession, must disclose information to the authorities, or warn another person who may be in physical danger.

Draft section:

13 Waiver

- (1) A person who has a privilege conferred by this Part may waive that privilege either expressly or impliedly.
- (2) A person waives a privilege conferred by this Part if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document
 - (a) in circumstances that are inconsistent with a claim of confidentiality; or
 - (b) if it is unfair in the circumstances for the person to retain the benefits of the privilege while taking the benefits of disclosure.
- (3) A person waives a privilege conferred by this Part if that person
 - (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
 - (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.

...

MATERIAL ACQUIRED BY ANOTHER PERSON

176 For a long time it was assumed that the privilege was personal as between lawyer and client. If privileged information came into a third party's possession, that person could lawfully tender it in evidence in court. This was so even where the material had been acquired wrongfully. But the third party would be restrained by a timely injunction from using the material, and required to hand it back to the client. In New Zealand, however, the Court of Appeal ruled in *R v Uljee* [1982] 1 NZLR 561, that this roundabout way of proceeding is not essential. In *Uljee* the accused was overheard talking with his solicitor soon after the crime, at a time when the police were keeping watch over the house; they had led the two to believe that their conversation was private. The Court held that the policeman, who was outside the window and heard the conversation, could not testify as to what was heard.

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| Should involuntary disclosure to a stranger result in loss of the privilege? |
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177 The Commission considers that the Court of Appeal's approach is the most helpful way of dealing with these problems. Admittedly, this was a criminal case involving lawyer-client communications of a highly confidential kind. But it may still be appropriate for the court to exercise its powers in the same way, even though a lesser degree of confidence is involved. If so, the simplest and most direct way to intervene is to decline to admit the privileged communication as evidence. We are inclined to recommend that any remaining doubts about the legality of this course should be removed by a provision in our proposed evidence code.

178 The English courts have invoked the power to intervene in other, less dramatic circumstances than those in *Uljee*. For example, if the material is obtained as a result of breach of confidence, or if the document is inadvertently handed over to another party to the action, and that person has knowingly taken advantage of the mistake, the courts may prevent further use of the document (eg, *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 2 All ER 716, 731). On the other hand, if the material has been received innocently it appears that there is not much which can be done. The Commission believes that the courts are best left to devise their own standards in these matters. The code provision already referred to should allow the court in its discretion to decline to admit material if it has been disclosed involuntarily or through a breach of confidence.

Draft section:

13 Waiver

...

(4) A person does not waive a privilege conferred by this Part in respect of a communication, information, opinion, or document which has been disclosed to another person if the disclosure resulted from a breach of confidence or otherwise occurred involuntarily.

...

JOINT AND SUCCESSIVE INTERESTS

179 Persons who have a joint interest in the subject matter of privileged communications may be entitled, first, to have access to any privileged document, and secondly, to assert the privilege to protect the document against its use by third parties. That is clearly the case where two or more parties jointly consult the same lawyer; communications between the lawyer and one joint client are not privileged against another joint client. Where, on the other hand, the parties happen to have consulted the same solicitor with no intention to make a joint appointment, there will be no joint privilege.

But the principle is not confined to people who appoint the same solicitor. Litigants who share a common interest may exchange information for limited purposes (see para 171) and protection will be given for the shared information when disclosure is sought by third parties (*Unilateral Investments Ltd v VNZ Acquisitions Ltd* [1993] 1 NZLR 468).

180 Another example is where two parties share interests in the same property successively in time. For example, the two may be the former and present owners of property. Depending upon the nature of the material involved, the privilege can pass from one to the other. The principal example is the case of the personal representative of a dead person, who succeeds not only to the deceased's property, but also to the right to obtain and protect privileged communications between the deceased (when alive) and the deceased's lawyer. The personal representative is in turn under an obligation to use the information fairly for all persons interested in the estate, or who may have a claim against it. This may result in disclosure of certain communications, for example, to the court hearing a claim under the Family Protection Act 1955.

181 The doctrine would appear to be a reasonably open-ended one, whose full potential has not yet been realised. For example, in the United States federal courts it has become accepted that, in shareholder actions for alleged wrongdoing by the company or its directors, information which is privileged as between the company and its legal advisers may be made available to the shareholders (*Garner v Wolfenbarger* 430 F 2d 1093). There seems no reason why, in New Zealand, the doctrine should not be further developed by the courts as the occasion arises.

182 Care must be taken, however, in considering what material passes to the successor. For example, it is said that the Official Assignee may acquire information which has passed between the bankrupt and the bankrupt's solicitor. But this can only be true up to a point. It may well be appropriate for the Official Assignee to have access to details of discussions with the lawyer about the protection of the bankrupt's property from potential lawsuits. But it does not seem appropriate for the Official Assignee to require the lawyer to divulge details of the advice given to the bankrupt on how to defend proceedings in bankruptcy, and what effect bankruptcy will have on the bankrupt's assets and future business activities.

183 The Commission's present intention is to carry these principles forward into the evidence code, while allowing some room for the courts to be discriminating in deciding which material should be passed on to a successor in title.

Draft section:

14 Joint and successive interests in privileged material

- (1) A person who jointly with some other person or persons has a privilege conferred by this Part in respect of a communication, information, opinion, or document
- (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by this Part from having access or seeking access to the privileged matter; and
 - (c) may, on the application of an interested person who wishes the privilege to be maintained, be ordered by a court not to disclose the privileged matter in a proceeding.
- (2) A personal representative of a deceased person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document and any other successor in title to property of a person who has such a privilege
- (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by this Part from having access or seeking access to the privileged matter
- to the extent that a court is satisfied that the personal representative or other successor in title to property has a justifiable interest in the communication, information, opinion, or document.
- (3) A personal representative of a deceased person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document and any other successor in title to property of a person who has such a privilege, may, on the application of an interested person who wishes the privilege to be maintained, be ordered by a court not to disclose the privileged matter in a proceeding.

THE FURTHERANCE OF A CRIMINAL OR UNLAWFUL ACT

184 It is well established that a communication made to further the commission of a crime or fraud is not protected by legal professional privilege, whether or not that purpose is shared with, or known to, the other party to the communication. But it is only recently that the underlying basis for the rule has been stated. It does not rest solely on the fact that a person who knowingly undertakes such a purpose is disqualified from relying upon a protection which might otherwise be claimed. There is a further element - the paramount duty of the courts to investigate and deal with criminal conduct.

185 This was accepted by the House of Lords in *R v Central Criminal Court, ex p Francis* [1989] AC 346, though not all members of the House concurred in Lord Goff's view that the principle applies to the general doctrine of legal professional privilege (395-396). (The House of Lords had to construe the provisions of a statutory provision requiring disclosure.) In that case a client and solicitor who carried through a routine house purchase transaction were innocent dupes of a third person who was using the purchase to "launder" money acquired through drug trafficking.

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| Should the client be affected by the unlawful purpose of the lawyer or some other person? |
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The House decided that the communications between solicitor and client had to be disclosed. The decision attracted criticism for its implication that no person consulting a solicitor could be sure of the privilege, as someone else (perhaps a supplier of funds, perhaps a witness) might be acting unlawfully.

186 The Commission accepts the force of that criticism, but only as regards those privileges where the policy considerations are so compelling that they should be framed as "absolute" privileges. Here, the person claiming the privilege should not be deprived of the privilege unless they know of the unlawful purpose. Our draft code will so provide (see s 15). On the other hand, as regards those privileges which are not absolute but subject to the court's overriding discretion, the fact that a third person is using an innocent communication as a means of effecting an unlawful purpose is an important consideration in the exercise of the discretion. The Commission therefore has no difficulty with the result in the *Francis* case, where the privilege claimed was for general legal advice and there appears to have been no indication that the innocent client could be prejudiced by disclosure. Under the Commission's proposals, such advice should attract only a qualified privilege. The considerations referred to in the *Francis* case could be taken into account by the court in exercising its discretion to override the privilege, with the same result. There is no need to provide for this specifically. Each of the provisions dealing with the qualified privilege is broad enough to accommodate the same considerations.

187 It will be sufficient, therefore, to provide a general exception to the law of privilege where it appears to the court that the privileged communication is made, or the information compiled, with an unlawful purpose. The exception should be limited to cases where the person claiming the privilege knows of the unlawful purpose. That should be the only occasion where an absolutely privileged transaction is affected by the unlawful intent of one of the parties to that transaction, or some third person.

188 With that limitation, the Commission believes that the present "exception" is an important qualification to the law of privilege and should be provided for specifically in the code provisions. As to the form of the exception, we do not think that it should be an absolute rule. We are inclined to prefer a provision which says that the court has a discretion to disallow a claim of privilege for communications made to further a crime or fraud. This would enable the court to take into account the investigation and punishment of crime as an important consideration. It is not, however, the only consideration to be weighed by the court. Therefore, the court should not always disregard the privilege when it is apparent that communications have been made for an unlawful purpose. Especially in the case of communications between lawyer and client which are sought to be disclosed in criminal proceedings, it may not be appropriate to override the privilege.

Suppose, for example, a client charged with a very serious offence concocts a totally false alibi, but then resiles from that position. Should it follow inexorably that the lawyer should be forced to disclose that? It seems better to permit the court to balance the opposing interests.

189 There is a further question whether (as has been held in Australia) the exception should extend beyond crime or fraud, to include any case where there is an intention to do an unlawful act. (This rule has now been adopted in the Australian Evidence Bill 1993, cl 125, but confined to actions resulting in civil penalties, or deliberate abuses of power). The Commission is inclined to think that it should. It is difficult to defend the use of a privilege to cloak a deliberately unlawful act, or to avoid the due consequences of having committed one. (For example, instructing a counsel solely to ensure that the counsel - who may also be a witness to the event in question - does not have to make a compulsory disclosure which would otherwise have been required.) It should not matter whether that act is a crime, an abuse of statutory power, or an attempt to prevent others exercising their legal rights. This will not result in loss of privilege where people merely want to find out their rights, and how to "sail close" to the existing law without infringing it. Clearly that would not be an "unlawful intention" for these purposes. Nor would it be unlawful for a guilty person to instruct counsel to defend a case on the basis that guilt has not been established by the Crown.

Should any "unlawful" purpose result in loss of the privilege? Or only a "criminal" purpose?

Draft section:

15 Powers of court to disallow privilege

(1) A court may disallow a claim of privilege conferred by this Part in respect of a communication or information if the court considers that the communication was made or received or the information was compiled or prepared to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence, a fraud, or other unlawful act.

...

INFORMATION RELEVANT TO THE DEFENCE OF AN ACCUSED

190 In recent times it has become firmly established that legal professional privilege cannot be invoked where its exercise would prejudice the defence of an accused. The same exception has been recognised in relation to the identity of police informers (see ch 12). The Commission is not convinced, however, that this should be a complete answer to a claim of privilege. Rather, it seems more appropriately to be an important consideration which may permit the court to obtain information if it is considered just in the circumstances, notwithstanding the privilege.

Should the court have a *discretion* to override the privilege where information is sought by an accused? Or should there be a *rule* enforcing disclosure?

191 Some case law suggests that to override the privilege an accused might be

required to show something more than the fact that the information is relevant to the defence. This "additional" factor will vary according to the needs of the particular case. In *R v Ataou* [1988] 2 All ER 321, for example, the English Court of Criminal Appeal held that before an order requiring disclosure would be made, it must be shown on the balance of probabilities that a claim of privilege should not be sustained. This could be done by establishing that the client no longer had any recognisable interest in maintaining the privilege. This ruling was no doubt appropriate in the context of the facts of that particular case. But the Commission does not believe it should be given the status of a general rule.

There are many different contexts in which the issues arise. The privileges sought to be protected differ considerably in their social importance. Not all of them need to be so respectfully treated. In general the Commission is of the view that each case will need to be considered on its own merits, having regard to the nature of the evidence and the possible prejudice to the person with the right to claim the privilege.

192 There is one situation where the privilege is particularly likely to be attacked on the ground that it is needed for defending a criminal proceeding. That is the case of co-defendants in a criminal case. In dealing with such a situation, the Ontario Court of Appeal in *R v Dunbar and Logan* (1983) 138 DLR 221, took the approach of balancing the interests of the defendant seeking disclosure against the interests of the other defendant in withholding the information. If two persons, A and B, are each charged with a crime and tried together, can A require B's solicitor to disclose what B has said to B's solicitor, and vice versa? The information would appear to be potentially helpful for each of the defences. Various solutions have been offered:

- the information should not be privileged;
- the privilege should be sustained or overridden in accordance with a "balancing" test; or
- the information should be privileged.

193 The Commission favours the second option. It accords best with principle and with the general character of the law of privilege as it has emerged in recent years. It also reinforces the protection given to co-accused by limiting their competence and compellability as witnesses at any time when they might be jeopardised by giving evidence (Evidence Act 1908 s 4(7)). To override the privilege and seek evidence from the lawyer while the co-accused is still at risk would subvert that protection. But much would depend upon the nature of the information. The possibility of separate trials would also arise. No doubt the overriding concern in every case would be to ensure a fair trial for both A and B. In this respect a general rule of privilege or no privilege would not appear helpful.

194 The Commission supports a general provision permitting privilege to be overridden, in the court's discretion, if the information is required for the defence of an accused and other evidence to similar effect cannot reasonably be obtained by the accused. However, this is a tentative view which may need revisiting as the Commission's work on criminal procedure develops.

Draft section:

15 Powers of court to disallow privilege

...

- (2) A court may disallow a claim of privilege conferred by this Part in respect of a communication or information if the court considers that
- (a) evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present his or her defence effectively; and
 - (b) other evidence to similar effect cannot reasonably be procured by the defendant.

Settlement negotiations:
statements made "without prejudice"

The "without prejudice" rule protects communications made with a view to settling a dispute. It is sound in policy. But before it can be codified, questions about its underlying nature and legal form have to be resolved.

195 People who have a dispute about their rights and liabilities will usually wish to negotiate with each other to see whether the dispute can be settled or compromised. In an effort to reach a settlement, they may say things which they would not wish to be used in evidence, most commonly, statements which could be taken as indicating a belief that the law or facts may be against them. It is well established that these statements cannot be used in later court proceedings. They are said to be made "without prejudice", and are inadmissible under the "without prejudice" rule.

196 The term "without prejudice" has different meanings in different contexts, and only one of these meanings is intended here: the statement is made "without prejudice" to the speaker's right to pursue or defend litigation as if the statement had not been made. This is to be compared, for example, with the contractual context, where a concession may be made "without prejudice" to the maker's rights to revert, at some future date, to the original position under the contract. And sometimes the expression may be made without any specific legal consequence at all, as where a payment is made voluntarily, but "without prejudice", in the vain hope that it might be reclaimed at some future time.

197 The Commission believes that the evidentiary "without prejudice" rule is a useful and well-justified legal doctrine. But the process of codification raises significant questions about its nature and the way in which it is to be applied. This chapter considers

- the justification for the rule;
- its nature and extent; and
- how the privilege can be invoked during negotiations.

THE JUSTIFICATION FOR THE RULE

198 Historically, the rule began as little more than an acknowledgement that evidence of this kind normally has very little weight or value. The courts took the view that when someone makes a concession in the hope that they can reach a settlement of a dispute, this says little about the facts on which the dispute is based. But in the latter half of the eighteenth century, the courts began to recognise that there was also a legitimate policy consideration to be taken into account. It is in the best interests of society as a whole that disputes are resolved quickly and by mutual agreement; parties should be able to "buy their peace" by offering a settlement, without fear that the concession will be held against them if the litigation proceeds (see generally Vaver, "Without Prejudice' Communications - Their Admissibility and Effect" (1974) 9 Univ British Columbia LR 85).

199 Both the evidentiary and policy considerations are important in modern litigation, and amply support the continued existence of the rule. As the Commission has already pointed out in other contexts, resolving disputes quickly and informally is an important benefit to any legal system (*Arbitration* (NZLC R20 1991) ix; *The Structure of the Courts* (NZLC R7 1989) para 142). A consideration of "fair play" is also relevant - it would not be fair to permit one party to litigation to entice the other into good faith compromise negotiations, simply to extract concessions which can be used in court proceedings.

200 There are examples where the need for the evidence outweighs any scruples the court might have about "prejudicing" the maker of the statement. Here, the compromise effort may well be genuine, but the concession has an unusual significance which makes it vital that the evidence be admitted. The statement may, for example, give notice to the other side that an act of bankruptcy has been committed, an event which must have serious consequences for any agreement into which the parties might enter (*In re Daintry, ex parte Holt* [1893] 2 QBD 116). Another obvious illustration is where the parties are now litigating over the terms of the settlement purported to have been reached, and it is necessary to refer to their negotiations to find out what that agreement was. More difficult is the case where one of the parties tries to persuade the court to reduce the costs that would otherwise be payable, on account of a "without prejudice" offer of settlement made by that party. The courts have not admitted such evidence, although the reasons given are not entirely convincing (*Walker v Wilsher* (1889) 23 QBD 335, but see *Cutts v Head* [1984] Ch 290).

201 The Commission proposes that the evidence code continue to protect communications made during settlement negotiations from use in litigation. The need for protection to allow the possibility of settlement to be effectively explored is the primary justification for the rule. But the modest evidential value of much of the information is also significant in determining the balance the law should strike between this policy and the

general evidential policy which requires all relevant information to be made available to a court.

THE NATURE OF THE PROTECTION

202 What is the nature of the "without prejudice" rule - does it confer a "privilege"? If so, it is unusual because, although there is a communication between two people, the purpose of the privilege is not to prevent a third party having access to it. The person to whom the statement is made is generally the person seeking to tender it as evidence. It is for this reason that some courts prefer to describe the rule as one of "admissibility", rather than as one of privilege (See, eg, *Rush and Tompkins v GLC* [1989] AC 1280).

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| <p>Is the "without prejudice" rule best seen as a privilege, or as a rule about the inadmissibility of unhelpful evidence?</p> |
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203 But in all other respects it is very similar to a privilege, and other judges and writers have classified it in that way (eg, *Cross on Evidence* (Mathieson, 1989) paras 10.42-10.46). The Commission prefers that view, and proposes to include the rule amongst the sections of the code dealing with the law of privilege. The only major difference between this rule and the other privileges considered in this paper is that, if it is to be waived at all, both parties to the communication must agree to its use in court. This is because each has an interest that the settlement negotiation as a whole should be kept from the court, although evidence of particular statements may happen to be potentially damaging only to one party (see *Prudential Assurance Co v Fountain Page Ltd* [1991] 3 All ER 878).

THE EXTENT OF THE PRIVILEGE

204 There are two aspects relating to the extent of the privilege which should be considered. The first is its application in criminal cases. The second is whether, and if so in what circumstances, the privilege can be overridden in the wider interests of justice.

Criminal cases

205 The privilege has in practice only been used in relation to the settlement of civil proceedings, because settlement or compromise (known in the United States as "plea bargaining") is not a practice which is formally recognised in New Zealand criminal procedure. Although there are quite detailed rules on plea bargaining in the United States codes of evidence and procedure, it would be inappropriate to include such provisions in a New Zealand evidence code until practice has changed. The broader topic may fall for consideration under the Commission's reference on criminal procedure.

Overriding considerations of justice

206 Of more immediate importance is how the various public interest limits on the privilege are to be accommodated in a code provision. Should it attempt to spell out each of the specific occasions where privilege cannot be asserted? Or is it preferable to deal with the matter more broadly, leaving it to the court to determine whether, in the circumstance of the particular case, the need for the evidence in court proceedings outweighs the policy reasons for excluding it? Consistently with recommendations made in respect of a number of other privileges, the Commission prefers the latter approach.

Should the "without prejudice" rule have its own defined exceptions? Or is it sufficient to provide a general judicial discretion to override the privilege?

207 The present law is unclear. In *Rush and Tompkins* Lord Griffiths said "resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it" (1300). However, the texts usually spell out those reasons in some detail, and it is not clear whether a departure from that practice was envisaged in the passage quoted.

208 The most comprehensive attempt to state the circumstances in which the privilege should not apply is found in the legislation proposed by the Australian Law Reform Commission, which was (in substance) introduced into the Federal Parliament in 1991 (*ALRC Report on Evidence* R38 (1987), s 113 draft Evidence Act). Under that definition as first proposed, the privilege was to have no application if

- the dispute is settled;
- the evidence contradicts or qualifies evidence given about the attempt to settle the dispute;
- the communication affects the rights of any person;
- the communication is made in furtherance of fraud, a criminal offence, or an action giving rise to a civil penalty; or
- a party to the dispute knows, or ought reasonably to know, that the communication is made in furtherance of a deliberate abuse of power.

There were also a number of provisions dealing with disclosure by consent. The list was somewhat altered and extended by the time of the introduction of the Evidence Bill 1993 (see cl 131).

209 The Commission agrees that this list of exclusions points to situations where the court might properly override the privilege, but doubts whether the list is - or can ever be - exhaustive. The first three exceptions are illustrations of cases where the need for the information in court proceedings might outweigh any purpose served by keeping the information secret. There are others. Suppose that in the course of "without prejudice" negotiations, one party discloses to the other that a serious crime has been committed, and the police wish to use the disclosure as evidence in support of a prosecution for that crime. Other examples are where one party applies unfair pressure (which need not necessarily be unlawful), or where to recognise the privilege would be inconsistent with

the policy of other legislation, such as the Fair Trading Act 1986. Such situations are of course unlikely, but must still be considered when developing legislation intended for broad and enduring application.

210 Conversely, although the Australian exceptions point to situations where the justification for the privilege is substantially weaker, there may be circumstances within those exceptions where protection is still necessary. In *Rush and Tompkins*, for example, a dispute between two parties had been settled. The case falls within the first exception on the list. But a third party was suing in respect of the same subject matter, and sought discovery of material from the "without prejudice" negotiations between the other two. The House of Lords held that discovery should not be permitted. As the first of the above "exceptions" was initially drafted, it seems unlikely that the same result could be reached using the statutory list.

211 The Commission therefore inclines to the view that the law on the scope of the privilege is too fluid to permit the enactment of firm rule with a series of defined exceptions. The Commission's preference, in codifying the rule, is to include a direct statement of the basic rule or principle, along with a power for the courts to override it if the need for the information outweighs the adverse effects of disclosure on dispute settlement.

HOW THE PRIVILEGE IS TO BE INVOKED

212 When negotiating on behalf of clients, lawyers customarily invoke the privilege by using the words "without prejudice". The practice appears to date back to the 1820s. It is a useful practice which serves to identify admissions made for the purpose of negotiation, and distinguish those where the admission is unconditional. But the use of these words has never been essential. "[I]f it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission" (*Rush and Tompkins*, 1299-1300).

213 The courts will readily infer that an admission is made conditionally, for the purpose of negotiation (*Rodgers v Rodgers* (1964) 114 CLR 608, 614). And where a series of letters has been begun on a "without prejudice" basis, only a clear, express warning from one of the parties will change the status of the correspondence which follows. Nor is the presence of a third party as mediator any bar to invoking the privilege.

214 The privilege extends to communications which are reasonably incidental to the settlement negotiations. The policy is to allow the parties to "speak freely about all issues in the litigation both factual and legal when seeking compromise" (*Rush and Tompkins*, 1300). However, it has been held that where an accident claimant, who submitted himself for a medical examination as part of negotiations for a settlement, made a damaging admission to the doctor about the cause of the accident, the communication was not reasonably incidental to the negotiations and the privilege did not apply (*Field v Commissioner of Railways for NSW* (1957) 99 CLR 285). That was a difficult case, especially if approached solely as a question about the meaning of the words "reasonably incidental". Looking at the problem more broadly, this was a case where the claimant's

statement was of considerable significance to the case, and it was totally unnecessary for any attempt at settlement. A decision in favour of disclosure would be unlikely to affect adversely the settlement of future disputes. Applying the discretionary approach proposed in para 0, the outcome reached by the majority of the High Court of Australia in that case is justifiable.

215 In general, the courts have adopted a wide view of how the privilege may be invoked, and the communications which will be protected. The criteria in our proposed legislation are drafted to reflect a similar view.

Draft section:

6 Privilege for settlement negotiations

- (1) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of
 - (a) any communication between that person and any other person who is a party to the dispute if the communication was
 - (i) intended to be confidential; and
 - (ii) made in connection with an attempt to settle the dispute between the persons; and
 - (b) a confidential document that contains the terms of an agreed settlement of the dispute.
- (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document which that person has prepared, or caused to be prepared, in connection with an attempt to negotiate a settlement of the dispute.
- (3) Notwithstanding subsection (1) and (2), a court may order the disclosure in a proceeding of a communication or document for which a person has a privilege under those subsections if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege.

PART III

PRIVILEGES ASSOCIATED WITH
PARTICULAR CONFIDENTIAL RELATIONSHIPS

Introduction

Privilege is conventionally linked with a number of confidential relationships, apart from those between lawyers and clients. Most of these are already provided for by statute. If there is to be a general discretionary power to protect confidential information (ch 15), what purposes can these specific statutory provisions serve?

216 The privileges considered in this part of the paper are all linked to specific confidential relationships, namely

- husbands and wives (ch 9),
- ministers of religion and those in their spiritual care (ch 10),
- doctors and patients (ch 11),
- law enforcement agencies and informers (ch 12), and
- journalists and their sources (ch 13).

There are of course many other relationships where conferring an evidentiary privilege has been suggested. These particular ones are selected partly on historical grounds. At some time in the past, they were seen by either the courts or the legislature as worthy of special consideration. For all but the last the law has created a privilege, or something akin to it, peculiar to that relationship. In this respect they differ from the protections considered in the next part of the paper. There, when protection is accorded, it is done with reference to the confidential nature of the relationship or the secrecy of the information in question, and not because the relationship or information happens to fall within any pre-determined

class. Here, the protection of the privilege depends only upon the existence of a particular kind of relationship.

217 At least some of these relationships (eg, doctor and patient) might now be better governed by the discretion applicable to any confidential relationship, discussed in ch 15. In other cases, however, it appears desirable that the relationship should continue to be given separate and absolute protection. Where the case for protection of a defined type of relationship is clear cut, there is merit in stating a privilege separate from the general discretion. These separate provisions can stand as distinct points of reference, throwing light on how similar confidential relationships should be dealt with under the discretion. This is a matter which will be taken up more fully in ch 14.

218 Whether a particular privilege should be specifically provided for nowadays depends on how cogently it can be demonstrated that it is justified. The task is more difficult here than in the previous part because of the fundamentally disparate nature of the two opposing claims. In the case of legal professional privilege, the two opposing claims both relate to the administration of justice. Would the court system, and the activities which surround it, be more significantly harmed by withholding the privileged information, or by ordering its disclosure in court proceedings? But the privileges discussed in this part depend upon balancing the cost to the court system against the wider public interest. For example, in the case of journalists and their sources, if the source is not disclosed, the court system is adversely affected. If the source is disclosed, society may perhaps suffer damage of a very different character, namely, a deterioration in the freedom and quality of public information.

219 These potential harms to society are not easy to evaluate in themselves, let alone to balance against the potential harm which may be done to the administration of justice if significant information is not disclosed. Nor can they be readily demonstrated in a courtroom setting. Judges who administer justice every day may perhaps be more conscious of costs for the legal system than broader social costs. A legislative assessment, even if only in general terms, may provide a truer and more acceptable initial balance between these two harms than individual judicial decisions. But that cannot be achieved for every class of case where, in particular circumstances, privilege can properly be claimed.

220 This part of the paper considers the claims that may be made in support of a specific privilege in each of the five cases mentioned. In each case the Commission concludes that some protection is still justified and considers how best to give it effect. Sometimes, however, that effect may be satisfactorily achieved without enacting a specific statutory privilege.

Married persons: privilege and compellability

Requiring wives and husbands to testify against each other can be prejudicial to the marriage relationship, and to the economic welfare of them both. But if they are to be protected, how and when should that be done? Should non-marriage relationships also be protected? Are there situations where a wife or husband should still be made to testify? Who decides whether they will testify?

221 Under the present law, a person is generally competent to testify in both criminal and civil proceedings affecting that person's spouse. The ordinary rules of evidence will apply. But there are two significant qualifications in New Zealand law. One is the privilege for communications between husband and wife (the privilege). The other is the rule that in criminal cases the spouse of an accused person cannot be made to give evidence for the prosecution (the non-compellability rule). When dealing with other forms of privilege we have not needed to explore the question of compellability. But here the history and purposes of the two rules are closely intertwined. Both are techniques for protecting a relationship from the court process. The privilege can only be understood and evaluated when both are considered together.

222 The same Act that first enabled spouses to give evidence also created a privilege to protect communications between husband and wife (English Acts Act 1854). The wording of the statutory privilege has not changed since its enactment and is now set out in s 29 of the Evidence Amendment Act (No 2) 1980:

A husband shall not be compellable in any proceedings to disclose any communication made to him by his wife during the marriage, and a wife shall not be compellable in any proceeding to disclose any communication made to her by her husband during the marriage.

223 Although the provision is expressed in terms of compellability, it is in substance a privilege, since the spouse must testify about everything except the communications described in s 29. In contrast, the rule of general non-compellability in s 5 of the Evidence Act 1908 provides a more significant limit on the evidence that may be required from a married person: the prosecution in a criminal case cannot compel a person to give evidence against his or her spouse. A defendant can compel his or her spouse to give evidence for the defence. But the defendant cannot compel the spouse of a co-accused to testify, unless the co-accused joins in the application.

224 The Commission is of the view that the protection conferred by the rules of privilege and non-compellability reflects important policy considerations. But the existing law may no longer be a fully effective and appropriate way of meeting these concerns. Framing adequate legislation is difficult, however. It is doubtful whether there will ever be a perfect response in the laws of evidence to some of the major issues that test this area of law, such as society's response to family violence.

225 In this chapter we consider

- the justification for protection,
- the groups to whom the law should offer protection,
- the privilege for communications between spouses, and
- the non-compellability rule.

THE JUSTIFICATION FOR PROTECTION

226 Reasons advanced at earlier times for not allowing husbands and wives to testify against each other, such as their supposed unity of interest and the risk of perjury, carried little weight once the parties to proceedings were able to give evidence in their own cause. Judges and juries are able to evaluate the weight of evidence. And the suggestion that the privilege for communications between husband and wife would encourage candour and honesty within the marriage has always lacked practical plausibility. At one time there may also have been a link with the privilege against self-incrimination, the protection for the evidence of spouses perhaps being a last vestige of earlier notions of the marriage consortium, or simply required by fairness. But that could not be a cogent reason for the non-compellability rule now.

Should any protection be given for people who are required to testify against their spouses?

227 Rather, the history of the protection of spouses from the general duty to give

evidence suggests that the underlying aim has been to protect the institution of marriage. The relationship of husband and wife is one of the most intimate and confidential that there can be. To compel a husband or wife to come to court and offer testimony against the other partner, or to testify about matters relating to the confidential concerns of the marriage, may have serious consequences for that marriage.

228 The conclusion that the law seems to have evolved to protect the institution of marriage provides little guidance for the shape of any future reform. The further question must be asked: why has the law protected marriage in this way? Clearly it has been an important institution over time, basic to much of the way in which society has traditionally been organised. In earlier times it was also much harder to leave an unhappy marriage. Thus a strong social interest could be discerned in the nuclear family unit remaining intact and functional.

229 Two underlying policy goals of the law can be discerned. First is the fact that marriage will in general be a very intimate relationship - arguably more so than any other class of relationship. It is unquestionably harsh for the legal system to disregard that intimacy in its search for information. There may be an ongoing intimate relationship which the witness wants to preserve even when the relationship has involved violence. A second possible factor is the hardship that may befall a spouse as a result of giving evidence in the course of a prosecution. When the proceedings concern abuse within the family, a spousal witness may be reluctant to give evidence because of fear of further violence, or fear of adverse economic or social consequences for the family. In other cases, although the defendant's spouse may be the best placed to give information about the whereabouts, and physical and mental state of the defendant at particular crucial times, the spouse may have almost as much to lose emotionally and financially as the defendant does if a conviction is obtained.

230 There may also be some cost, at a more general level, which would result from denying any form of protection to the partner of a defendant. The public may well question the adequacy of a justice system in which a battered woman who refuses to testify against her partner is imprisoned for contempt while the defendant goes free.

231 The cost to the legal system of offering protection must of course be put into the balance. But in practical terms it may not be great. For any one of the reasons just mentioned a spouse may have a strong incentive to be absent from the court, decline to answer questions, or answer them in a false or prevaricating way. A significant number of family violence prosecutions apparently collapse at present because of the reluctance of the spouse to give evidence.

232 Nevertheless, there are occasions when the need for the court to be able to ascertain the truth, and the importance to the case of the information held by the spouse, would seem to be overwhelming. An obvious example is proceedings to determine the custody of children, where the welfare of the child is the paramount consideration. Another, more difficult case may be the prosecution of a father for child abuse, where the mother is also fearful of abuse by her partner and so is reluctant to testify. The balance of interests in these cases, and the array of pressures that may be directed at the potential spouse-witness, are complex, and probably unable to be resolved in the abstract, or in a

general way. But it is clear that there are times when it is hard to justify putting the protection of a relationship or one individual before the court's need for crucial information in proceedings aimed at preventing harm to another.

233 With such cases in mind, it has been suggested that the protection is now an anachronism, and that it is time for it to be done away with altogether. But careful thought needs to be given to the practical consequences of that course. Whatever the law, witnesses will always be reluctant to give evidence against someone they are close to. In the absence of any specific rule or procedure, the matter will be handled in the first instance by the discretion of the prosecution in preparing the case. The prosecution will have a choice, for example, about whether to press the reluctant witness to give evidence, or to pursue the case at all, or to bring contempt proceedings against a witness who remains defiant. They may not always take sufficient account of the pressures on the spouse and the need for that person's evidence, as distinct from the question of whether a prosecution is warranted. A court in turn must decide whether contempt is proved and whether any defence is available, and it then has a discretion on penalty. Thus abolition of any explicit protection will still result in discretion being exercised, but in an untrammelled manner and potentially later in the proceedings than is desirable.

234 The Commission's provisional conclusion is that it is appropriate for the law of evidence to make allowance for these concerns. We do not know of a jurisdiction which does not accord some protection. We should not ignore the fact that the intrusion of the court process into people's lives can cause significant disruption and hardship. Moreover, it is preferable to resolve any question about the obligation to give evidence early in the process, and explicitly. The evidence code should reflect this policy. Before examining the form of the protection, however, we consider another basic question of policy and scope: the question of to whom protection should be available.

THE SCOPE OF PROTECTION

235 As mentioned, family structures are evolving. The marriage rate has fallen significantly in recent decades. Many are marrying later in life, perhaps cohabiting for a time before marrying, if they marry at all. The divorce rate has risen. According to census figures, the number living in de facto relationships increased by over 30 percent between 1981 and 1986, and by over 40 percent between 1986 and 1991. There are now over 160,000 people living in such relationships (*1993 Yearbook*, 94).

236 The policy goals for according protection as we have defined them - to protect intimacy and to avoid hardship - extend to other relationships, and in particular to other couples in "relationships in the nature of marriage". This is so whether the relationship is heterosexual or with a person of the same sex. The New Zealand Bill of Rights Act 1990 recognises a right to be free from discrimination on the basis of marital status or sexual orientation (s 19). Therefore, any protection should apply equally to these couples.

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| Should protection extend to de facto and other family relationships? |
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237 The policy could also be argued to go much wider, for consistency requiring

protection of other people who are bound to the accused by ties of close affection. Such a broad scope for the law has been proposed by the Law Reform Commission of Canada (*Report on Evidence* (1978) s 40 draft Evidence Code), and in a dissenting recommendation by Justice Kirby in the Australian Law Reform Commission's *Interim Report on Evidence* (R26 Vol I (1985) paras 540-543). That dissenting view was ultimately adopted in the Evidence Bill 1993 cl 18(1) (protection extended to parents and children). What is the extent of protection now warranted in New Zealand?

238 The Commission suggests that it is possible to draw a line between relationships analogous to marriage and other close ties for the purposes of evidence law, simply on the degree of intimacy that will usually be involved. They are in general the most intimate type of relationship possible. They are as well voluntarily entered into and maintained, and are therefore perhaps more vulnerable than other family ties. It also seems relevant that other close relationships, such as that between parent and child, have been a basic part of our social structures longer than marriage has, and yet the law has never seen fit to protect them.

239 On one view this distinction can be seen as arbitrary. But lines do have to be drawn. Extending the protection to relationships of the same character as marriage, but not to all those who may claim some level of closeness with an accused person, seems to the Commission to be an acceptable balance between the desire to recognise the personal costs that involvement in the legal process may carry and the basic principle of evidence law that all relevant evidence be available to the decision-maker. Any apparent arbitrariness is softened in this part of the evidence code by the ability of those excluded from the specific protective provisions to argue for protection of confidential communications by analogy under the general discretion. Nonetheless, we would be interested to know how often in practice the unwillingness of others to give evidence is a significant issue.

240 The Commission intends to recommend that the evidence code contain an explicit mechanism for allowing spouses and de facto partners, whether of the same or opposite sex, not to testify in criminal cases. Finding the appropriate terminology, however, has not been easy.

Most if not all New Zealand legislation that applies to de facto partners does so by reference to the concept of legal marriage, using such phrases as "living as husband and wife" or, more commonly, "living in a relationship in the nature of marriage". This is so even when the legislation includes same sex relationships (see, eg, the Electricity Act 1992 s 111(2)(e)). We accept that some may find the equation of such relationships with marriage unfortunate, but can see no easy way to avoid it. It is difficult to find any other effective way of indicating how close the relationship needs to be, in terms of emotional and financial co-dependence, for the legislative protection to apply.

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| How should de facto partnerships be defined? |
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241 In the majority of cases it should be readily apparent whether a relationship is covered. But if there is a question about the nature of a particular relationship, the court will have to consider the policy behind the protection and the indicia of a "marriage-like relationship". Drawing on case law and previous legislative attempts at a definition, the Commission suggests that the key factors relevant to this decision are the living arrangements of the couple, and the emotional and sexual relationship between them. To

a lesser extent the degree to which financial resources are pooled may also be relevant nowadays although many couples (married and unmarried) choose to keep these separate. We have considered whether it would be helpful to state in the evidence code the main factors relevant to determining whether a person should be protected from the obligation to give evidence because of his or her relationship with the accused, but are not convinced that such a list is necessary or desirable. The factors are in large part common sense. To attempt to list some raises the spectre of arguments focused on technical points about the factors and their relative weights rather than the basic character of the relationship in question and its need for protection. We have not included a list in the draft code provisions, but would welcome comment on whether one would be desirable. We now turn to examine the two existing mechanisms for protection.

THE PRIVILEGE FOR COMMUNICATIONS BETWEEN SPOUSES

A general privilege for spousal communications?

242 The Commission doubts whether the present privilege is an effective means of minimising the intrusion of the court process into personal lives. Although clear and decisive, the law as set out in s 29 of the Evidence Amendment Act does not protect very much (see para 0). It does not do justice to the claims to privacy of communications or of other information shared during the relationship. In particular, it protects only statements made *to* the witness and not statements made *by* the witness.

Thus in civil cases it is in theory possible to render the privilege ineffective: it should be possible to construct the entire conversation because each spouse is compellable to tell the court what he or she said. (The hearsay rule may provide another limit at present on the admission of this information.) Nor does the privilege protect highly intimate and personal matters concerning the relationship between the two not contained in statements by the witness. The witness may still be required to give evidence, and perhaps evidence on highly personal and sensitive matters.

243 The potential effect of the privilege is also important. In criminal proceedings, where the defendant is not of course compellable, the privilege may permit the defendant's spouse to filter the evidence given to the court. The spouse may speak of events in a way which makes them appear entirely innocent, when (if what was said at the time is included) they would be damaging. Or the spouse may select particular statements and claim the privilege for others. This practice is perhaps not a common one, and the principle of waiver may apply to a spouse who testifies to only some of a connected series of statements (see ch 6). But there is still potential for the spouse to filter evidence in a way which the defendant, if he or she chose to give evidence, could not.

244 These difficulties are a necessary part of any system of protection which seizes upon one aspect (communications) of the many ways in which information may pass from one spouse to the other in the course of a close relationship. Protection is desirable, but these technical difficulties have the potential to result in the separate and absolute marital privilege operating in an unfair manner. For these reasons the privilege has been abolished in England, and its abolition has been proposed in a number of other

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| Should the present privilege for communications between husband and wife be abolished? |
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jurisdictions.

245 The Commission believes that s 29 should not be carried forward into the evidence code. If necessary, protection for particular confidential communications or information can be sought under the general discretion of a court to exclude testimony in appropriate cases. We return to this power in ch 15.

A special rule for the resolution of domestic disputes?

246 So much for a general privilege for spousal and other familial communications. There is, however, another form of communication, associated with the relationship of husband and wife, for which special provision has been made in the law. Section 18(1) of the Family Proceedings Act 1980 provides that where any information, statement or admission is disclosed or made to a counsellor under that Act, it is not admissible as evidence in any judicial proceedings. This provision seems to us to be sound in general principle, since there are strong policy reasons to encourage settlement of family disputes and to ensure that any settlements are based on full awareness of all relevant facts. The English courts, acting under their general common law powers (see ch 15), have now reached a similar conclusion: *In re D (Minors)* [1993] Fam 231, 234. So, even without s 18(1), we would expect the courts to reach similar conclusions acting under the general discretion which will be proposed in ch 15.

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| Should the present protection for communications with family counsellors be reviewed? |
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247 There are, however, difficulties with a clear-cut statutory provision of this nature. In *re D* it was recognised that at common law there may be an exception for the "very unusual case" where there has been child abuse or there is a present possibility of harm to a child. We concur in that view, and would question whether s 18(1) should not make some provision for that. Also, it is apparent that the common law principle of non-disclosure applies only to family proceedings, whereas s 18(1) is more broadly expressed and could apply in any judicial proceedings, such as criminal proceedings for child abuse, or a claim in tort for violence occurring at a mediation conference. Indeed, when the Scottish Law Reform Commission considered a similar specific statutory provision, they put in these as exceptions and added a number of others as well (see Scottish Law Reform Commission, *Evidence: Protection of Family Mediation* R136 (1992)). The New Zealand provision is, of course, open to interpretation by the courts, and in view of these difficulties may perhaps be confined to the particular context of proceedings under the Family Proceedings Act itself.

248 The Scottish Law Reform Commission preferred a specific statutory provision to the discretionary approach which has found favour in New Zealand in other contexts. Of the latter it said, "It would not remove doubt, it would not provide clear and simple rules, and it would present the courts with a time-consuming and difficult job" (see para 2.13). It will be borne in mind, however, that in Scotland there was no corresponding jurisdiction to that under which the English Court had acted in *re D*, so the Scottish Law Reform Commission's apprehension in this regard would carry greater weight in Scotland than it would either in England or here. For reasons set out more fully in ch 14 (paras 0-0), we consider that these fears (while not completely groundless) are of less significance in New

Zealand, and are outweighed by the factors which are in favour of a discretionary provision.

249 More importantly, despite all the efforts made in the Scottish proposals to identify potential exceptions, the rules are still insufficiently discriminating. In criminal cases, or in cases where the agreement itself was challenged, the court would (under the proposed Scottish provision) be obliged to admit all relevant evidence, with no discretion as regards information which in other circumstances would be protected. Nor would the information be protected in child care or adoption proceedings. There are some cases where the disclosure principle might need to be tempered with mercy. Conversely, in a civil action brought by a child for past abuse, the information would be absolutely protected, which is in our view undesirable. We would therefore have considerable difficulty supporting a similar proposal here.

250 On the assumption, however, that s 18(l) can be given a limited interpretation, we do not propose to recommend its repeal at this time. We take the same view of a number of other related provisions which are expressed in similar terms.⁵

NON-COMPELLABILITY IN CRIMINAL CASES

251 The rule of non-compellability is a more comprehensive way of dealing with the problem than the privilege. It applies only in criminal cases: since in civil cases a defendant can be obliged to testify for the plaintiff, any rule which prevented the defendant's spouse from testifying would make little sense. The practical effect of the criminal law rule is that, if a person decides to give evidence against a partner then, with the abolition of the privilege, the whole evidence will have to be given. If not, nothing comes to the court and all the information which the person has acquired is protected. The current law gives that decision to the potential witness. This protection has for over a century been available only in criminal cases, where the consequences of an adverse finding are the most severe for the defendant and potentially also for the spouse witness.

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| Should the spouse or partner of an accused be a compellable witness in a criminal trial? |
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252 The Law Commission has already concluded that some protection should continue to be given here, and that it is not appropriate at present to leave these decisions entirely within the discretion of the prosecution. Three possibilities remain:

- to continue the current law, leaving the decision with the potential witness but expanding the group of people who are able to invoke the protection;
- to qualify a firm rule of non-compellability by exempting specified offences, or by giving the court a general power to override the protection where the interests of justice so require; and

⁵ See Children, Young Persons, and Their Families Act 1989 ss 37, 77, and 176; Protection of Personal Property Rights Act 1988 s 72.

- to render spouses subject to the normal obligations to give evidence, but give the court power to excuse witnesses where the balance of interests does not require that the evidence be given.

At this stage we prefer the last of these options.

An absolute rule of non-compellability

253 New Zealand has a simple rule at present that in criminal cases the prosecution cannot compel a spouse to testify. The individual witness is given the decision. There is merit in practice in leaving the witness to assess the potentially complex personal pressures that may surround this decision. But this rule leaves no room for an overriding public interest in prosecution, such as that referred to in para 232. In addition, this type of rule may be less satisfactory when combined with the more broadly defined group of people to whom the Commission has suggested protection should be accorded. The difficult factual questions that may at times arise in determining whether borderline relationships are covered by the rule could diminish the practicability of the rule. There is a risk that the prosecution will be confronted with a potentially large group of people refusing to give evidence until a court has ruled on whether the relationship with the accused qualifies for protection.

A qualified rule of non-compellability

254 In many jurisdictions a spouse, while generally not compellable, can always be required to give evidence on a number of specified offences. Many, but not all, concern offences within the family where the spouse may be the only person able to give crucial evidence. An example of such legislation is found in cl 19 of the Australian Evidence Bill 1993. Often the nominated exceptions can be traced back to common law exceptions to the rule of spousal incompetency, which has not yet been completely overturned in some jurisdictions.

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| Should compellability be governed by a rule with exceptions, or by a judicial discretion? |
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255 Two strands of reasoning underlie having lists of specified offences on which a spouse is compelled to give evidence. One is that removal of choice for the witness has been thought to make it easier for those who are afraid to give evidence or who are subjected to pressure. The obvious and distressing example is that of the battered wife. But the effectiveness of this response has been questioned. A vindictive man is not likely to draw nice distinctions based on whether his partner appeared in court compulsorily or voluntarily. The point may also be made that law enforcement agencies should tackle the problem of illegitimate pressure directly, both by protecting the woman and pursuing the person bringing that pressure to bear, rather than attempting to force women to withstand the pressure and give evidence.

256 The second reason for compelling spouses to testify in some cases seems simply to be a general assessment that the public interest in prosecuting some types of cases outweighs the justification for protection. In individual cases that may of course be the

right judgment. But the Commission agrees with criticism that these lists of specified offences require decisions by law-makers on competing public interests that are too broad, and too reliant on intuition rather than information on actual costs. The evolution of such lists in other jurisdictions has also shown that over time arbitrary distinctions develop. They create the potential for complex procedural problems at trials which involve several charges, not all of which involve listed offences. These problems are exacerbated if there is more than one accused.

257 For these reasons the Commission is not inclined to recommend the development of lists of offences on which spouses would be compellable. Moreover, the basic rule of non-compellability, to which such lists would provide exceptions, would still suffer from the problems identified for the first option. Giving the court a discretion to compel an otherwise non-compellable witness where the public interest requires it is subject to the same criticisms.

A discretion to excuse individual witnesses

258 These considerations led to an alternative approach being enacted in Victoria in 1978 (Crimes Act 1958 (Vic) ss 399-400). The ordinary law of compellability applies to all, but the court has a discretion to allow individuals from certain groups not to give evidence if the public interest does not require it. Similar discretions have been enacted in South Australia and New South Wales, recommended by the Australian and Canadian Law Reform Commissions, and raised as a possibility by the English Law Commission (see Evidence Act 1929 s 21 (SA); Crimes Act 1900 s 407AA (NSW); ALRC R38 s 109 draft Evidence Act; Law Reform Commission of Canada, *Report on Evidence* (1978) s 40 draft Evidence Code; Law Commission (UK), *Criminal Law: Rape Within Marriage*, No 205, (1992)). Although earlier versions of the Australian Evidence Bill did not approach the matter in this way, it was ultimately adopted in the Evidence Bill 1993, cl 18.

259 An advantage of this approach is that the competing policy considerations are able to be weighed up in the light of the facts of the particular case. On an individual basis, just results are likely to be achieved more often. Relevant considerations include

- the probable probative value of the evidence,
- the seriousness of the offence,
- the disruption of any continuing relationship,
- the harshness of compelling the person to testify, and
- the availability of other evidence on the same matters.

260 A disadvantage is the resulting uncertainty about available evidence when preparing for trial. But that uncertainty is present in practice now, and is most directly tackled by providing protection and support for the spouse witness. An interlocutory

procedure can allow the person's compellability to be determined before trial if necessary. Although such a procedure takes time, and may create potential for delay, the Victorian experience has not shown a significant problem.

261 There is a more general concern about a basic rule of compellability which can be avoided only by appealing to the courts' discretionary powers. Women may refrain from calling the police when threatened, because of the hardship likely to result from any later prosecution. That hardship could be physical, emotional or economic for the woman or her children. Calling the police is likely to be an appropriate reaction in a crisis. A decision about participating in a later prosecution may be less clear-cut. The lack of any later prosecution does not of course mean that police time has been wasted; responding to a call for protection must be a crucial part of the policing function.

262 This concern should be addressed at a more fundamental level. It overlooks the discretion that should be exercised by law enforcement agencies before any prosecution is commenced. There is no necessary connection between the involvement of law enforcement agencies, or the arrest of a person, and the bringing of a prosecution. There should be separate consideration in every case of whether the public interest requires the matter to be prosecuted. The prosecution guidelines issued by the Crown Law Office state that the attitude of a complainant to a prosecution may be taken into account in all cases and acknowledge that a prosecution may legitimately be discontinued because of the desire of a witness not to give evidence. Although there is a strong public interest in stopping family violence, that does not mean that a prosecution - as distinct from police intervention and arrest - will always be in the public interest. It seems to the Commission that the careful exercise of this discretion by the police and prosecutors is the key to responding appropriately to the complex pressures that may be operating in these difficult cases. Once the prosecution has determined that the case should be prosecuted however, and that the evidence of the spouse is necessary, any further question about whether a reluctant spouse must give evidence should be handled by the court.

263 The Commission recommends that the proposed evidence code provide for all persons, other than the defendant, to be generally competent and compellable. The court should however be able to excuse a person living with the defendant in an intimate relationship in the nature of marriage from giving evidence in criminal proceedings if the public interest does not require it.

Draft section:

7 Discretion as to compellability of married persons and persons in relationship in the nature of marriage

A court may direct that a person who is legally married or is a partner in a

relationship in the nature of marriage (including a relationship between two persons of the same sex) is not compellable to give evidence for

- (a) the prosecution in a criminal proceeding against his or her spouse or partner; or
- (b) a person who in a criminal proceeding is a co-accused of his or her spouse or partner.

Religious and spiritual advisers

Courts are rightly reluctant to require clergy to testify about what takes place in the confessional. But does a special privilege have a place in modern secular society? If so, should it apply to all relationships of spiritual comfort and support?

264 The courts have always been reluctant to compel disclosure of confessions made to ministers of religion, although no specific privilege was ever created at common law in New Zealand or England. In New Zealand since 1885, there has been legislation which provides that confessions made to a minister are not to be disclosed in any proceeding (see now Evidence Amendment Act (No 2) 1980 s 31). The term "confession", used in the statute, refers to the spiritual aspect of the minister's work.

265 As in the case of other privileges there is a more general protection, currently found in s 35 of the same Act. This is capable of covering communications made in the course of a religious adviser's pastoral and counselling work. This provision is considered as part of a wider discussion of confidential relationships in ch 15.

266 The Commission considers that, as in the case of marital privilege, the relationship established with clergy is sufficiently private and important to attract some form of privilege, though, in view of changing patterns in religious and spiritual practice, the definition of what is protected by s 31 may not be sufficiently wide. In this chapter we address

- the justification for the privilege, and
- how the privilege should be defined.

THE JUSTIFICATION FOR THE PRIVILEGE

267 There is a common perception that organised religion (as it has traditionally been understood) has lost much of its power and authority in societies such as our own. But a majority of New Zealanders have a concern for religious and spiritual matters. In the 1991 census over 70 percent of the population stated that they had a religious denomination. In a 1989 survey of 1000 people on values in New Zealand, 23 percent of the sample attended church at least monthly. While organised religious activity is now a minority pursuit (51 percent of the sample reported that they virtually never went to church), 81 percent believed in God (with or without doubts). Half of this number believed in a personal God. Of the total sample, 52 percent expressed belief in some form of spirit or life force. The survey indicates, then, that a sizeable minority of New Zealanders still worship publicly, and that a substantial majority profess some form of spiritual awareness or belief (Gold and Webster, *New Zealand Values Today* (1990)).

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| <p>Should there be a special privilege for confessions and similar communications with a religious mentor?</p> |
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268 The justification for the present legislative privilege appears to rest largely upon considerations of privacy and respect for the confidence. In the case of Roman Catholics at least, deference to the strong obligation that church law places upon the priest may also have been a factor.

269 It is also possible to make an argument that society as a whole benefits from the practice of hearing confessions. Guilty persons can be helped by religious advisers to become reconciled with themselves, their family and society. This process may even involve a confession to law enforcement authorities. But nowadays the religious influence, though no doubt important for particular people and communities, is only one of a number of ways in which society deals with those who have not adjusted to the demands it makes upon them. Psychologists, counsellors, welfare workers and probation officers may, in that respect, play a similar role to that of the religious adviser. There is no reason, based solely on considerations of benefit to society, to provide special treatment for clergy.

270 A further problem with this justification is that it is by no means clear that the privilege is necessary in order to encourage people to consult spiritual advisers. In most cases, the fear of revelation of the confession in court proceedings is probably not significant in determining whether people will take the opportunity of seeking spiritual guidance, either in the confessional or through some other form of contact with clergy. Though the general confidentiality of the confession is important, the possibility of legal proceedings is not likely to come to mind when the confession is made. Only in the most unusual cases are the police or a private litigant likely to see communications to clergy as a potential source of evidence, and so pressure clergy to reveal confessional secrets.

271 More cogent is the argument that compulsory disclosure may be an unnecessary restriction on the free exercise of religion protected by ss 13 and 15 of the New Zealand Bill of Rights Act 1990, which protect freedom of thought, conscience and religion and the manifestation of a person's religion or belief. At least in those religions where regular confession is essential for those practising the faith, it could be said that the law's intrusion

into the sanctity of the confessional unduly interferes with the practice of the faith. More generally, it may be said that if it becomes generally known that the secrets of the confessional have been passed on to other persons, even under compulsion of law, the relationship between a minister and church members could be severely damaged.

272 But this consideration does not necessarily support the type of invariable rule against use of confessional evidence which is found in s 31, since the protections conferred by the Bill of Rights have always to be balanced against the reasonable requirements of a free and democratic society. It certainly does not support the case for a privilege applicable to all communications with ministers of religion. The Supreme Court of Canada has recently considered this point, and observed:

The extent (if any) to which disclosure of communications will infringe upon an individual's freedom of religion will depend upon the particular circumstances involved, for example, the nature of the communication, the purpose for which it was made, the manner in which it is made, and the parties to the communication. (*R v Fosty* [1991] 6 WWR 673, 689)

The Court went on to say that such cases had to be determined upon a case by case basis, and that the freedom of religious expression was not absolute.

273 The most direct justification is one based on the desire to protect privacy of the communication, in view of the extremely personal nature of the relationship and the special quality of religious beliefs and experiences. In New Zealand, the idea has been expressed by the Court of Appeal in these terms:

The rationale of any such privilege must be that a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief. (*R v Howse* [1983] NZLR 246, 251)

274 The amount of information lost to the courts by a privilege will be small. Not only are clergy an unlikely source of relevant and admissible evidence, but they may also refuse to give evidence of confessions to them as a matter of conscience - irrespective of any legal obligation. This view was put very strongly to the Australian Law Reform Commission by the churches in that country (ALRC R38 para 208). Our preliminary consultation with churches in New Zealand indicates that some would make a similar choice between what they see as the laws of God and the laws of the state. If the benefits of access to the information are at best marginal, denying protection risks creating a largely unnecessary conflict between church and state. We welcome further comment on whether there is a need for protection, and the likely reaction if no explicit protection was available.

275 The Commission is of the view that it is desirable to continue to provide some form of privilege for communications made with religious advisers. It should apply both to confessions and to less formal attempts to come to terms with personal spiritual problems. This view is based principally on considerations of privacy and, to a lesser extent, freedom of exercise of religion. We now turn to the more difficult question of how the privilege should be defined.

DEFINING THE PRIVILEGE

276 There are two basic issues:

- Should the privilege be a separately defined and absolute privilege, or should it be treated as part of the general, discretionary privilege for confidential relationships?
- If it is a separately defined privilege, what should it cover?

An absolute, defined privilege?

277 The Commission is of the view that there is some advantage in maintaining the present, separately defined privilege for those classes of communication where the need for absolute secrecy is clear and well understood by the clergy. The decision is a finely balanced one, however, and we seek comment on whether others see a need for a separate provision.

Should the privilege be an absolute one?

278 The reason for the Commission's preference is that all of the communications under consideration would almost certainly be protected even if the law took the form of a discretion. They are deeply private and there is a long history of the courts having declined to compel clergy to testify about such matters, showing both the respect the courts may be expected to have for the personal judgment of clergy who are summoned before them, and a reluctance to bring about any confrontation between the claims of spiritual and temporal authorities. This practice could be expected to continue under a discretionary regime, but a change in the present basis of the law could be needlessly unsettling. Clergy 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?

279 It is also relatively simple to formulate an absolute rule as the communications are all of the same character and relatively easily defined. This contrasts with communications to a spouse or doctor, for example, where the breadth of the matters that may be covered has led the Commission to conclude that an absolute rule would not be satisfactory. An additional benefit from an absolute rule is that it will provide a fixed reference point for argument by analogy under the general discretion.

What should the privilege cover?

280 Under the present law, the privilege applies only to a "confession" made to a "minister . . . in his professional character". This definition may not be wide enough to cover the range of communications which may take place with a religious adviser, 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.

281 The term "confession" is, at first sight, limiting, since very few churches still adopt the practice of hearing confessions, and even fewer insist on that as a regular part of the practice of the faith. But the term appears to have been seen by the courts as capable of somewhat wider interpretation. In the only reported case where s 31 has come before the New Zealand courts, it was given this meaning:

Should the privilege be confined to "confessions"?

"Confession" in s 31 . . . means a confession in the religious sense and that, in my view, requires that the person making the confession is seeking some spiritual response for himself. In the ordinary sense that 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 for the person making the confession. (*R v Howse*, 249)

282 The other term used in the definition, "minister", is defined in s 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:

Should the privilege be confined to practices within recognised religions and churches?

The term "religion" is not itself defined, nor is there case law in this context, though nowadays one would expect, consistently with the protection of all forms of religious belief in ss 13 and 15 of the New Zealand Bill of Rights Act 1990 that it would be read widely. But there are limits. It could be argued that a group which propagates ethical beliefs not based on the existence of some God or higher being does not qualify under this definition.

Further, the definition implies that there must be some form of organised religious structure or hierarchy. The mere self-constituted relationship of teacher and disciple would not be enough.

283 The Commission considers that the provision should be broadened to include religious and spiritual communications in a general sense, whether or not they involve atonement for sin, and regardless of whether they are made within a structured religious community. The important criteria are, in the Commission's view:

- communications must be made for the religious or spiritual benefit or comfort of those making them; and
- those to whom communications are made should be qualified by reason of their status within an established community of worship, or their special position of trust for the person making the communication, to receive communications of that kind.

The privilege would apply to the communication itself, and to all other discussions which reasonably relate to the communication.

284 This definition would not include, however, communications for purely temporal purposes (such as advice on the control of a wayward child). Nor would it comprehend rationalist systems of ethical conduct which do not depend on the belief in some god, divine force or other spiritual basis for life. These cases are more in the nature of counselling, although the courts would need to take care to ensure that any spiritual aspect of the case was not outweighed by more worldly concerns. Since the court would still have power, in appropriate cases, to accord the communication privilege on account of its general confidential nature, the decision in any particular case will probably not turn on the precise definition, so much as whether the court considers that the case is sufficiently analogous to a religious communication to warrant protection.

Draft section:

8 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 his or her 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.
- (2) A person is a minister of religion for the purposes of this section if he or she 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.

Doctors and psychologists

Consulting a doctor or psychologist is a very private and personal matter. But should patients be allowed to use confidentiality as a cloak for criminal conduct or insurance fraud, which would otherwise be revealed? How should the respective interests in confidentiality and the administration of justice be balanced?

285 The application of the law of privilege to medical practitioners has always been difficult, because of the wide range of matters which a consultation with a registered practitioner may cover. At the one extreme there is a routine consultation over an apparently minor physical problem which (for some unexpected reason, perhaps to do with insurance) later becomes important in court proceedings. At the other, there is the consultation with the psychologist, who may probe deeply into the subject's personality to uncover sensitive personal matters, and sometimes indications of past misdoings or the possibility of future anti-social actions. Strong ethical and legal duties in general protect all of this information from unauthorised disclosure. But it does not follow that the same information should also be privileged in court proceedings.

286 Communications made to medical practitioners have, since 1885, been accorded a limited privilege against disclosure in court proceedings in New Zealand law. The present provision is s 32 of the Evidence Amendment Act (No 2) 1980. It deals with privilege in civil proceedings. The 1885 legislation drew no distinction between criminal and civil proceedings, but was amended to exclude criminal proceedings in 1895. It was not until 1980 that a very limited privilege was re-introduced for criminal proceedings (s

33).

287 Under the present law, a registered medical practitioner or a clinical psychologist may not disclose the following protected communications in court proceedings:

- *in civil proceedings*, communications made by a patient to a doctor or psychologist, which the patient believes are necessary for examination, treatment or other action;
- *in criminal proceedings*, the same type of communications, but only if the consultation relates to drug dependency or any other condition or behaviour that manifests itself in criminal conduct.

The protection is limited in various ways discussed later in this chapter.

288 The Commission considers that, while there are some cases in which this protection is justified, there are many others, not all of them covered by the current explicit exceptions, in which it is not. In general, we doubt that the wide privilege apparently conferred in respect of civil proceedings is effective or justifiable, and think that much of the present law is better dealt with as part of a general discretion to protect confidential communications. The much narrower provision dealing with criminal proceedings, however, does appear to serve a useful purpose.

289 In this chapter we discuss

- the justification for the privilege,
- the operation of the privilege in civil proceedings, and
- the specific privilege available in criminal proceedings.

THE JUSTIFICATION FOR THE PRIVILEGE

290 The reason most commonly put forward for medical privilege is that it is in the best interests of society that its citizens remain healthy, and consult medical advisers for that purpose. The privilege which the law accords to patients' communications with their doctors encourages them to be open with their medical advisers, who can then effectively diagnose and treat any illness from which they suffer.

Should consultations with doctors be privileged?

291 While there can be little dispute about the initial premise that society has a strong interest in its members seeking medical care when needed, the remainder of this justification is open to question. The most serious problem lies in the assertion that the privilege will make a difference to what patients do. The general assurance of confidentiality may be important, but for most "ordinary" visits to a General Practitioner or other medical adviser, the patient is unlikely to be concerned about potential legal proceedings. The doctor is trusted to maintain confidence in so far as the law permits and

that duty is enforceable in a variety of ways. There will be a very few cases where a patient knows that there may be a legal problem; even fewer where the patient is not completely open with the doctor about the complaint because of that; and fewer still where the patient does not see a doctor for fear of the legal consequences, and becomes seriously ill as a result. It is implausible to argue that the general health of the population will be affected if doctors are sometimes asked to testify about the medical problems of their patients.

292 Even if it could be established that a medical privilege made a difference to the way people consulted with doctors, and so contributed significantly to the public good, there remains the question whether the benefits to society are outweighed by the costs of the privilege. There are two related heads of cost. The first is incurred because the courts may have to decide cases with insufficient information if no other evidence is available on the point. (In many cases, however, the medical examination which can be ordered by the court will provide adequate information.) Second, a fully-fledged medical privilege allows people to hide the fact that they are making fraudulent and deceptive claims which might be refuted easily if the medical history were made available. As will be seen in the next section of this chapter, both the legislature and the courts have been strongly aware of this risk, and have hedged the privilege with major limitations. This would seem to indicate that, in society's view, the claim to privilege is not a strong one. It is readily overridden if the evidence is important to the decision of the case.

293 Considerations of privacy are a more convincing basis for the privilege. Personal illness and bodily malfunction are intimate things which most people prefer to keep to themselves; there is still some stigma attached to disease, especially those that are contagious, and mental illness in particular. This preference is one which society in general respects. The increasing value that is being placed on personal privacy has been recently illustrated by the enactment of the Privacy Act 1993. Techniques of investigation which invade the human body, against a subject's choice, require a strong justification before they can be accepted. True, patients submit themselves to examination by a doctor more or less willingly, but only on conditions of strict secrecy and confidentiality. This confidence should be respected, not only by doctors but also by litigants and the courts. Interference in that confidential relationship should be a step of last resort, where the information cannot be obtained elsewhere and the need for it is great.

294 The Commission considers that there is force in this assertion of a right to privacy. This is particularly so when the consultation relates to psychiatric problems. The patient's willingness to open up the inner recesses of the mind may well be conditioned upon an expectation of complete confidentiality. Furthermore people referred for psychiatric help because of behavioural or similar problems may have more to fear from court proceedings than have patients with physical illnesses.

295 But the claim to privilege still has to be balanced against the undesirable consequences it can have in the cases already mentioned. Although the confidentiality interest can be great, as with some psychiatric consultations, there will be times when it is particularly important to know about the mental state or history of a patient, for instance when the lives of others may be affected. The question is how the law can best reflect that balance. The choice is between maintaining a version of the existing rule, which confers a privilege but then introduces a number of broad exceptions, or entrusting such matters to

the court through general discretionary powers.

CIVIL PROCEEDINGS

296 We consider this choice first, in relation to the law governing medical privilege in civil proceedings. There is a general privilege here. But in the following examples, the basic privilege found in s 32 of the Evidence Amendment Act (No 2) 1980 is considerably limited by the exceptions or narrow wording of the provision:

- The family of the patient are concerned about the patient's want of capacity to manage his affairs, and seek the appointment of a guardian, against the patient's objections. The patient's doctor can be compelled to give evidence about the medical history of the patient, since this is a "proceeding in which the sanity . . . or other legal capacity of the patient is in dispute" and thus not covered by the rule of privilege. (s 32(2)(a))
- The patient has applied for life insurance, and has been asked to obtain a report from her doctor. There has been some past history of illness, and there is a discussion about which of the patient's past illnesses ought properly to be included in the report. The discussion is one "in or about the effecting by any person of an insurance on the life of himself or any other person", and is not covered by the privilege. (s 32(2)(b))
- A person has obtained life insurance at a time when he is suffering from an illness which turns out to be fatal. Before the insurance is taken out, the patient sees the doctor and the initial symptoms of the illness are observed. In proceedings by the insurer to set aside the life policy, the doctor must testify about what was seen at the consultation, since the privilege applies only to "communications . . . by a patient", not to observations made by the doctor. (*Lucena v National Mutual Life Association of Australia* [1912] NZLR 481; *McDougall v Henderson* [1976] 1 NZLR 59, 62)

297 The Commission does not suggest that these are cases where privilege should have been accorded. Indeed, in some United States jurisdictions where no such limitations operate, experience has shown that the privilege "has permitted unwarranted recovery on policies of insurance, fostered fraudulent claims in personal injury litigation, and excluded essential medical testimony in testamentary actions requiring the determination of mental capacity" (Manitoba Law Reform Commission, *Report on Medical Privilege* (R56 1983) 20). Nor are the examples listed the only possible exceptions. In the United States, the complete list of exceptions found in the various statutory provisions conferring a medical privilege is very long indeed (see Wigmore, para 2380). Two not included in the New Zealand statute are actions against the doctor and personal injury suits.

Should the present privilege, in civil cases, be assimilated into the procedures governing confidential information generally?

298 The effect of the present statutory provision is narrowed further by the general rules of evidence. First, since a communication by a patient repeated to the court by a doctor is

hearsay evidence, that information will often be technically inadmissible anyway. (This consideration will be less significant if the recommendations of the Law Commission on hearsay are adopted: PP15 1991.) Second, the rules governing the admission of expert opinion evidence, and the need for the court to be presented with the factual foundation of that opinion, might prevent a doctor from telling the court of any opinion formed about the patient's condition. It is safe to conclude that the scope of the additional protection given by s 32 is small and unclear.

299 As mentioned at the outset of this chapter, a very wide range of information is conveyed in consultations with health care professionals. Some of that information will be highly personal, but some will not. The privacy interest which justifies protection will vary. The context in which the information is relevant to court proceedings and the importance of the information to those proceedings will also vary. For example, in family proceedings it could be very important for the court to know whether a parent's psychiatric condition puts a child at risk of physical or psychological harm (*Re C (A Minor)* [1991] Fam LR 524). In many cases, of course, sufficient information would be obtained through examination of the parent by court-appointed doctors or psychiatrists. (See Webb and others, *Family Law in New Zealand* (1992) paras 6.118-6.119). Privilege would not apply to that examination. But if the results of the examination were inconclusive, the issues at stake might well impel a court to seek information from a psychiatrist who had known the parent over a longer period of time.

300 The experience with the current provision suggests that the privilege is better considered as a discretionary privilege, rather than one in which the courts try to achieve justice by reference to a rule which confirms privilege but creates numerous exceptions. The attempt to define in advance the cases where particular information will be important is not likely to succeed, since it may well depend upon the circumstances and evidence in the particular case, rather than the abstract category into which the case happens to fall. For example, why under the present law should a privilege apply to consultations with doctors by someone challenging a dismissal from a job on health grounds, but not to consultations by people seeking insurance? And why (if the consultation is for insurance purposes) should anyone other than the insurance company concerned have the possibility of access? These are illustrations of how the arbitrary form of the privilege in civil cases fails to give effect to its underlying rationale.

301 At the same time, when protection does exist, the ambit of the privilege could be widened to cover more of the things that patients would regard as confidential in their relations with their doctors. The limitation, in the present section, to "communications made by a patient" is artificial. The doctor's examination of the patient (whether external, or in the course of surgery or other intrusive forms of treatment or examination), and the diagnosis made as a result, are equally confidential.

302 The Commission therefore considers that, while there is justification for some form of medical privilege on privacy grounds, the interests of the patient are not best protected by the present statutory privilege in civil proceedings. The matter is better dealt with by resort to a discretionary provision dealing with confidential information generally. The provision discussed in ch 15 will provide that wider and more flexible protection, and will be available in all types of proceedings.

CRIMINAL PROCEEDINGS

303 The discretionary protection just proposed would also be available in criminal proceedings, and would provide a general protection that is not given at present. The current provision on privilege in criminal proceedings gives absolute protection, but only in one very specific type of case. This is where, without treatment, there is likely to be further criminal offending. In that case there is a very direct link between the health problem, potential court proceedings and a defined social harm of some magnitude.

Should the present privilege in criminal cases, where the illness may result in criminal conduct, be retained?

304 Thus the privilege in criminal proceedings applies only to communications if the patient

believes they are necessary to enable the registered medical practitioner or clinical psychologist to examine, treat or act for the patient for

- (a) drug dependency; or
- (b) any other condition or behaviour that manifests itself in criminal conduct. (s 33)

A proviso excludes from protection consultations which are required by a court or other lawful authority.

305 The justification for this privilege was very fully set out by the Torts and General Law Reform Committee when it proposed the reform in 1974 (Torts and General Law Reform Committee (NZ), *Report on Medical Privilege* (1974); see also Moodie and McKelvey, *Medical Privilege* (1974)). This is a case where the administration of justice should give way to the need for confidentiality since the broader aim of securing due compliance with the law is more likely to be achieved through medical treatment than through prosecution. This is particularly true of drug addiction, where legal sanctions have little effect and the most important thing is to rehabilitate the addict.

306 It is of course difficult to assess whether the existence of the privilege does in fact encourage people to come forward for treatment. Rigorous proof is not available. But drug addicts in particular have to fear prosecution, not only for drug offences, but also in many cases for offences committed in order to get money to pay for drugs. Particularly where such a person is unknown to the police, coming forward to receive treatment would have serious consequences if the fact of treatment were to be disclosed to the police. Also, the fact that treatment is often received from a government agency makes it important that there be no suggestion that the information could become available for other government purposes. The privilege apparently closely reflected the position in practice when it was proposed.

307 The Commission accepts the importance of ensuring that those whose illnesses

may result in criminal behaviour get treatment. We propose that the limited but absolute privilege for criminal cases in s 33 be brought forward into the new evidence code. Consistently with what has already been said about the ambit of the civil privilege (para 0), however, the ambit of s 33 should be widened to include all information acquired in confidence as a result of the examination or treatment of the condition. There is one further respect where amendment would be useful. Under the present law, the protection applies only in cases where the person treated is a defendant. But people may be deterred from seeking treatment by fear of attracting the attention of the police to their family and close associates as well. The Commission therefore proposes that the rule protecting the information from disclosure should apply in any criminal trial, not just the trial of the person being treated.

308 It may be thought that the group of health professionals covered by s 33 is too narrow. Not all persons to whom addicts and others may be referred for examination, treatment and action will be registered medical practitioners or registered clinical psychologists. The Commission has considered a wider and more functional definition, under which it would be sufficient that the person seeking assistance genuinely believed that the person consulted was appropriately qualified to offer professional assistance in dealing with their condition. But we have rejected that approach as entailing needless uncertainty. The privilege proposed gives absolute protection, and the legislation should clearly indicate its intended scope. The simplest way of doing so is to continue to confine its protection to registered medical practitioners and clinical psychologists. Cases which are clearly analogous should receive appropriate protection under the general discretion. The privilege will continue to extend protection to those assisting doctors and psychologists.

309 With these modifications, the Commission considers that the privilege now contained in s 33 of the Evidence Amendment Act (No 2) 1980 should be retained. The privilege should not continue where there is a professional or legal obligation to warn a person in danger, which overrides medical confidentiality. Section 14 of the proposed provisions makes it clear that the privilege will still be available in later court proceedings, despite this brief lifting of the general veil of confidentiality.

Draft section:

9 Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists

(1) This section applies to a person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct, but does not apply in the case of a person who has been required by an order of the court, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or other purpose.

(2) A person has a privilege in a criminal proceeding in respect of any communication made by the person to a medical practitioner or clinical psychologist which the person believes is necessary to enable the medical

practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

(3) A person has a privilege in a criminal proceeding in respect of information obtained by a medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

(4) A reference in this section to a communication to or information obtained by a medical practitioner or a clinical psychologist is to be taken to include a reference to a communication to or information obtained by a person acting in a professional capacity on behalf of a medical practitioner or clinical psychologist in the course of the examination or treatment of, or care for, the person by that medical practitioner or clinical psychologist.

(5) In this section

clinical psychologist means a psychologist registered under the Psychologists Act 1981 who is engaged in the diagnosis and treatment of persons suffering from mental and emotional problems;

drug dependency means the state of periodic or chronic intoxication produced by the repeated consumption, smoking, or other use of a controlled drug (as defined in section 2(1) of the Misuse of Drugs Act 1975) detrimental to the user, and involving a compulsive desire to continue consuming, smoking or otherwise using the drug or a tendency to increase the dose of the drug.

Informers

Police informers have customarily been protected by a rule of practice which prevents their identity from being disclosed in court. This practice can now be recognised by conferring a special privilege on informers.

310 Police informers are people who give information to the police about the commission of crimes. It is of great importance to the detection and prosecution of crime (and often to the preservation of informers' safety) that their identity be kept secret. The practice not to compel disclosure of the identity of police informers has long been observed in the courts.

311 The present protection covers the identity of the informer, including information from which the informer's identity can readily be ascertained (*Tipene v Apperly* [1978] 1 NZLR 761, 767). The Crown may withhold the informer's identity at trial and in any preliminary enquiries.

312 Different considerations arise where it is sought to withhold the identity of an informer who appears as a witness. These considerations, which relate to witness protection and the need to ensure a fair trial for the accused, are beyond the scope of the present enquiry. The Commission, therefore, regards that situation as better dealt with as part of its criminal procedure reference. It is also being considered as part of a study currently being undertaken (within the Commission's evidence reference) on the rules governing how the credibility of witnesses can be questioned.

313 This chapter deals with four matters which relate to protecting the identity of informers:

- the form of protection;
- who is an informer;
- the requirements for protection; and
- the exceptions to protection.

THE FORM OF PROTECTION

314 This protection has traditionally been dealt with under the law of Crown privilege or public interest immunity. That subject will be considered, in general terms, later in this paper (see ch 16). The protection afforded by public interest immunity has in recent years been based on a "balancing process". That is to say, the court weighs up the need for the information against the possible harm to the public interest if the information is disclosed. This is a particularised balancing: claims that particular types of information should be protected simply because of the category or "class" they fall into have generally been discouraged (see para 0).

315 In the case of police informers, however, it has always been recognised that too much is at stake to allow a balancing approach to be adopted. Not only is there an established body of law to that effect, but also a strong policy reason for giving clear assurances that the informer will be protected. Without a definite and clear-cut provision, people may not be prepared to offer information relating to the commission of crimes to the Crown or government departments.

316 Opinion appears to be divided on whether the protection given to informers should be regarded as a separately defined, exclusionary rule, or an application (hallowed by custom, no doubt) of the general law of public interest immunity. The Australian Law Reform Commission adopted the latter course (ALRC R38, s 112 draft Evidence Act). The important question here is whether any separate privilege can be justified and, if so, what its limits should be. There are arguments either way, but on this issue the Commission is inclined to differ from the recommendation made in Australia.

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| Should there be a special privilege for informers? |
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317 The case in favour of such a defined privilege is that persons who regularly give information to the police have much to fear if their identity becomes known to persons engaged in crime. That will inevitably be the

case if they are named in criminal proceedings. Without a specific rule preventing disclosure, they are likely to be deterred from coming forward with information since the police cannot guarantee their safety.

318 The police then will find it difficult to detect and prosecute certain classes of offending where they are reliant on police informers (eg, drug dealing). As with other similar arguments discussed in this paper, it is difficult to assess how effective the present rule is in practice. It is not likely that many informers will be aware of the subtle legal difference between a statutorily defined rule, and a settled judicial practice not to compel the police to reveal informers' identity. On the other hand, if there is such a settled practice and it is not going to change upon adoption of the evidence code proposed by the Commission, then there is merit in having the legislation reflect the settled practice. So, in the Commission's view, the specific rule for police informers should remain.

319 Assuming that a special, defined protection is to be given to informers the Commission believes that it should take the traditional form of a privilege. That is to say, it should be conferred on a specific privilege holder (the informer) who alone should be able to determine whether the information should be made available in court. (In practice, of course, it will normally be the police who invoke it in the informer's interest. But if there were a privilege, then even if the police did not challenge the enquiry, there would be a stronger indication that the court should intervene to protect the informer.) Anything less than that (eg, a rule that the court cannot require the Crown to produce the information, but the Crown may in its discretion tender it) would fail to give adequate protection to the informer. Like any privilege, it is subject to the general exceptions to which we will shortly refer, but otherwise it should be an absolute privilege. We have drafted the relevant section (s 10 of our draft code) with those considerations in mind.

WHO IS AN INFORMER?

320 The rule should be confined to informers who have a sufficient expectation of the kind of protection a privilege entails. This means that it must have been reasonable for an informer to expect, at the time of giving information, that his or her identity will be kept secret. That will in general include professional informers, and others who on the particular occasion have a reasonable expectation of confidentiality. In line with the present law the privilege would also apply to police officers working undercover, if they are not called as witnesses by the prosecution (*R v Hughes* [1986] 2 NZLR 129, 146, 155, 159).

321 However, not every person who passes information on to the police will be entitled to protection. This will depend on the circumstances. For example members of the public who make statements to the police in the course of a criminal investigation commonly anticipate giving evidence at trial and would not therefore come within the rule (see *Tipene v Apperly* [1978] 1 NZLR 761, 767). Conversely, the privilege would cover callers on television or radio programmes like "Crimewatch" who provide information on the basis that their identities will be kept secret.

THE REQUIREMENTS FOR PROTECTION

322 In the Commission's view, the basic requirements for invoking the privilege protecting the identity of informers should be these:

- the informer must have provided information to an enforcement agency;
- the information must relate to the possible or actual commission of an offence; and
- the circumstances must be such that the informer has a reasonable expectation that his or her identity will be kept secret.

323 These requirements could be seen as altering the existing law in two ways. First, the Commission proposes extending the rule to cover situations where information is given not to the police but to other bodies responsible for prosecuting offences. The rule at common law has tended to be framed as applying only to police informers which leaves those who provide information to other bodies and do not want their identities to be disclosed in court to seek protection through public interest immunity. Yet many other government departments and agencies use informers and some may be as reliant as the police are on the flow of information from informers in order to enforce areas of law for which they are responsible. Reference may be made in this connection to the Departments of Customs, Inland Revenue, and the Ministry of Agriculture and Fisheries. There seems to be no strong policy reason against extending the rule to protect the identities of informers to these bodies. The Law Reform Commission of Canada accepted the need for such an extension to the law. (*Report on Evidence* (1978), s 44 draft Evidence Code)

Should the privilege extend to information given to any enforcement agency, not just the police?

324 Against this extension it could be argued that there is not such a serious need for protection where, for example, information is passed on about environmental offences or traffic offences. In some cases there may be no danger of reprisal at all, while in others there could be. There is the point that protection can always be sought, for an informer in this type of

case, under one of the general discretionary provisions (see chs 15 and 16). It has already been established that public interest immunity may arise in cases of informers to governmental bodies with prosecutorial responsibilities (*CIR v E R Squibb & Sons Ltd* unreported, Court of Appeal, 10 June 1992, CA 276/92). Nevertheless, there is still some danger that informers to these other bodies could be deterred by the lack of a definite assurance that their identities will not be disclosed. Furthermore, it seems to the Commission that, in principle, these other bodies should be able to offer the same degree of protection to their sources of information that the police are able to offer to theirs.

325 The second matter on which our proposals seem to differ from existing law is in relation to police methods of operation and police observation posts. In some recent cases courts have permitted the police to keep secret the location of premises from which they have observed activities, so as to protect the identity of the occupiers of the premises who cooperated with them, apparently treating this as an extension of the rule protecting police informers (*R v Rankine* [1986] QB 861 and *R v Johnson* [1989] 1 All ER 121). In a similar vein, in other cases courts have also permitted the police to not disclose their techniques of investigating and detecting crime, for example, they have not had to reveal the location of listening devices (*R v McFarlane* [1992] 1 NZLR 495).

326 Under our proposals, these situations would fall to be dealt with on a discretionary basis under the general provision for the Crown (see ch 16). The provision we propose only covers informers - those who give information (compare *R v Rankine*). Although the Commission accepts that it will sometimes be important to keep information relating to police techniques and methods of operation secret, it would seem to be difficult to accurately define this range of information. Furthermore such information will often be highly relevant for the defence in a criminal case. For these reasons, it seems to the Commission that the best course is to allow the court to balance the opposing interests in each case rather than to try to amalgamate these situations into the rule for informers. We are nevertheless interested in comments on how best to provide protection for this type of information in the appropriate circumstances.

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| <p>Should the privilege apply to protect police surveillance points and the like?</p> |
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EXCEPTIONS

327 The privilege will be subject to the normal exceptions for an absolute privilege (see ch 6), though in practice few of them are likely to apply. The one situation in which the court must seriously consider whether an informer's identity should be disclosed is where the identity would assist the defence of an accused in a criminal trial. The general principle here, as regards public interest immunity and privileges generally, seems to be that, while any protection given may be overridden if the information is required for the defence of an accused person, this is a matter of discretion for the court to determine in the circumstances of the case (see para 451). Although the cases concerning informers could be interpreted as holding that there is a definite exception to the protection in this situation, there does not seem to be any real departure from this general principle (*Marks v Beyfus* [1890] 25 QBD 494, 498 and *R v Hughes* [1986] 2 NZLR 129, 146).

Should the privilege be lost wherever the accused needs the information for the defence of a prosecution?

328 The Commission considers that this exception should be discretionary in the case of informer identification. The main utility of the privilege lies in protecting the sources of police information in criminal proceedings. It is most frequently invoked in criminal cases. If there were a clear-cut exception it would involve a significant risk for the police and informers that disclosure would be ordered simply because the accused asked for the information. The protection which the rule provides would be considerably limited, raising the possibility that potential informers could be deterred from coming forward.

329 The issue is a difficult one since the public interests involved (effective enforcement of the criminal law and the effective defence of accused persons) are both important, and here they are irreconcilable. Nevertheless, consistency with the general law and the need for the court to weigh carefully the circumstances of the particular case, indicate that a discretionary approach should be taken.⁶ The Commission is therefore of the view that if an informer's identity is relevant to the defence of an accused, this should be a strong, but not conclusive, factor in favour of disclosure. In any case where there is real risk of a miscarriage of justice and the Crown insists on proceeding with the prosecution, the Commission would expect the court to have no hesitation in ordering disclosure of the informer's identity.

⁶ This is also consistent with the approach of s 84A of the Evidence Act 1908 (introduced by the Evidence Amendment Act 1986) which enables an undercover police officer to give evidence without having to reveal his or her true identity if the Commissioner of Police gives a certificate to permit this. However, the court may in its discretion override the certificate and grant leave to allow questioning as to the officer's true identity. (The grounds for exercising the discretion are set out in subs (7).)

Draft section:

10 Informers

- (1) An informer has a privilege in respect of information that would disclose or is likely to disclose his or her identity.
- (2) A person is an informer for the purposes of this section if the person has supplied, gratuitously or for reward, information to an enforcement agency, or to a representative of an enforcement agency, concerning the possible or actual commission of an offence in circumstances in which the person has a reasonable expectation that his or her identity will not be disclosed.
- (3) An informer may be a member of the Police working undercover.
- (4) In this section, **enforcement agency** means the Police of New Zealand and a body or organisation which is responsible for the enforcement of an enactment.

Journalists

Good journalism requires accurate sources, who may not disclose sensitive information if they believe their identity may become known. There are signs of an incipient protection for journalists' sources in the law. Should a more definite privilege now be recognised?

330 Journalists who have acquired information from confidential sources will often be reluctant to identify the source, even when testifying in court proceedings. The common law has acknowledged that there are times when they should not be obliged to do so. But the protection given at common law is limited, falling well short of a recognised privilege (see, eg, *Attorney-General v Clough* [1963] 1 QB 773, 792; *X Ltd v Morgan-Grampian Ltd* [1991] AC 1, 40). The matter has been regarded as one within the discretion of the court, but with an implication that if the information is important to the hearing it should be disclosed.

331 In respect of discovery and interrogatories, the courts have devised a more settled rule of practice known as the "newspaper rule". The rule has afforded the proprietors and editors of newspapers an immunity from disclosure of sources in defamation and related actions (see, eg, *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163, 165). But it has no application beyond the interlocutory stages of a case, and it is uncertain to what extent it is discretionary.

332 In New Zealand, the position of journalists may have been somewhat strengthened by s 35 of the Evidence Amendment Act (No 2) 1980, which is applicable to confidential communications generally. It has resulted in very little litigation, and there appears to be

no reported case where a journalist has relied upon it to protect his or her source. Potentially at least, the section could apply to any confidential information possessed by a journalist. The principles applicable to confidential information generally (discussed in ch 15) would then apply. The discussion in this chapter, however, is limited to information which identifies the journalist's source.

333 This chapter considers

- the justifications for a privilege for journalists' sources,
- whether the protection afforded at common law and in equity is sufficient, and
- the options for legislative reform.

JUSTIFICATION OF A CLAIM TO PRIVILEGE

334 The most frequently encountered justification for a privilege is that the gathering of news is promoted if journalists and their sources can be assured that confidentiality will be maintained. It is important to society that information about matters of public concern be disseminated, even if the price which must be paid is that full information may not be available to the court. A privilege serves the wider interest of society better than if no privilege were accorded. This is the justification which can be broadly subsumed under the rubrics of *freedom of expression*, and more specifically, *the free flow of information*. The policy is similar to that applied to the sources of official information under s 9(2)(ba) of the Official Information Act 1982.

Should journalists' sources be protected?

335 An associated claim is that if immunity were denied then journalists would have to rely at best on sources anonymous to them as well as to others, which would mean that their ability to verify any information supplied on a confidential basis would be severely limited. It may lead to the free flow of false or inaccurate information (see Blasi, "The Newsmen's Privilege: An Empirical Study" (1971) 70 Michigan L R 229, 246). The situation is not unlike that of the prosecution relying on facts supplied by a police informer (see ch 12). It is important, in the public interest, to know these facts, yet the source may be tainted and would need to be verified. For these reasons, journalists are very protective of confidential sources, a fact which is reflected in the Code of Ethics of the New Zealand Journalists and Graphic Process Union (JAGPRO).

336 As against this, there is the general principle that all relevant evidence should be made available to the decision-maker, a principle which of course militates against *any* privilege. Furthermore, the journalists' claim to a privilege is based on an assumption which establishes a link between denying immunity and the drying up of confidential sources. It is not easy to assess the degree to which the protection of sources promotes the flow of information (see *Moysa v Alberta (Labour Relations Board)* (1989) 60 DLR 4th 1, 7). There is also the apprehension that enacting a privilege could be tantamount to granting a licence for abuse by journalists and informants, as well as providing a shield

from actions in defamation (see Torts and General Law Reform Committee (NZ), *Professional Privilege in the Law of Evidence* (1977) 70). The journalist who knows that a source of information will not be verified may be less than scrupulous in his or her attempts to ensure that published information has a basis in fact.

337 A privilege may also be justified on the ground that it is necessary to protect privacy and human rights. The relationship between the journalist and the source is a private one of confidence, which extends to the identity of the source itself. Of course, the mere obligation of confidence is not enough; as Lord Parker CJ said in *Attorney-General v Clough* [1963] 1 QB 773: ". . . confidentiality of itself has never been recognised as a ground for a valid claim of immunity" (787). But the privacy interest suggests that a principle which should be employed in devising an appropriate law protecting journalists' sources is that they should not be disclosed unless there is good reason to do so.

338 The privacy interest cannot be divorced from very important public interests involving free speech and the effective functioning of a democracy. In the United States and Canada attempts have been made to base a journalistic privilege on federal constitutional grounds (see *Branzburg v Hayes* 408 US 665 (1972) and *Moysa v Alberta (Labour Relations Board)*). Although in both jurisdictions the attempts have failed, it appears that with the enacting of the New Zealand Bill of Rights Act 1990 there is now scope in New Zealand for a similar rights-based argument to be submitted. Such an argument would be based on s 14, which specifically protects freedom of expression.

339 The Commission takes the view that on balance there is a case for according privilege to journalists' confidential sources of information. Nevertheless, it has to be circumscribed with some care, and there appears to be no room for any "absolute" privilege which would prevent the courts from looking into individual cases to see whether the privilege is justified. The question is whether the existing common law principles afford a sufficient protection, or, if not, whether the matter requires specific legislation, or whether it is enough that confidentiality may be protected under the general discretionary powers afforded by statute.

THE PRESENT LAW

340 There are three particular ways in which some protection has been afforded, but it is limited in scope and fragmented in principle. These are

- at trial: the general rule,
- discovery in cases for defamation: the "newspaper rule", and
- equitable proceedings for discovery.

At trial: the general rule

341 While the common law recognises the desirability of promoting the free flow of

information, it does not recognise, and has never recognised, the existence of a specific privilege for journalists. In cases such as *Attorney-General v Mulholland* [1963] 2 QB 477, the court laid down conditions for questioning journalists: that the question be relevant, and that it be "a proper and, indeed, necessary question in the course of justice to be put and answered," as Lord Denning expressed it. But while this limited protection has often proved adequate in practice, it does not give the same degree of assurance, as does a privilege, that protection will be given and will be seen as paramount to interests such as the due administration of justice.

Discovery in defamation cases: the "newspaper rule"

342 The "newspaper rule" prevents the plaintiff in defamation proceedings from obtaining discovery of the sources of information on which the defendant newspaper relied in publishing allegedly defamatory material. It is an important protection for newspapers and journalists, but it does raise the question whether it should not be seen as one aspect of a much wider principle. The Commission does not wish to suggest that in its rationale, or in the policy to which it gives effect, the rule is unsound. It does, however, sit uncomfortably with the less categorical protection afforded by the general law in cases other than defamation. This suggests that, in the absence of legislative provision, courts have not worked out a coherent policy to deal with the protection of journalists' sources. This impression is reinforced by occasional judicial comments to the effect that even in defamation actions the rule is one of "practice" and not of law (see, eg, *John Fairfax & Sons v Cojuangco* (1988) 82 ALR 1, 7).

343 The rule has been supplemented by a provision in the High Court Rules. R 285 states that if the defendant pleads the defences of honest opinion (formerly fair comment) or qualified privilege then "no interrogatories as to the defendant's sources of information or grounds of belief will be allowed" (see also, in England, RSC O. 82, R 6). It extends protection beyond the news media, but is limited to interrogatories. The courts have accepted that, in view of its limited application, it is not a codification of the previous law (*Broadcasting Corporation of New Zealand v Alex Harvey Industries* [1980] 1 NZLR 163, 176). The result, however, is further overlap between various rules and principles protecting journalists' sources, and further fragmentation of legal doctrine.

An equitable remedy

344 This want of coherence is also apparent in an old equitable procedure designed to obtain information from persons who are not parties to any current litigation. The procedure was invoked in *British Steel Corporation v Granada Television* [1981] AC 1096, in which an unknown employee of the plaintiff had leaked documents about the plaintiff's business to the media. The plaintiff sought information from the defendant television company, not because it wished to take proceedings against that company, but because it was concerned to discover the identity of the informant so that steps could be taken to prevent further leaks.

345 What is significant about this remedy is that, although in pre-trial proceedings

against the newspaper the "newspaper rule" would be likely to prevent discovery, here discovery becomes the focus of the trial itself and the plaintiff has a better chance of success. Because the plaintiff seeks only the protected information (intending to act upon it by exercising legal rights against a person other than the defendant), the position is very different from an ordinary defamation case. There it can usually be claimed that success in the current proceedings will fully compensate the plaintiff for any damage sustained. Here, the plaintiff will not be satisfied with any remedy which can be obtained against the defendant alone.

OPTIONS FOR REFORM

346 The privileges discussed in all but one of the previous chapters are already provided for by legislation; the question is whether that legislation should be amended or brought forward into the proposed evidence code in its present form. With respect to journalists' sources, however, the only existing statutory protection is a very limited provision found in the High Court Rules governing interrogatories. Given that an entirely new provision may be necessary, what form should it take?

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| Should there be an absolute or qualified privilege, specifically for journalists' sources? |
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347 An absolute privilege against disclosure is not an attractive solution, and it appears to apply in only one jurisdiction: Austria (see Wilhelm, *Protection of Sources. An International Review of Journalistic and Legal Practice* (1988) 21-23). In common law jurisdictions, the tendency in recent years has been to make all relevant evidence available to the court, and such a move towards absolute protection would represent a contrary direction. Furthermore, it not only carries the very real risk of abuse, as mentioned in para 0, but it could also lead on occasion to manifest injustice.

348 More acceptable is the statutory qualified privilege. A qualified privilege may take a number of different forms. The principal distinction is that between a statutory regime specific to journalists and the media, and a general discretionary one applicable as well to other confidential relationships. The possible models for reform are considered under these two broad heads.

A specific statutory regime

349 One example of a specific statutory provision which protects journalists' sources is s 10 of the Contempt of Court Act, enacted in England in 1981. It creates a presumption against disclosure unless an applicant can satisfy the court that disclosure is necessary under one of four heads: the interests of justice, national security, or for the prevention of disorder or crime. Another example is the California "shield" law (§ 1070 of the California Evidence Code) which is painstaking in its definitions of "newsmen" and "unpublished information", for instance.

350 But there is a fundamental weakness in an enacted qualified journalists' privilege: it can restrict the freedom of journalists in their use of confidential sources, in a way perhaps not intended by the legislature. It does so by using definitions which are artificially

confining. Section 10 of the Contempt of Court Act 1981 (UK), for instance, which protects *published* information, does not take into account *unpublished* material, nor does it appear to cover co-workers privy to the same information. The California "shield" law, on the other hand, appears to exclude publication of news stories outside periodical publications.

351 Furthermore, attempts at definition can lead, paradoxically, to an uncertainty which is less desirable than that generated by a general discretion. Instead of concentrating on the underlying policies and their application to the case at hand, courts must first engage in considerable semantic analysis to determine what the definition means (see Cripps, "Judicial Proceedings and Refusals to Disclose the Identity of Sources of Information" (1984) 43(2) CLJ 266). The Commission believes that in the case of a professional activity, particularly one so closely linked with principles of freedom of speech, it is undesirable to define that activity in any but the most general terms.

A general discretion

352 A specific statutory regime introduces a measure of certainty by giving the court a framework within which to reach its decision. A discretionary regime can offer a framework no less useful, if sufficient guidelines are provided. But it has the added advantage of giving a court the necessary flexibility to adapt to changing circumstances. Accordingly, the Law Commission considers that the approach indicated by s 35 of the Evidence Amendment Act (No 2) 1980 should be retained - but with certain modifications.

Should journalists' sources be protected by the general discretion for confidential information?

353 A discretion to allow a witness to decline to answer questions always existed at common law, and its application has extended beyond journalists. The enactment in 1980 of s 35 removed in New Zealand any lingering doubt as to the existence of the discretion. The wording of the section reflects the view of the Torts and General Law Reform Committee, which recommended its enactment in 1977, that there should be flexibility with suitable guidelines, so as "to ensure a reasonable consistency and predictability of approach."⁽⁷⁴⁾

354 Although the Committee and the legislature appear to have had journalists in mind when the legislation was adopted, the protection which s 35 offers is no longer adequate. The following matters need to be addressed in any redrafting of the provision:

- *The protected information.* *Cross on Evidence* (Mathieson) 269, maintains that s 35 "does not entitle a journalist to claim the Court's indulgence to permit him to refuse to name an informant: it is only the information passed, or the facts stated in the document that may be withheld *under s 35(1)*." Scrutiny of the provision may not bear out this reading, since to excuse a witness from having to answer *any* question would appear to extend to protecting the identity of the source, and disclosure would therefore be a breach of confidence. However, there may be an ambiguity which should be eliminated. Any provision replacing s 35 should make it clear that the identity of the source of information, or matters which might reveal that identity, may be protected from disclosure.

× *A presumption of protection?* It seems to be accepted that, under the present s 35, the onus is on the party seeking to withhold the information to satisfy the court of the necessity of doing so. The Commission does not propose that a new provision should shift that onus to the party seeking its disclosure. However, it should not be necessary to have to establish in each case that the freedom of the press and the confidentiality of its sources are matters of public interest which, other things being equal, should be protected by the section. For this reason, the free flow of information (and, by implication, the freedom of the press) should be declared to be a matter of public interest.

× *Application to interlocutory proceedings?* There is some doubt as to whether s 35 applies to discovery (*Sutton v NZ Guardian Trust*, unreported, High Court, Auckland, 23 June 1986, A 835/84, Barker J, 89). While there is no occasion to abolish the "newspaper rule", it need not remain a distinct doctrine; and the principles underlying the general discretion should also be made to apply in interlocutory proceedings.

· *The guidelines.* The guidelines laid down in s 35(2)(a),(b), and (c) are insufficiently detailed. In respect of protection for journalists' sources, the following additional guidelines would be helpful:

- alternative avenues should be exhausted before ordering a journalist to disclose;
- a court should take into account the nature of the proceeding, such as whether it is criminal or civil; and
- it should also consider whether disclosure can occur in a manner which limits publication, such as through inspection by the court or name suppression.

355 The Commission considers that with these amendments, which may be helpful for other types of confidential information too, a provision equivalent to s 35 in the proposed evidence code would adequately protect journalists' sources from compulsory disclosure. There is therefore no need for a specific head of privilege, separately enacted. Moreover, since the new provision would apply to all relationships of confidence, and not just to the sources of journalists, there would no longer be any need for R 285 of the High Court Rules (see para 0). The "newspaper rule" would be likewise subsumed under the wider discretion, which could be applied to discoveries, interrogatories and witness evidence as seemed appropriate to the respective court. No separate provision is proposed for journalists (see s 11, at end of ch 15).

PART IV

PRIVILEGES OF GENERAL APPLICATION

Introduction

Information need not fall within any particular category to be protected. The courts have a general power to control the admission in evidence of confidential material, from the private and/or the government sector. There are questions about the overlap between the legal doctrines involved, and between the general powers on the one hand and the defined privileges on the other.

356 There are two doctrines which confer general protection on confidential material. One is for private confidences, the other is for government secrets. What they have in common is that they deal generically with confidential or secret information. They do not link privilege with any defined relationship or specific occupation. It is enough that the information is confidential or secret, and that disclosure of information deriving from it may cause harm to the public interest. That, however, is only the first step in determining whether, in any particular case, protection ought to be granted. The court must then look at the facts of the case, balancing the harm to society caused by disclosure against the harm caused to the administration of justice if full information is not available.

357 It is proposed here to lay the ground for the more detailed discussion which follows in the next two chapters. The Law Commission discusses in this chapter

- the basis of the distinction, in present law, between the two doctrines, and

- the case for a discretionary approach to defining what material is protected from disclosure in court.

PRIVATE AND PUBLIC CLAIMS FOR PROTECTION

358 The two doctrines, developed separately in this part of the paper, are

- the law applicable to confidential relationships in the private sphere (ch 15), and
- the law protecting information for the benefit of the public interest in good government ("public interest immunity") (ch 16).

359 The relationship between the two doctrines is not straightforward. As a matter of law, they would appear to be distinct. In the New Zealand Court of Appeal, Cooke P has indicated that he is disposed to the view that "the kind of claim to confidentiality made in [the former] field need not be approached under the head of public interest immunity" (*Re Dickinson* [1992] 2 NZLR 43, 46 following a similar observation by Ralph Gibson LJ in *Brown v Matthews* [1990] 2 All ER 155, 164). But the conceptual basis for such a distinction is not clear, since the private interest in confidentiality still has to be balanced against the public interest in a fair determination of the issues in the case (see *Re Dickinson* 47). This requires reduction of both types of interest to a common denominator; that is to say, the balance of the public interest in avoiding the effects of secrecy on the one hand and of disclosure on the other.

Should the distinction that is now drawn between private confidentiality and public interest immunity be retained?

360 Nice points can therefore be entertained about the basis of the present common law jurisdiction. But in New Zealand the focus has been changed by legislation. Section 35 of the Evidence Amendment Act (No 2) 1980 stresses, as a prerequisite to its operation, the existence of a confidence between the witness and some third person, which would be breached if the information were disclosed in court. This clearly points to the private nature of the originating confidence. But the section then goes on to require the court to balance the public (not private) interest in maintaining confidentiality, against the public interest in having the evidence disclosed to the court. This, it may be argued, indicates that there is no conceptual distinction between what the court does in cases of private confidence and public interest immunity.

361 The difference between the two appears to lie, not in the conceptual approach, but in the types of case each is designed to cover. It is often maintained that public interest immunity is limited to matters affecting government (and central, rather than local, government at that) (see *Cross on Evidence* (1989) 287-288). Clearly this view has historical force, although (as the authors of *Cross* rightly accept at 288) there has been a recent judicial tendency to treat them as part of the same jurisdiction. Section 35 itself takes in cases which could well be regarded as governmental, as is shown in the case of *R v Secord* [1992] 3 NZLR 570 (statement made to a probation officer, as required by Criminal Justice Act 1985).

362 The Commission proposes, notwithstanding this theoretical uncertainty, to deal with private and governmental secrets separately. It may be asked whether the Commission should not go further, and integrate the treatment of private and government information in a single, omnibus statutory discretion. There are things to be said in favour of that course. The broad principle adopted by the Commission elsewhere is that the Crown should be in the same legal position as its subjects (*A New Interpretation Act: To Avoid "Prolivity and Tautology"* (NZLC R17 1990) paras 128-129). That proposition underlies the Crown Proceedings Act 1950 and is explicitly affirmed in s 27(3) of the New Zealand Bill of Rights Act 1990. Moreover, as already suggested, the legal techniques used to protect the information are becoming increasingly similar in both cases.

363 The Commission considers, however, that amalgamating the two doctrines would be too radical at this stage in the development of the law. Claims for Crown immunity will continue to have some distinctive characteristics. It is helpful to separate them out, so that their character (and the recent jurisprudence which has developed around them) is not lost. It is true that the distinction between the two doctrines will be hazy in borderline cases. Since, however, both doctrines will be expressed in very similar terms, assigning a particular case into one class or another should not normally lead to any significant differences in result.

THE CASE FOR DISCRETIONARY PROTECTION

364 It is proposed first to consider discretionary protection in general terms. Then we explore the basic arguments for making special provision (as we have in the previous two parts of the paper) for specific types of confidential information.

Rule or discretion?

365 The movement towards discretionary justice was fairly well rooted in the style of the law reforms of the 1970s and 1980s, and reflected a more general concern (which was shared by the judges) that society is not always well served by inflexible rules. Developments in the law of privilege followed that course. As Cooke P observed in *R v Howse* [1983] NZLR 246, 251,

As to s 35, this is a characteristic piece of statutory law reform in the New Zealand tradition. Identifying an area as having problems not lending themselves to solutions by fixed rules, the legislature has conferred a discretion on the Court to weigh the competing public interests bearing on each particular case, having regard to broad criteria.

It would be fair to add that the law of public interest immunity, which was entirely judge-made, and was accepted by judges in not only New Zealand, but also England, Australia

and Canada, had a similar tendency.

366 In the case of public interest immunity at least, it may be argued that the judicial power is not a true discretion, but is more an exercise in judgment based on fairly hard criteria. The question, "does the public interest in preserving the secrecy of this information outweigh the public interest in disclosing it for these court proceedings", is a well directed question. True, the word "outweigh" is a metaphor behind which lies a reference to a fairly complex (and not clearly structured) series of value judgments. But the arguments which can be made for or against disclosure fall within a fairly limited range and eventually a decision has to be made about which set of arguments is the more convincing.

Does the "weighing" rule involve a pure discretion, or a closely directed judgment?

367 Following this line of thought, when public interest immunity is put into statutory form, reference is sometimes made only to the "weighing" metaphor. Any discretionary element is downplayed. For example, in the Ontario Law Reform Commission's *Report on the Liability of the Crown* (1989), 133, the draft statute (s 7(1)) says that

the court . . . shall allow the disclosure of the evidence unless the court is satisfied that the injury to the public interest that would result from disclosure would outweigh the injury to the administration of justice that would result from withholding the evidence

(See also the Law Reform Commission of Canada's proposed code, s 43(2), which confers a "privilege" on the Crown in similar terms, no reference being made to the court's involvement in making the assessment.)

368 Our own draft provisions (ss 11(2) and 12(2) of the proposed code), follow the pattern set by s 35 of the Evidence Amendment Act (No 2) 1980, and explicitly recognise the discretionary element in the decision to allow evidence to be withheld. Their form is adapted from the much simpler provision found in the Australian Law Reform Commission's Report No 38, Appendix A at 187 s 112(1). For reasons which are mentioned in the following paragraphs, we consider it important to examine the discretionary element out in the open and discuss whether it is appropriate. However, we would welcome comment on whether, in the final version, that form of words should be adhered to. The alternative would be to adopt the form of words used in one of the Canadian draft provisions.

Is discretionary protection appropriate?

369 Both the statute and the judge-made law were creatures of their time. The Commission acknowledges that some informed members of society may be less willing than they once were to trust the courts to do the right thing when released from the discipline of formulating and applying clear and well-directed rules. While the Commission does not share that distrust, nevertheless it considers that it is important to look carefully at any discretionary element in what is proposed. It is also

Are the discretionary elements in s 35, and the Commission's proposals, too great?

important to enquire whether a rule of law might effectively be adopted instead.

370 When is it appropriate to adopt a statutory judicial discretion? This is a broad question, and we confine our comments to the particular needs of the law of privilege. Several points need consideration:

- Major policy matters should not be avoided by the expedient of framing a discretion, when they need to be settled by the society through its elected representatives.
- There should be a reasonable assurance that the facts that would have been needed to legislate on any unsettled matter will also be available to a court, through the experience and judgment of its members, or else through evidence provided in particular court proceedings.
- The discretion should cover a sufficiently confined area which can be dealt with on the basis of well-recognised criteria. Allowing, perhaps, for an initial "settling in" period while ambiguities are explored, the courts should be able to follow general principles which give an assurance that the discretion is one capable of being fairly and consistently applied.

371 The Commission considers that its proposals for dealing with the law of confidential information satisfy these three requirements. As to the first, the policy direction is clear: the information must be "confidential". To make the policy considerations more specific, one would need to go beyond broad generalities and refer to specific types, or classes of case where secrecy should be maintained. But it seems unlikely that a list of "approved" confidential relationships, or types of confidential information would be helpful. The task of preparing such a list would be a large one, and even then some cases which fell within it would clearly be undeserving. For example, should a confidence between a "doctor" and a "patient" be protected, when it takes place in a prison in which both are inmates? For each category, there might have to be a number of such exceptions. And there could be lengthy debate about whether protection should be confined to relationships with registered or specially qualified members of each occupational group, when the critical issue in individual cases is likely to be whether the patient or client thought, in good faith, that they were dealing with someone who had the ability to help them in a very private area of their lives. And, of course, even if against all the odds a list can be created, it will rapidly go out of date as new ways are found of helping other people.

372 Once the information has been identified as "confidential", the question is one of balancing the need for protection against the need for the information in court. The criteria which will usually be relevant can be listed, as we have done in our draft legislation (see para 414). The balancing process itself is difficult to describe further, since its application will be very particular to the circumstances of the case. What is "damaging" to the person who is trying to have the evidence kept secret, on the one hand, and what is "important" to the person trying to get it disclosed on the other, will be very variable.

373 The second question is whether the courts will be sufficiently acquainted with the facts to make a full and fair assessment of the situation. As to one side of the equation, the

need for the information in the particular case, the court will usually be in a much better position to assess the particular circumstances, than any legislature could provide for in advance. But the position is more difficult with the other side of the equation, namely, the possible social harm which could result if information which passes to a particular class of counsellor or adviser is regularly made available in court. It has to be conceded that this assessment will invariably have a speculative element.

374 Nevertheless, the court will have before it the opinion of the adviser who has been asked to disclose the information. The parties can also call, without too much difficulty, an expert in the same field, perhaps someone from the executive of the adviser's professional association. This is precisely the kind of information on which the legislature itself would likely act if it formulated a general rule on the same subject. It is therefore difficult to see what advantage, in this respect, a legislative rule might have over a judicial discretion.

375 Finally, there is the question of fairness and consistency in the application of the relevant principles. It should be observed that the courts have applied the present law of public interest immunity, which has few clear guidelines, reasonably effectively for over 30 years. There appears to have been little complaint based upon unpredictability or failure to develop consistent principle. That may indicate, either that the courts have maintained reasonable consistency, or else, perhaps, that consistency is not the paramount concern in such cases. That is not to say that the absence of guidelines is a virtue. We have some comments later about the way in which the discretion which applies to general private confidences should be exercised. They may assist in evaluating any claim that the discretion is an uncertain or arbitrary one.

376 Given that the court can assess the situation in each individual case in the light of the particular state of evidence at the time, there seem to be substantial benefits in maintaining a system of discretionary protection. The disadvantages that might ordinarily cast doubt on the wisdom of such a law appear not to exist here, and it seems unlikely that the legislature will do better by attempting to lay down more concrete rules in advance. The criteria which are set out in the Commission's draft evidence code (s 11), while not perhaps necessary, may go some distance towards alleviating any remaining fears there may be about the width of the proposed discretion.

Should the discretion apply in all cases?

377 If the discretionary approach is in general to be preferred, should not all privileges be brought within its purview? Why maintain a series of separate privileges? This question was addressed, in a preliminary way, in ch 8. Now that the specific privileges have all been considered, it is possible to offer a more definitive answer to that question. The choice depends upon the nature of the information which is to be protected.

Are defined privileges better brought within the courts' discretionary powers rather than being dealt with separately?

- The information may be so significant and damaging that it is desirable to have a clear rule stating that such information, if disclosed in the course of a particular relationship, cannot be disclosed in any circumstances. Without such a rule, people would not communicate with those in the best position

to help them, or with those whom they can best help.

- The information, though not in itself particularly significant, may be an obvious "target" because of its proximity to court proceedings. Without a general rule, there will be frequent claims for the information on the off-chance that it may be of assistance to the other side in the case, if only by way of minor "point-scoring" at the trial.
- The information, though of itself insignificant, may be imparted in the course of a relationship traditionally regarded as private or sacred. It is desirable to have a rule which expresses that symbolic bond, even at the cost of losing information which might be of value in a court proceeding. In practice the cost will be slight, or observable only in a small minority of cases.

378 Examples of the first class would be found in statements made by client to lawyer in relation to a pending court case (ch 3), or statements made by a person dependent on drugs to the doctor giving treatment (ch 11), or the identity of police informers (ch 12). Examples of the second would be found in information gathered by the other side in a court case (ch 4), communications with a lawyer about a legal matter where litigation is not currently contemplated (ch 5) and statements made in the course of settlement negotiations (ch 7). An example of the third would be religious and spiritual communications (ch 10).

379 As suggested in ch 8, there is a further reason why it may be desirable to have certain clear privilege rules, alongside the general discretion. By indicating its intention in those areas, the legislature can establish "markers" which the courts can use as reference points when similar matters arise under the general discretion. For example, the present law (and our draft code), when it deals with testimony of spouses against each other, indicates a very clear policy that one spouse should not be required to testify in circumstances which could cause damage to the relationship between the spouses or to the family unit. This could well be a significant consideration, also, when in a civil case the opposite party is trying to get matrimonial information from a spouse and disclosure would imperil the marriage bond.

380 Most of these cases which call for separate treatment have already been identified by the courts or in earlier legislation. With the exception of police informers, it is not proposed at this stage to add any further categories to the established list. The only other category of case which might perhaps deserve special consideration, is that of the accountant, auditor or other commercial expert, who gives advice on the possible impact of the law on a proposed transaction. Had the Commission not recommended an extension to the boundaries of legal professional privilege, so that (in its qualified form) it extended to such activities, very serious thought would have been given to including a specific protection for communications with commercial advisers in relation to legal matters.

381 Apart from that, a study of the relevant law, and of the files of the Torts and General Law Reform Committee whose work formed the basis for the present s 35, does not suggest that there are other relationships which call for special treatment in this way, and

indeed the sentiment of many of those professionals with whom we have been able to discuss our draft paper, is that they would prefer not to be put in a special position and thus set apart from others who perform similar functions.

382 That is to treat the matter at the general level. The Commission is aware that there are some provisions, applicable to particular types of proceedings, where special rules automatically exclude confidential material, apparently for one or more of the reasons we have described. This seems perfectly legitimate, even if protection (for that limited purpose) goes beyond what we have recommended. For example, under s 18(1) of the Family Proceedings Act 1980, no evidence is admissible of statements made or information disclosed to a counsellor exercising functions under the Act, or at a mediation conference. As already pointed out in ch 9, this very simple statement of the rule does not take into account the varied circumstances in which it may be applied. But in general there can be no objection to specific provisions dealing with confidentiality in particular types of proceeding, as long as they are consistent with the wider framework of the law of privilege.

Conclusion

383 The general "balancing" process referred to in this chapter is common to both the discretionary approach applied under s 35 and the law of public interest immunity. Balancing is a difficult process to control by statute, and any description of the process will necessarily be approximate only. It is a matter for the exercise of principled judgment, but the courts' approach cannot be confined by rules. The outcome of the process is neither precise nor certain. But it is preferable to attempting to define classes of protected claimants by statute, especially as the public seeks the counsel of new groups of advisers who are not covered by the present legislation. It is not satisfactory to attempt to delineate these relationships one by one. That does not preclude the possibility that some additional privileges might be created if there is a real need for them, either generally or for particular purposes. But the direction of the law should be to strengthen the general judicial discretion, and make special provision only where the case for it is clearly established.

Confidential relationships

There are a large number of confidential relationships which are not covered by any defined privilege. The present law permits the court to excuse a witness who is being asked to testify in breach of a duty of confidence. But some secrets are not the subject of a duty of confidence at all. The person who has most interest in the secret being kept may not be in court. How far should the courts be able to go to protect confidential and secret information?

384 The previous chapter discussed, in general terms, powers of the court to order that confidential information not be disclosed in court proceedings. This chapter will look in more detail at the protection of private confidential information. It will be proposed that the provisions of the present law (s 35 of the Evidence Amendment Act (No 2) 1980) be adapted and extended to cover all matters of private confidence. This general protection would run alongside the specific provisions dealing with privilege and non-compellability discussed in previous parts of this paper.

WHAT SHOULD BE PROTECTED?

385 The reasons for protecting confidential information are as wide-ranging as the human relationships and desires which cause it to be kept secret. It is proposed to mention three classes of case to illustrate that variety:

- counsellors;
- commercial transactions; and
- other relationships.

Should a single discretionary power be used to protect a wide range of confidential information?

Counsellors

386 During this century there has been an expansion of relationships in which confidences are regularly communicated by one party to another. Indeed, in some of these relationships confidentiality is at the heart of the transaction. Many are analogous to the doctor-patient relationship, and may in some cases have grown out of it. They are those which involve counselling of some description, a practice which often has a significant psychological element, and relevant occupations range from marriage guidance counsellor to social worker, and even to school teacher. All may be privy to confidences of some kind or other, whether they relate to matters of sexual or of social dysfunction, or some other intimate concern.

387 There will be occasions when it is vital that such information be before a court, for example, where the welfare of a child is at stake. Another example is when the nature of professional help given to a client is significant in assessing the validity of a claim the client is now putting forward; for example, in relation to a disability insurance claim. But there are other cases where the same information can readily be obtained without breaching the confidence of the relationship. Or it may be that the information is not of great significance to any important issue in the case. There is a clear case for balancing the potential harm caused by breaching confidence, against the need for the information in the proceedings. The alternative would be to allow counsel for either party to insist on disclosure simply on the grounds that the information is, or may be, "relevant" to the case according to a very low standard of what is relevant.

Commercial transactions

388 Confidentiality can also arise in what may be broadly characterised as a contractual context. Two areas which are commonly associated with such confidentiality are employment and banking, although it is not of course confined to them. Both involve some kind of implied or express term or undertaking that certain information will not be disclosed. An employee may, for instance, become privy to sensitive commercial information; while an employer may store data on employees, such as references, which may be withheld even from the employees themselves (see, for example, *Bell v University of Auckland* [1969] NZLR 1029; *Slavutych v Baker* (1975) 55 DLR (3d) 224). Similarly, banks will not divulge information about customers' accounts unless legally obliged to do

so. (See *Tournier v National Provincial Bank* [1924] 1 KB 461; *Allingham v Bank of New Zealand* (unreported, High Court, Auckland, 18 August 1988, Barker J, CL 23/88).)

389 The law should in general protect confidentiality of customer accounts according to the nature and strength of the confidence. But that is for the protection of the customer, not the convenience of the holder of the information. As to the latter, the Banking Act 1982 provides a legislative scheme under which certified banking records can be received in evidence without the necessity for calling any bank officer (s 5). Bank officers cannot be compelled to attend court to produce bank records or prove matters recorded therein (s 6).

The entire Act is under review with a view to its repeal (Reserve Bank of New Zealand *Review of the Banking Act 1982 A Discussion Paper* (June 1993)). The Commission would support the repeal of these two provisions in particular. Section 5 covers matters which will be dealt with, in much more general terms, in our code provisions about hearsay evidence (see NZLC PP15).

390 Section 6 may have been desirable when proof of such matters by producing bank statements was much less common than it is now, and production of the original bank books could have inconvenienced the bank through temporary loss of its records and the demands upon its staff time. But these considerations now apply to a much lesser extent, and there is no reason why a bank should be treated differently from any other commercial institution whose business records are relevant in court proceedings.

Other relationships

391 There are other relationships, too numerous to mention and too varied to categorise, where similar expectations of confidence arise. Journalists and their sources have already been discussed (ch 13). Other examples include serious and confidential advice given between family members; important trade or business secrets, on which business success depends; and charitable organisations' confidential information about the people they help or the causes they support. In all of these cases, the same considerations apply as with counsellors and confidential commercial transactions. The general principle of confidence flows from a wide range of relationships for which no general privilege has ever been claimed. It can also apply within one of the traditionally privileged relationships in cases where they do not meet the accepted conditions for the grant of a privilege.

392 In every case, the circumstances determine whether a court should allow some form of protection for confidential information. In many of the relationships which have been mentioned not every aspect necessitates confidentiality. A teacher's counselling of a pupil about an abusive relationship at home, for example, cannot be compared with the same teacher's routine administrative dealings with the same pupil. In addition, confidentiality will often be relative in nature; that is, while the information will never be made available to the public at large, it will be referred, as and when necessary, to colleagues and other professionals.

393 This means that when considering such relationships of confidence it is not appropriate to think in terms of occupation or interest alone, or to draft specific

occupational protections. It is better to look at the nature of the information for which protection is sought. The importance of protecting it from disclosure may vary considerably from case to case.

394 The Commission considers that the confidentiality of material generated in these relationships needs protection. That can best be done (as it is under the present law) by conferring a discretionary power on the court to decline to require witnesses or the parties to disclose information because of the harm to society which may result. It is a judicial "power", not a "privilege" possessed by a party to a particular relationship. If that power is exercised, there is the same effect as if the material is privileged. Still, the process of reaching that conclusion is different, and in this paper, and in our draft statute, we have reserved the term "privilege" for the specific privileges referred to in the previous two parts of the paper.

THE PRESENT LAW

395 Some occupations and relationships are specifically covered by the law (see ch 13). This is true of marriage guidance counsellors who, because their work is almost entirely bound up in a confidential relationship, are given absolute protection in certain circumstances in New Zealand by s 18(1)(a) of the Family Proceedings Act 1980 (see para 246). This would not change under the Commission's proposals. But others, such as social workers and probation officers, are given no specific protection (see *R v Secord* [1992] 3 NZLR 570) in which case a claim for privilege requires the exercise of the court's discretion.

396 This discretion derives from three separate - but not unconnected - sources:

- A procedural "discretion" not to require a witness to testify about, or a party to discover, confidential information which is admissible, but not necessary for the case (see *Science Research Council v Nassé* [1980] AC 1028, 1066).
- A rule of the common law requiring the courts to weigh the harm to the public interest caused by disclosure of the confidential information against the costs to the administration of justice if it is not disclosed (see, for example, *Campbell v Tameside Council* [1982] QB 1065; see also ch 13).
- A general statutory discretion to excuse a witness from answering a question or producing a document, applying a similar balancing test (Evidence Amendment Act (No 2) 1980 s 35).

The first of these relates to criteria of "relevance" which vary from case to case and about which little more can be said. But the other two call for specific comment.

397 The common law doctrine allows the court to give protection for private confidences. Confidentiality is not in itself sufficient to establish such a claim for immunity, but if confidentiality can be shown to be operating in the public interest, then the courts will protect it. The court determines where the public interest lies by balancing the interest in

maintaining confidentiality against the interest in the administration of justice. The presumption is that the latter will prevail unless, in the words of Lord Diplock in *D v NSPCC* [1978] AC 171, 218, "a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law." In balancing the two interests, the court has to weigh up the respective harm which could result from protecting the information from disclosure or not. In particular, it has to consider the importance of the information in resolving the dispute before the court, and whether - when it becomes generally known that information of this kind can be made available to the court - persons supplying such information will stop doing so.

398 Section 35 was enacted specifically to extend protection beyond the historically recognised professions. It is a peculiarly New Zealand provision, though law reform agencies in some other countries have since adopted the same approach in their recommendations (eg, Western Australian Law Reform Commission *Report on Professional Privilege for Confidential Communications*, Project No 90 (May 1993)). The section provides:

(1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

- (a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding;
- (b) The nature of the confidence and of the special relationship between the confidant and the witness;
- (c) The likely effect of the disclosure on the confidant or any other person.

399 New Zealand courts have seen s 35 as supplementary to the general law, and on occasion appear to have applied the principles of the general law in preference to those stated in the statute. The statute itself contains significant gaps. For example, it excuses the recipient but not the communicator of information, so that (in theory at least) the person who gave the information in confidence may be required to disclose it. There are also ambiguities and some doubt as to whether New Zealand courts would apply s 35 to instances of contractually based confidentiality (see *Re Dickinson* [1992] 2 NZLR 43, 50).

LEGAL REQUIREMENTS FOR PROTECTION

400 What is now needed is a statutory provision giving comprehensive protection to confidential relationships and information. Although s 35 is a good starting point, it may be usefully contrasted with s 109 of the draft Evidence Act proposed by the Australian Law Reform Commission (*Report on Evidence* R38 (1987) - a provision which was not adopted in the Evidence Bill 1993). This is both wider in scope and more detailed in its specification of how the court's discretion should be exercised. The Commission is of the view that the corresponding provision in a New Zealand evidence code should follow a similar approach.

401 In drafting the relevant provision, the following questions need to be addressed:

- Which relationships qualify for protection?
- Who is protected?
 - What is protected?
 - On what basis should the court's discretion be exercised?
 - What guidelines or relevant considerations should apply?
 - In what circumstances is protection inappropriate?

Which relationships qualify for protection?

402 In principle, any relationship involving the need to keep information confidential should qualify for protection. However, as has already been pointed out, confidentiality alone is not enough (see para 0). The question is whether it is sufficiently in society's interest for the confidential matter to be given protection. This means that in each case the court must examine the particular relationship to see whether it should be protected, or at least to weigh the damage to it if confidential information is disclosed to the court against the costs to the administration of justice if it is not.

403 This case-by-case approach is entirely appropriate for new situations which have not come before the court in the past, and the Commission believes that the ordinary process of case law development will recognise categories of confidential relationships which the courts recognise as qualifying for protection. It therefore sees no particular merit in providing a statutory list of relationships which presuppose a public interest in ensuring that they are not damaged by disclosure.

404 However, in order to suggest a general shape to the proposed discretion, a list of relationships and interests which may come within it is given here. This list - which is by no means exhaustive - may be divided into two categories. The first comprises those relationships and interests for which the Commission has suggested that the only appropriate protection is that given under a general discretionary provision:

- counselling and other support relationships;
- relationships involving commercially sensitive matters;
- personal privacy, particularly in the areas of finance and employment; and
- the free flow of information and the freedom of the press (see ch 13).

405 The second class comprises those relationships which were discussed in the previous two parts of this paper. While it seems at first sight strange that these need to be included, there are good reasons for doing so.

- In some cases (for example, doctors) automatic protection is conferred only in limited situations, or for particular purposes. Protection is clearly needed in the cases falling within the definition. But for other cases, there is still a strong element of confidentiality inherent in the relationship. It is important that the court not be prevented from exercising its general discretion, merely because in other, clearer cases the statute provides an automatic privilege.
- In other cases the ambit of protection may well be sufficiently widely drawn, so that in the normal course the court would not want to extend it any further. But the particular relationship may involve a different kind of confidentiality as well. A lawyer, for example, may also be a family adviser and confidant in relation to non-legal matters. It is important, in that example, to test confidentiality against the standards appropriate to *both* lawyers and family confidants.

Examples of relationships falling within the first class are marital and analogous relationships (ch 9), and health practitioners and their patients (ch 11). Examples in the second class are all the professional legal relationships (chs 3, 4 and 5), those with religious or spiritual advisers (ch 10) and settlement negotiations (ch 7).

Who is protected?

406 The wording of the present s 35 is narrow, in that it permits the court only to *excuse* a witness. But it does not *require the witness not to speak* - even if to do so would be a breach of confidence (*R v Howse* [1983] NZLR 246, 251). The provision should be widened, allowing the court to intervene to protect a range of interested persons. This would include not only the person who received a confidential communication and is asked to divulge it in court, but it also includes the person who made the communication, and indeed anyone in whose interest it is made - an example being a child on whose behalf a parent has consulted a doctor. A comparable provision is found in s 109(5) of the Australian Law Reform Commission's draft Evidence Act. Further, the court should be able, of its own motion, to order a witness not to testify as to confidential matters. This may be because such confidentiality is generally in the public interest, or because the court wishes to give parties with an interest in the information the opportunity to seek its protection.

Should people other than the witness be able to assert a claim to protection?

407 A more fundamental respect in which s 35 appears to be narrower than it logically needs to be, is in its reference to a relationship of confidence. This implies that there must be two people, a confider and a confidant. Further, disclosure must be a breach of some duty implicit in that relationship. Since it is the confidant who normally owes a duty of non-disclosure, the section operates only where information is sought from the confidant. The following situations are not covered:

Should a confidential relationship between two people be an essential prerequisite?

- Where the confider and confidant are the same person (for example, where instead of going to a priest, a person makes their penitence privately after making a lengthy written list of sins, real or imagined).
- Where, although there is both a confider and a confidant, the relevant material is found in the confider's possession (for example, where a person seeking a counsellor's help is encouraged to write down a list of their weak and strong points, preparatory to a further exploration of their capacity to function in the world).

In practice, however, this is not likely to be a significant limitation. Such documents are usually destroyed immediately. Even if they exist at the time a lawsuit begins, it will be very difficult for the other side to get to know of them. The only reason a person might have for retaining them would be to record the transaction for future reference. But, if the transaction were a business one, under consideration in the proceedings, the court would be unlikely to protect the record. And if some illegal action were involved as well, the court would be still less likely to do so (see ch 5). (Even then, production could be successfully resisted, not under s 35, but on the grounds that it might incriminate the witness. That topic will not be pursued here since it has been reserved for consideration in other work of the Commission.)

408 In criminal cases such information may be discovered as a result of the execution of a search warrant (in respect of which s 35 has no application anyway). If the document consists of a record of a criminal transaction, or if in some other way it unequivocally points to criminal guilt, then it would probably be admitted under the present law. But if (as is more likely) the writing is equivocal, consisting of no more than a general expression of remorse which cannot be tied to any particular event, then the court in its general discretion to afford the accused a fair trial would probably exclude it from evidence, unless it had a bearing on some other issue, such as the accused's sanity. This too is a topic more closely linked with the law of criminal procedure, which is the subject of a separate reference to the Commission.

409 Although the issue is unlikely to have much practical application, the Commission is inclined to frame the general confidentiality provision somewhat more widely than s 35. In doing this we follow (in spirit if not in precise wording) the precedent set in Australia (ALRC R38, draft Evidence Act, s 109(1) which refers to "a confidential communication or a confidential record". The Canadian Law Reform Commission's draft provision dealing with general privilege (s 41) is more limited, applying only to "confidential communications" made in the course of a professional relationship. But the wider provision seems necessary as a matter of logic. We are proposing that the legislature's

concern should be to prevent the unnecessary invasion of privacy through court proceedings. That concern applies equally whether private information has been communicated to another person or not.

What is protected?

410 Section 35 defines the protected matter as "information" or a "document", the supply or production of which would be a breach of the witness's duty of confidence. This covers not only what the witness has been told but also what the witness has observed on a confidential occasion, as well as facts or details which he or she has collated. In the case of doctors, it would protect observations made of the patient, tests conducted, and any diagnosis made as a result (compare ch 11, para 301). However, protection should be extended to cover information possessed

Should protection be limited to communications?

- not only by witnesses, but also by persons who are asked to make discovery in legal proceedings, whether they are parties to the litigation or not; and
- not only by persons in a special relationship of confidence, but also by those who have acquired information as a result of a breach of that confidence, or through inadvertent disclosure.

Should there be protection for information possessed by third parties?

The basis of protection

411 Section 35(2) speaks about the public interest in having the information disclosed in court being "outweighed" by the public interest in the preservation of confidences. It would be more precise, in the Commission's view, to measure the latter in terms of the "harm" brought about by the disclosure of confidences. This is the approach of the Australian Law Reform Commission's draft Evidence Act -both in relation to confidential communications in general (s 109(1)) and to the privilege claimed for matters of state (s 112) - and of the Canadian Federal and Provincial Task Force (*Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (1982) 461). Although measuring the harm caused by disclosure against the public interest in making such information available remains a complex process and is still expressed somewhat metaphorically, it indicates to the court more accurately just what factors it needs to consider in deciding whether or not to grant protection.

412 The Law Commission believes that it is likely that, in carrying out the "weighing" process, in many cases the court or tribunal member will want to see the document or find out what information is in issue. That can be done without necessarily showing it to the party who seeks disclosure (see para 26). The Commission does not see any difficulty with that. The judge will probably have already formed the view that (on the facts otherwise known to the court) the case for disclosure is in the balance. If the judge then sees that the information is important to the case, it will almost inevitably have to be produced anyway. If it does not have that degree of importance, an experienced judge or tribunal member

should not have too much difficulty in putting it out of mind, and in forming a judgment based solely on the admitted evidence.

Statutory guidelines or suggested considerations

413 The question arises as to whether or not the legislation should go further, and include a series of guidelines or considerations which courts may wish to take into account, as do ss 109 and 112 of the Australian Law Reform Commission's draft Evidence Act and cl 130 of the Australian Evidence Bill 1993. Certainly, the courts have reached satisfactory conclusions without detailed statutory guidance. However, given that the Commission's proposals widen the ambit of s 35, it may be that the discretion needs some form of direction or limitation.

414 The Commission has therefore included in its own draft legislation a set of possible guidelines or considerations. They are drawn from those already listed in s 35 and from overseas models, particularly the Australian Law Reform Commission's draft Evidence Act and the Canadian Federal and Provincial Task Force Report. A court would be required to take into account:

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|--|
| Is it helpful to include a list of relevant considerations in the statute? |
|--|

- *the nature of the proceedings* - for example, whether they are criminal or civil;
- *the nature of the information sought* - whether it is fact, opinion, conjecture or arises from policy discussion;
- *the significance of the information to the proceedings* - the extent to which it is likely to influence the outcome, and whether there are other means of obtaining the same information;
- *the consequences of disclosure* - the extent of harm likely to be caused to the party wishing to protect the information, to the confidential relationship itself, and indeed to such relationships in the future;
- *the availability of means of limiting the adverse effects of disclosure* - for example, whether conditions can be imposed on who is to obtain the information, and what use may be made of it; and
- *age and current sensitivity of the information or issue* - whether the need for protection has diminished with time, or because of prior disclosure to other parties.

415 It is in the nature of a list of factors of this kind that their significance will vary from case to case. Some factors will always tell against production, for example, if the information is not significant to the case before the court, or if its disclosure will seriously harm some innocent party. Others will always tell for production, for example, if the material is needed for the defence of a criminal trial, or if the document, though once commercially sensitive, has lost any significance for the holder's current activities. But

some are ambiguous. For example, the fact that the case is a civil proceeding between two private parties or commercial concerns is obviously not a factor against production if the successful determination of such cases is important for the general effectiveness of commerce (eg, in resolving the proper rentals to be set for long-term leases). But it may be so if the court takes the view that one side is pursuing a "grudge" against the other, no very significant principle being in issue between them. So it is not realistic to expect all of these factors to line up on different sides of a list in favour and a list against, without reference to the particular facts of the case.

Disqualifying factors

416 Finally, there is the question whether the claim to protection can be lost, either through the conduct of the claimant or through some other overriding consideration. Looking back to the privileges discussed in earlier chapters, it will be seen that a privilege may be lost if

- the confider consciously waives it,
- the confider voluntarily discloses or publishes the information, or otherwise uses it in a way which is inconsistent with maintaining a privilege,
- there are persons with joint and successive interests who should have access to the information (but only as regards them),
- the privileged communications are made in furtherance of a criminal or unlawful act, and
- the privileged information is relevant to the defence of an accused.

(See also draft evidence code, ss 13, 14 and 15.)

417 In the form in which the Commission's proposed legislation has been drafted, these provisions will not expressly apply to the information protected under the general confidentiality section (s 11), since it does not confer any "privilege". But, given that the jurisdiction is discretionary, they are matters the court will naturally wish to take into account in deciding whether or not to grant protection. So we have not thought it necessary to incorporate these limitations into this particular section. They are in most cases relevant under one or other of the factors the court is directed to take into account by the section itself. Reference may be made in particular to "the nature of the communication or information and its likely importance to the proceeding", and "the extent to which the information has already been disclosed to other persons". In addition, any person seeking the exercise of the court's discretion will in any event wish to show that, in making the application, they are acting fairly, properly and in accordance with any legal duties they owe to the witness and to other parties to the case.

Draft section:

11 Discretion as to confidential information

(1) A court may, in the circumstances described in subsection (2), direct that a confidential communication, or confidential information, or information which would or might reveal a confidential source of information, must not be disclosed in a proceeding.

(2) A court may give a direction under this section if the court considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in

- (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
- (b) preventing harm to
 - (i) the relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
 - (ii) relationships which are similar to the relationship referred to in subparagraph (i); or
- (c) maintaining activities which contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the court must have regard to

- (a) the anticipated extent of harm which may result from the disclosure of the communication or information; and
 - (b) the nature of the communication or information and its likely importance in the proceeding; and
 - (c) the nature of the proceeding; and
 - (d) whether other means of obtaining evidence of the communication or information are or may be available; and
 - (e) whether means of preventing or restricting public disclosure of the evidence are available if the evidence is given; and
 - (f) the sensitivity of the evidence having regard to the time which has elapsed since the communication was made or the information was compiled or prepared and the extent to which the information has already been disclosed to other persons, and
- the court may have regard to any other matters which it considers relevant.

(4) A court may give a direction under this section in respect of a communication or information whether or not the communication or information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by this Part.

The Crown

After major changes in direction in the past 30 years, the law concerning the release of government information is now relatively well settled. No major change is proposed, and the code provision will be brief. But a number of technical issues need to be resolved.

418 This chapter deals with claims to protection made by or on behalf of the Government. The claim to protection for state secrets depends upon the interest of the state, which may be harmed if information is disclosed in court proceedings. This, as has already been pointed out (ch 14), places the law on a different basis from that of the privileges discussed in Parts II and III. Indeed, the leading texts (eg, *Phipson on Evidence*, (1990) ch 19; *Cross on Evidence* (1989) ch 11) put this material in a separate chapter, under the heading "Facts Excluded by Public Policy". It is now customary to see the law, not as conferring a "privilege", but as operating on general grounds of policy. The older term "Crown privilege", which was formerly applied in such cases, has fallen into disuse, and the term "public interest immunity" has been put in its place.

419 The law on this subject has changed a great deal in recent years. Its "modern synthesis" is now well described in *Phipson on Evidence* (1990) 479 in these terms:

. . . [H]istorically there were two main strands of authority relating to the exclusion of evidence on the ground that it would be contrary to the public interest that it be disclosed. First, there are the cases which concern the degree to which courts would uphold the executive's desire for maintaining a veil of secrecy over its deliberations . . . The second category of cases were those where the courts have given protection to an aim of

the government because such protection was necessary for the maintenance of order . . . With the encroachment of the state into every aspect of life, it is not surprising that the latter category has been broadened, and drawn strength from the former.

The courts, however, have become reluctant to protect routine governmental information. And in New Zealand, another chapter of the story was written when the legislature adopted the Official Information Act in 1982. It is difficult to argue nowadays that too much government information is protected, or that it is generally kept secret on inadequate grounds.

420 The Commission acknowledges the importance of the principles of the Official Information Act 1982. The Act adopts a general principle of "availability" - that is, government information should be made available to the public unless there is good reason for keeping it secret. As regards personal information relating to private individuals, that principle is now implemented by the Privacy Act 1993 (see Official Information Amendment Act 1993, s 5, inserting a new s 24 into the principal Act). Both Acts affirm that not all government is open, and set out reasons for withholding information. The legislation has rightly been accepted by the courts as an important influence on the way in which the law of public interest immunity should be applied (see *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290, 305).

421 The Commission takes the view that the general policies of the Official Information Act are by now so well entrenched that there is little point in discussing the justification either of the immunity, or of the broad approach the courts have adopted in dealing with government claims for immunity from compulsory disclosure. Questions remain, however, about the form in which the common law principles of public interest immunity are to be codified. In this chapter it is proposed to consider

- what should be protected,
- the nature of the legal requirements for protection, and
- how a government claim to secrecy is challenged.

WHAT SHOULD BE PROTECTED?

422 It is proposed here to refer to four broad classes of government information which have traditionally been protected by the doctrine of public interest immunity. They concern

- high level government activities,
- the Cabinet.
- the administration of the law, and
- general administrative functions of government.

High level government activities

423 Any government (no matter how "open" it wishes to be) will want to keep to itself certain secrets, relating to security, sensitive diplomacy, and the formulation of current financial or economic policy. A helpful definition is found in the Official Information Act 1982, s 6.⁷ We set the section out in full:

6. Conclusive reasons for withholding official information - Good reason for withholding official information exists, for the purpose of section 5 of this Act, if the making available of that information would be likely -

- (a) To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
- (b) To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by -
 - (i) The government of any other country or any agency of such a government; or
 - (ii) Any international organisation; or
- (c) To prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
- (d) To endanger the safety of any person; or
- (e) To damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies relating to -
 - (i) Exchange rates or the control of overseas transactions;
 - (ii) The regulation of banking or credit;
 - (iii) Taxation;
 - (iv) The stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes;
 - (v) The borrowing of money by the Government of New Zealand;
 - (vi) The entering into of overseas trade agreements.

(Section 7 - which is not quoted here - extends the same protection to information which may affect the Government's relations with Pacific dependencies and self-governing states.)

424 The law of public interest immunity goes a considerable distance in accommodating this legislative concern for high level sensitive information. According to more traditional views of the law, this is the type of information which is readily accorded protection (see *Asiatic Petroleum Co Ltd v Anglo-Persian Oil Co Ltd* [1916] 1 KB 822). Even in modern law, courts are likely to accord great weight to Ministerial certificates on the subject, and to disclaim any ability to judge sensitive political matters any better than Ministers and their advisers. But there will still be occasions where an order for disclosure has to be made (see *Sankey v Whittam* (1978) 142 CLR 1 - disclosure of parts of negotiations between the Commonwealth and the Australian states during meetings of the

⁷ See also Privacy Act 1993, s 27, though that section contains no equivalent to paragraphs (d) and (e) of section 6 of the Official Information Act 1982.

Loan Council). However, high level government information covering sensitive matters is relevant to court proceedings only on rare occasions. Therefore, the question of disclosure in court and public interest immunity usually does not arise in this context.

The Cabinet

425 One type of information is excluded from s 6, but is frequently mentioned elsewhere as "high level". It consists of Cabinet minutes and official advice to Ministers about legislation and policy formulation. This information is found instead in s 9. That section sets out good reasons for not disclosing information unless "the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available". Section 9(2)(f) speaks of the case where withholding is necessary to:

- (f) Maintain the constitutional conventions for the time being which protect -
 - (i) The confidentiality of communications by or with the Sovereign or her representative;
 - (ii) Collective and individual ministerial responsibility;
 - (iii) The political neutrality of officials;
 - (iv) The confidentiality of advice tendered by Ministers of the Crown and officials . . .

426 Whether this information should be protected depends very much upon its nature and upon the timing of disclosure. This is particularly so of policy documents. It is one thing to disclose Cabinet minutes in relation to an ongoing matter on which the Government has yet to announce its policy. It is another to disclose them some years after the decision is made, in order to help clarify the policies which officials might be expected to follow in their actions and decisions. The need for a balancing approach is recognised in both judicial decisions and the Act itself. And there is the further important point that when the matter becomes one of public interest immunity, the court will have evaluated the information and will know how its disclosure is likely to affect the mix of evidence it has before it. In any balancing exercise, the need for the information (which can best be assessed by the court) is a vital factor in the ultimate decision.

The administration of the law

427 The next group of cases where information is currently protected under the law of public interest immunity are those dealing with matters which are under the courts' control. Modern judges have inherited a recognised set of practices now found in the textbooks in a crystallised form. These practices also fall within para (c) of s 6 of the Official Information Act, which refers to information whose disclosure might "prejudice the maintenance of the law" (see also Privacy Act 1993, s 27(1)(c)). It is customary to exclude from evidence

- testimony of judges and (to a lesser extent) arbitrators, concerning cases they have heard,

- testimony of advocates concerning statements made by them in court (which practice arises out of the general principle that an advocate may not also be a witness in the same case),
- testimony of jurors, concerning their deliberations, and
- information concerning the identity of police informers.

These practices are listed in *Phipson*, 474-477, and *Cross*, 289, 294-296, where they are regarded as matters falling within the general doctrine of public interest immunity, rather than as defined privileges. A list is also to be found in the Australian Evidence Bill 1993, cl 129.

428 The fourth type of case (concerning informers) has already been dealt with (see ch 12). As to the others, the Commission takes the view that, in general, these matters of judicial practice (and some of them are so little touched upon by precedent that they are scarcely more than that) are best entrusted to the court's overall power to control its own processes. However, the provisions for protection of government information in the code should be wide enough to encompass these matters too.

General administrative functions of government

429 Section 9 of the Official Information Act provides a number of further grounds on which protection of information from disclosure may be maintained. (The corresponding provisions of the Privacy Act 1993, ss 28 and 29, do not refer to concerns specific to government). As already pointed out, any claim to protection under s 9 is to be balanced against other considerations which show that it is in the public interest to make that information available. Much of the material listed in s 9 is precisely the sort of information which should be made available in an open democracy, particularly where it has a bearing on the rights and interests of the individual who is seeking to obtain it. It has regularly been made available under Official Information Act procedures. Although formerly it could be protected by a Minister's certificate under the law of "Crown privilege", that is no longer the case. The old "candour" argument (that preservation of the secrecy of advice is necessary to ensure that officials will be candid with each other, and with their Minister) is now treated with scepticism by the courts in public interest immunity cases (see *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290, 306).

430 Nevertheless, a legitimate and strong claim to secrecy, even in court proceedings, may be made out on appropriate occasions. Here too, therefore, there appears to be a case for some form of protection in court proceedings, but one which allows the court to exercise considerable discrimination between different kinds of official information. It also requires the court to be very alert to questionable assertions of harm to the public. Those qualities are clearly displayed in current judicial decisions, and the Commission is confident they will be readily apparent in the exercise of a discretion under any provision that may appear in our code.

Conclusion

431 The Commission proposes that there should be a general provision in the evidence code referring to "matters of state". That term would be defined so as to include all information which is sought to be protected for reasons corresponding with those set out in ss 6, 7 and 9 of the Official Information Act (other than those involving personal privacy). "Matters of state" could (as the section is presently drafted) include other claims as well. There may be merit in the contrary view, that protection under the section should be confined to the same claims as those recognised in the Official Information Act. The reason is that, by law, if a claim to protection is not of such a kind, the document should be automatically available under the Act without any need to refer to the court at all. That, however, would represent a change in the existing law (though not, perhaps, one of great consequence). There are also disadvantages in tying the broad provisions of a code so tightly to the detail of another Act, even though the Act in these sections sets out broad and generally acceptable criteria for the protection of official information. It is difficult to be assured that the same degree of congruence between the law of public interest immunity and the Official Information Act will continue into the distant future. Views would be welcomed on whether there is a need to keep open the possibility of a somewhat wider jurisdiction and, if so, what types of claim might fall within it.

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| <p>Should classes of protected government information be spelt out solely in terms of the reasons given for withholding information in the Official Information Act 1982?</p> |
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LEGAL REQUIREMENTS FOR PROTECTION

432 The provision the Commission has in mind will take the form of a general legal discretion, similar in expression to what we have proposed for private confidential information. But it should be less explicit as to the considerations which will apply. The section should not attempt to describe what is and what is not protected in any detail. The standards are already well laid out in the Official Information Act 1982 and the Privacy Act 1993, or are understood as part of the law of public interest immunity.

433 In general, the discretion will have similar features to that protecting private confidential information, which has already been fully discussed. However it is necessary to consider a number of additional matters. They are:

- factors relevant to the decision;
- any special characteristics of government claims; and
- exceptions.

Each will be considered separately.

The relevant factors

434 The considerations which are relevant to the court's decision have already been discussed in relation to private confidential information (see ch 15). They are equally applicable to cases of Crown immunity, and indeed are virtually identical to those included in the public interest immunity provisions which were recommended by the Australian Law Reform Commission and the Canadian Federal and Provincial Task Force.

Should a list of factors relevant to protecting government information be included in the code provision?

435 The Commission intends, however, to put them only in the private confidentiality provisions, and not to repeat them in the public interest immunity provisions of the code. The same word "weighing" appears in both sections, and the general nature of the weighing process will be clear to the court from the earlier private confidentiality section. More importantly, the Commission considers that it would be unwise to offer a statutory definition of the process of decision. It might be set up in competition with, or priority to, the more sophisticated and complex provisions for dealing with the same kind of information found in the Official Information Act 1982 and the Privacy Act 1993. These give all the guidance that can usefully be given. The extent to which this guidance is appropriate, or whether it is necessary instead to apply more general public interest immunity considerations, will always be a matter for the court in the circumstances of the particular case.

Special characteristics of protection for government secrets?

436 The law of public interest immunity inherited a number of special methods of application which, in the eyes of jurists, have set it apart from privileges which protect private confidences. These differences were clear when the claim to public interest immunity was contrasted solely with the protection given to private confidential material by the traditional "privileges". They became less clear, however, as the courts recognised, or were granted by statute, the more general power they have at present to deal with matters of private confidence (see ch 15). But it may be argued that they should be specifically provided for in the evidence code.

437 The Commission considers they should not. Nowadays, there is a strong case for incorporating the same characteristics of protection which apply to claims by the Crown, into the general law governing confidential information. The techniques used by the courts to protect the public interest from unreasonable claims to disclosure have equal value here. Indeed, there is a general tendency for methods of protecting "public interest" and "private interest" to converge. That will be accentuated if the proposals discussed throughout this paper (and not only in ch 15) are implemented.

438 The various ways in which the law of public interest immunity is thought to differ from the protection given to private confidential information are identified in the leading texts (*Phipson*, 473; *Cross*, 287-288). In particular:

- Any person, not merely the party who has entrusted information in confidence, may seek to have the evidence withheld, and the court may permit withholding of its own motion.

- The objection of state interest cannot be waived by the Crown or any of its officials though (if reliance on it is so disclaimed) that may considerably affect the court's view of the public interest in non-disclosure.
- Where tender of the original documents is not permitted in the public interest, no copy is admissible either, even if it is found in the hands of someone who is not a public official and that person offers it to the court.
- The courts in the past have been willing to entertain "class" claims to protection. That is to say, documents which fall into particular "classes", such as Cabinet minutes, were invariably protected irrespective of how secret or serious the contents of particular documents falling in the class (though see now *Sankey v Whitlam* (1978) 142 CLR 1).

439 The Commission would not do away with these aspects of public interest immunity. On the contrary, it considers that they are desirable and should be applied more generally. If that is done, there is no need to make further reference to them in the code provision dealing with Crown immunity. We refer to each in turn.

440 As regards the question of *standing* to raise the question of secrecy, the Commission considers that this is a problem applicable generally to matters of privilege. Are people who are likely to be harmed adequately represented before the court? If they are, then the court may presume that a stance taken in court reasonably reflects what is in their best interest; if not, then the court must undertake to protect them itself.

This applies as much to (let us say) an absent beneficiary under a will where there is a private claim of privilege, as it does to a group of citizens who may be specially affected if the Crown (without consulting them) ignores a potential claim of public interest immunity.

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| Should the immunity be able to be sought only by the Crown? |
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441 For most practical purposes, of course, the court will act on the assurances of those appearing in the litigation, or at least give them considerable weight. But there will be times when it is not satisfied that the people with the real interest in secrecy are before the court. With public interest immunity, in current practice the claim is ordinarily made by the relevant Minister or head of department. That practice will presumably continue under the Commission's proposed legislation. But it is clear that the court has a general duty to exclude material where disclosure may damage the public interest (*Conway v Rimmer* [1968] AC 910, 950), and where that is the case it may act on the application of a party or witness, or of its own motion.

442 That is not to say that the courts may not be influenced by the fact that the Crown decides against making a claim to privilege where it could do so. It would seem that, at the very least, the courts are entitled to see this as a strong indication that the claim to privilege is unwarranted (*Sankey v Whitlam* 44, 100-101). But the point does not seem to be one on which a distinct set of rules should be made. If anything, the present law of privilege should be extended to ensure that in all cases the court can, in appropriate circumstances, act in the interests of absentees (see draft evidence code, ss 2(3), 11(4)).

443 In relation to *waiver*, similar reasoning would appear to apply. On the analysis offered in the previous paragraphs, the position of the Crown is little different from that of any person who is jointly privileged with a number of others. Any one of them should be able to object to production (see draft evidence code, s 14(1)). The fact that one of them waives the objection is not necessarily decisive against the others. Of course, the Crown is a recognised custodian of the public interest. Again, the Crown's decision not to object to disclosure will often be a strong indication of where the balance of public interest lies (see para 346).

Should the Crown be able to waive a claim for immunity?
What is the effect of waiver?

444 In the present law, there is conflicting authority on a related point. Should the Crown, having made a successful claim to privilege, be permitted subsequently to waive it, or should the waiver be regarded as ineffective? The Commission considers there should be no set rule on the matter. It can safely be committed to the discretion of the court, which could give such weight as it thought fit to the position taken by the Crown. The Crown may not have taken into account interests of some sector of the public. There could be third party interests in material supplied to the government by a third person. Even if the Crown waived the privilege that person could have their own independent interest in secrecy.

445 The question which arises when protected information is in *the hands of a third party* is more difficult. Presumably the Crown information will normally have got there as a result of some action on the part of government officials. The general principle the Commission has recommended for confidential relationships and other privileges is set out in the draft evidence code, ss 2(3) and 13. Basically, if information is given in confidence to another person, for purposes associated with the privilege, then the same privilege will attach to the information while it is in the other person's hands. If the information is disclosed to, or obtained through inadvertence by a third person, the court has a discretion to treat the information as continuing to be privileged. If, however, the privilege holder voluntarily gives the information to the other side, or generally publicises it, or puts it into issue in the proceedings, then the privilege is taken to be waived.

446 The Commission considers that, in general, this is not an unreasonable starting point in cases of public interest immunity. There may be circumstances where the consequences of public disclosure in court are so horrendous that the general public interest will require that the information be kept secret, notwithstanding that officials have previously, and unwisely, given it to others. And there may be cases where the information has never belonged to the Crown, but it is still important to keep it secret. An example would be where someone comes into the country with documents they have purloined from a friendly power. But these will be highly unusual, indeed exceptional, cases. They can be adequately catered for by a general discretionary provision.

447 Finally there is the matter of "*class claims*". These involve the contention (on behalf of the official who is resisting disclosure) that even though there may not be anything particularly damaging in the actual material sought in court proceedings, the document belongs to a class which ought never to be disclosed. The mere fact that it becomes known that documents in the class have in the past been disclosed

Should the code provide for "class claims" to immunity?

could have a damaging effect. The courts appear to recognise that such claims can be made, but in recent years have become somewhat sceptical, particularly where the only potential damage alleged is that officials, or witnesses in private enquiries may give less candid information in the future (*Fletcher Timber Ltd*, 306-307 and *Green v CIR* [1991] 3 NZLR 8, 11-12).

448 In the Commission's view, even class claims should be dealt with as a matter of judicial discretion, and not by the application of any general rule applicable to particular kinds of documents. Given that class claims are occasionally appropriate, however, there seems no reason why the court, in assessing the claim under the general discretion discussed in the previous chapter, cannot give due weight to that consideration. The critical question is whether undue harm may be caused if a document is released. The court should be able to take into account, not only the harm caused by the release of the contents of the documents itself, but also harm caused by the fact that a document of that particular class is released.

449 In the result, we take the view these characteristics of protection should be governed by the same general principles, whether they relate to matters of private or government confidence.

Exceptions

450 We turn now to the exceptions to public interest immunity. In general, the Commission would follow the pattern of exceptions already established for cases of legal professional privilege, as discussed in ch 6, and further considered in ch 15. As with private confidential information, it is not proposed to make specific provision for this in the section dealing with public interest immunity. The judicial discretion assumed by the courts will be exercised with the considerations mentioned in ch 6 in mind. They are, however, factors which need to be woven into the wider considerations which are discussed in the chapter. They will not necessarily constitute conclusive answers to the claim for protection.

451 The only matter about which the Commission would offer specific comment is information which is relevant to the defence of an accused person. In our general draft code provision for exceptions (s 15(2)), there will be a discretionary power to disallow privilege for evidence which is required for the defence of an accused. The accused's need for the information is to be weighed in the balance as a significant factor which militates in favour of admitting the evidence, and overriding any claim to privilege. The present law of public interest immunity does not seem to go further than that, so as to give an accused a clear right to compel disclosure of the information.

452 It may be argued (consistently with the principle that the Crown should disclose all information in its possession to an accused) that all information, even if it concerns high matters of state should be made available to an accused person, as of right (cf: *Sankey v Whittam*, 42). But in matters to do with state security, the community might then pay a high price for its scruples. In practice a court would only refuse to order disclosure in an extreme case. And in such a case, there would be obvious questions (both for the

prosecutor and the judge) whether a prosecution should proceed at all. This is not a matter the Commission wishes to pursue further at this stage, though it may need to be revisited in the context of our reference on criminal procedure.

CHALLENGING A GOVERNMENT CLAIM FOR SECRECY

453 Where a claim for protection is made, what procedures should be followed if it is disputed? In general, the procedure for asserting and challenging a claim to protection in this situation should be no different from any other privilege claim (see ch 1). But two matters deserve specific comment:

- the listing requirements on discovery of documents; and
- the initial burden of persuading a court to consider a disputed claim.

The listing requirements for discovery

454 Under the general law of discovery, a party claiming a privilege or other form of protection must list the documents for which protection is claimed. This enables the other side to consider whether the claim will be disputed. It will also form the basis on which the judge will make a decision whether or not to inspect the documents, before deciding that dispute.

455 This procedure does not apply to certain types of "high level" government material. The Crown can object to producing even a list of documents in its possession (see *Cross*, 282). Section 27(3) of the Crown Proceedings Act 1950 (as amended in 1982) provides that:

(3) Without prejudice to the proviso to subsection (1) of this section, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if -

(a) The Prime Minister certifies that the disclosure of the existence of that document would be likely to prejudice -

- (i) The security or defence of New Zealand or the international relations of the Government of New Zealand; or
- (ii) Any interest protected by section 7 of the Official Information Act 1982; or

(b) The Attorney-General certifies that the disclosure of the existence of that document would be likely to prejudice the prevention, investigation, or detection of offences.

Should the Crown continue to be exempted from the normal duty to "list" certain protected documents?

The enabling provision has been implemented by the High Court Rules, R 313, and the District Court Rules, R 335.

456 The question here is whether this special exception from the ordinary requirements of discovery is justified and should continue as part of the law. The provision would make it very difficult for the court to enquire into the validity of the underlying decision to withhold the documents. The court will never know whether there are any documents being withheld, and so cannot apply its mind to any "balancing test" between the need for the contents of any documents (if they exist), and the risks to the state if they are disclosed. So the provision is not consistent with the general principle that the court, not the Crown, has the ultimate responsibility to determine whether a claim to public interest immunity should be upheld.

457 Section 27(3) has a wider context in the Official Information Act 1982. That Act and the Ombudsmen Act 1975 indicate a legislative intent that the Government should, in certain situations, be able to restrict or even stop investigations by the Ombudsman of decisions to withhold official information. In particular, if the Prime Minister or Attorney-General certifies under s 31 of the Official Information Act that disclosure is likely to prejudice the country's security, defence, international relations, or relations with certain Pacific states, the Ombudsman may not make any recommendation for disclosure. Furthermore, if the Attorney-General issues a certificate under s 20 of the Ombudsmen Act 1975, which covers a broader range of materials than s 31, the Ombudsman cannot access the information during the enquiry.

458 These provisions indicate a clear intention to "ring fence" certain areas of government activity from the normal processes of scrutiny. But they do not purport to restrict the actions of the courts, even though it is assumed throughout the legislation that the court can review decisions under the Official Information Act, as it can any other statutory decision (Judicature Amendment Act 1972, s 4).

459 The court's power to review may be of little value if it cannot gain access to the information itself. Generally that is not a problem, because in undertaking such a review any claim to public interest immunity is overridden, Official Information Act 1982, s 11 (which is also applicable to the Ombudsman).

460 Here, however, the consequences of s 27(3) of the Crown Proceedings Act become apparent. The section applies whether or not the matter before the court is a review of an official decision to withhold information. If it is invoked by the Crown, no list of documents will come before the court. Therefore, the court could not know what particular document it should order to be disclosed. In proceedings where the law of public interest immunity applied, the court, without the list, might have insufficient information on which it could balance the interests involved.

461 But if the purpose of the legislation is to protect damaging secrets, it is a clumsy instrument. The only time when a Minister could be obliged to make a list of documents is on discovery. Section 27 appears to speak only of that. If so, the Minister could be summoned as a witness and asked to produce all documents in the Minister's possession - in which case public interest immunity could be claimed. Further, the section speaks of damage caused by "the disclosure of the *existence* of the document". But many documents, no matter how damaging their contents, can be described in such anodyne terms as not to cause damage by reason of their existence becoming known. The Prime

Minister could not be satisfied that the listing of the document in such a case would of itself cause damage.

462 It would seem that s 27(3) achieves little, and the effective protection of such secrets is already a matter entrusted to the discretion and good sense of the court under the law of public interest immunity. As far as the Commission is aware, it has not been invoked in any reported (or indeed, unreported) case. So s 27(3) of the Crown Proceedings Act and the rules which give effect to it are difficult to justify and probably should be repealed. Whether the provision serves any useful purpose is a matter upon which comment is invited.

The initial burden

463 There has been some judicial discussion of what needs to be established before a court will consider whether information sought to be withheld should be disclosed. In England, the rule appears to be that in cases where discovery is sought, the litigant seeking the information should show that it will be of positive assistance to the case (*Air Canada v Secretary of State for Trade* [1983] 2 AC 394). In New Zealand, under earlier High Court rules, it has been held that no such initial burden exists (*Fletcher Timber Ltd*, 295, 301, 305). Subsequently, however, the High Court Rules (R 312) were amended so as to accord more closely with the English rules, and it is arguable, though far from clear, that the English decision now applies here too (see *T D Haulage Ltd v NZ Railways Corporation* (1986) 1 PRNZ 668). Rule 312 can be interpreted as meaning that the court should be satisfied there are no other reasonable means, available to the applicant, of obtaining the information sought.

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| Should those who object to a claim of immunity first show that they need the information for their use? |
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464 In principle the Commission takes the view that all relevant evidence ought to be made available in court proceedings (NZLC PP14 1991). It follows that it should be for the witness or party claiming the privilege to satisfy the court that the information should be withheld. The need for the information is a matter which enters into the balancing process, but it should not be necessary to establish any particular degree of need as a threshold requirement for challenging the claim to public interest immunity.

465 In most cases the court will form a fairly clear view, one way or the other, without any need to rely on arguments concerning the onus of proof. As some judges have observed, that concept may not be helpful when applying the standards and procedures set out in the Official Information Act (*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 404-405, 411). The question of the initial onus has more theoretical than practical significance. But in some cases the onus could be relevant.

466 If a choice has to be made it seems reasonable to cast the onus upon the person seeking to withhold the information. It will be recalled that under the Official Information Act, the applicant is given the right to the information without having to show that it is actually needed for some purpose which is itself in the public interest. In the case of court proceedings, however, assuming that the information is relevant (a matter which the court can be relied upon to assess) there is an immediate and strong public interest in

disclosure of the information. Otherwise a matter before the court will not be disposed of on the basis of all available information. This throws an additional factor, of considerable weight, into the overall "mix", which in most ordinary cases will require some review of the original official decision to withhold the information. Of course, there will be some cases where that alone may still not be a sufficient justification for ordering disclosure.

467 The Commission is of the view that the question of initial onus has little practical significance. No specific provision dealing with onus is therefore included in the Commission's proposed code.

Draft section:

12 Discretion as to matters of state

(1) A court may direct that a communication or information relating to matters of state must not be disclosed in a proceeding if the court considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.

(2) A communication or information relating to matters of state includes a communication or information

(a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the Official Information Act 1982; or

(b) which is official information as defined in section 2 of the Official Information Act 1982 and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in paragraphs (b) to (k) of section 9(2) of that Act.

(3) A court may give a direction under this section in respect of a communication or information whether or not the communication or information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by this Part.

Draft privilege and compellability sections
for an evidence code

PART 4

PRIVILEGE AND CONFIDENTIALITY

1 Definitions

(1) In this Part

adviser means a person who, whether or not the person is qualified to practise law,

(a) conducts or helps conduct a proceeding on behalf of a party to the proceeding; or

(b) is engaged to give legal advice as part of the normal duties of that person's occupation or employment; or

(c) gives legal advice in the course of performing duties for an organisation which provides legal advice to the public or a section of the public;

proceeding means a proceeding conducted by a court or tribunal that has authority by law to hear, receive, and examine evidence in New Zealand.

COMMENTARY

Section 1

C1 *Section 1(1)* defines two terms.

C2 The term "adviser" will be used only in relation to the privilege for communications relating to legal proceedings or legal advice (ss 3, 4 and 5). In this context, an "adviser" does not necessarily have to be a qualified lawyer. Paragraph (a) applies to the case of a "McKenzie" friend (an unqualified person who helps a party in court proceedings) or an industrial advocate. Paragraph (b) applies where, for example, an accountant specialising in tax matters recommends a particular course of action, based on the accountant's understanding of taxation law. Paragraph (c) applies to people such as student volunteers at community law centres. Though a qualification to practice law is not essential, the adviser must be involved in the conduct of the case, or have been consulted as part of the adviser's normal occupation, or employment in, or duties for an organisation giving legal advice.

C3 The term "proceeding" is widely defined in this part of the code, to include all courts and tribunals which admit evidence. Many of these tribunals would not normally be governed by the laws of evidence as they apply in court, so the other parts of the proposed evidence code will have limited application to them. But this part of the code will establish the general legal principles which govern the balance between the need to maintain confidentiality on the one hand, and the need to establish the full facts in judicial or quasi-judicial enquiries on the other. It will give such assurance as can be given, to those who communicate or compile confidential information, that the information will be protected from disclosure.

- (2) A reference in this Part to a communication made or received by a person or an act carried out by a person is to be taken to include a reference to a communication made or received or an act carried out by an authorised representative of that person on that person's behalf.
- (3) Subsection (2) does not apply to
 - (a) section 3 (Privilege for advice concerning a proceeding):
 - (b) section 8 (Privilege for communications with ministers of religion):
 - (c) section 9 (Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists):
 - (d) section 10 (Informers).

COMMENTARY

C4 *Section 1(2)* provides that, in general, privileged or protected communications may be made by or to representatives of the principal communicators. In respect of the privileges listed in *s 1(3)*, however, privilege will attach only to communications by the principals personally (but see para C13). These are cases where it is important or customary for a person to communicate personally with their adviser, and complete protection is given to the communication on that account. Sometimes, of course, by custom or necessity, an agent will be entrusted with a role which in effect makes them the principal for the purposes of the relevant provision. For example, a company or a physically or mentally disabled person will have to employ an agent with full powers to instruct a lawyer and give the information that a client would have done. It is expected that the courts (as they do now) will regard the agent's communication as a "client communication". But it is not enough (as it would be, for example, under the other sections dealing with legal professional privilege) that the person making the communication be "an agent", even though they are making some type of communication to the lawyer on the client's behalf.

C5 Communications made by agents, even if they are not protected under ss 3, 8, 9 and 10, may still be protected under other sections of the Act. A communication made by an agent to a lawyer may be protected under ss 4 or 5. A communication made by an agent to a priest or doctor may be protected under the general power provided for in s 11.

2 Effect and protection of privilege

- (1) A person who has a privilege conferred by this Part in respect of a communication has the right to refuse to disclose in a proceeding
 - (a) the communication; and
 - (b) any information contained in that communication; and
 - (c) any opinion formed by a person which is based upon that communication or information.

- (2) A person who has a privilege conferred by this Part in respect of information or a document has the right to refuse to disclose in a proceeding that information or document and any opinion formed by a person which is based upon that information or document.

- (3) A person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document may require that the communication, information, opinion, or document must not be disclosed in a proceeding
 - (a) by the person to whom the communication is made or the information given, or by whom the opinion is given or the information or document prepared or compiled; or
 - (b) by any other person who has come into possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege.

COMMENTARY

Section 2

C6 *Section 2(1)* sets out the basic rights of the holder of a privilege. Where the privilege relates to a communication, it also covers the information contained in the communication, and any opinion formed as a result of acquiring that information. For example, if a person went to see a medical practitioner in the circumstances envisaged in s 9, the medical practitioner would not be able to disclose what the patient said (the "communication"), what the medical practitioner learned by listening to what was said ("information"), and the diagnosis made as a result ("opinion").

C7 *Section 2(2)* sets out the corresponding rights where the relevant section protects "information" or "documents" rather than communications. For example, s 9(3), dealing with doctors, protects what the medical practitioner observes as a result of examining the patient. That is, "information" not a "communication". The protection extends to any opinion formed by the medical practitioner which is based on what the practitioner has observed. (Note that documents need to be separately provided for, since they are not always "communications" - for example, documents prepared by one party in connection with the settlement of a dispute, referred to in s 6(1)(b); and documents which contain the terms of the settlement of a dispute, referred to in s 6(1)(c).)

C8 *Section 2(3)* confers further rights on the privilege holder who has voluntarily passed privileged material on to someone else, for purposes connected with the original privileged occasion. This includes the obvious case where the other person is the recipient of a privileged statement, such as a lawyer who receives instructions from a client. But it also covers the case where the person was given the privileged material in circumstances linked with those giving rise to the privilege. For example, a legal opinion may be passed on to another lawyer, or to a family friend, for their counsel and advice. In both cases, the privilege holder has an automatic right to prevent disclosure of the material in any court proceedings.

- (4) Where a communication, information, opinion, or document, in respect of which a person has a privilege conferred by this Part, is in the possession of a person other than a person referred to in subsection (3), a court may, of its own initiative or on the application of the person who has the privilege, order that the communication, information, opinion, or document must not be disclosed in a proceeding.
- (5) Notwithstanding subsections (1) to (3), where the court can order the disclosure in a proceeding of a communication under section 4(2), 5(3), or 6(3), the court can order disclosure of any one or more of
 - (a) the communication;
 - (b) information contained in that communication;
 - (c) any opinion formed by a person which is based on that communication or information contained in that communication.
- (6) Notwithstanding subsections (1) to (3), where the court can order the disclosure in a proceeding of information under section 4(2) or a document under section 6(3), the court can order the disclosure of any one or more of
 - (a) the information or document;
 - (b) any opinion formed by a person which is based on that information or document.

Definitions: **proceeding**, s 1

COMMENTARY

C9 *Section 2(4)* applies to privileged material which has come into the hands of a third party who is not closely linked with the original privileged transaction. For example, the privileged material may have been handed over accidentally; or it may have been mentioned in a conversation that the third party overheard. The courts may in such cases order the third party not to divulge the material. This settles a point on which the present law is not completely clear. However (unlike the provision in s 2(3)) this subsection does not confer a right to require non-disclosure; it will be for the court to decide in its discretion, whether such an order is appropriate.

C10 *Subsections (5) and (6)* are to be read alongside ss 4(2) (litigation privilege), 5(3) (privilege for general legal advice) and 6(2) (privilege for settlement negotiations). These privileges will all be qualified, that is to say, a court can in appropriate cases order disclosure of a privileged "communication", "information" or "document". Under s 2(1) and (2), where there is a privileged "communication" a privilege holder's rights extend to information contained in that communication (see para C6). Where there is a privileged "communication", "information" or "document", those rights also extend to opinions formed by those who have received it (see paras C6 and C7). *Subsections (5) and (6)* ensure that the court's discretionary powers to override each of the privileges are similarly extended.

3 Privilege for advice concerning a proceeding

- (1) A person who is a party to, or contemplates on reasonable grounds becoming a party to, a proceeding has a privilege in respect of any communication between that person and an adviser of that person if the communication was
 - (a) intended to be confidential; and
 - (b) made in the course of and fairly referable to the advisory relationship between the person and the adviser; and
 - (c) made for the purpose of giving or receiving advice concerning the proceeding or conducting, or helping to conduct, the proceeding.

- (2) A reference in subsection (1) to a communication between a person who is a party to, or contemplates on reasonable grounds becoming a party to, a proceeding and an adviser of that person is to be taken to include a reference to a communication made between such a person and an authorised representative of the adviser.

Definitions: **adviser, proceeding**, s 1

COMMENTARY

Section 3

C11 This is the first of three sections dealing with what has traditionally been known as "legal professional privilege". Section 3 applies where the client communicates directly with a legal adviser in relation to a legal proceeding. Section 4 applies to preparations for such a proceeding, other than communications directly between the client and the legal adviser. Section 5 applies where no such proceeding is pending or contemplated, and the client is merely seeking legal advice. Of these sections, ss 4 and 5 confer only a qualified privilege, which can be overridden in the court's discretion (see ss 4(2), 5(3)). Section 3 alone confers an absolute privilege.

C12 The requirements for asserting the privilege in s 3 correspond in general with those of the common law. However, under the common law, the privileges referred to in ss 4 and 5 were also "absolute" privileges. That will not be the case under the new statute. Absolute protection, as the privilege is defined in s 3, will be available only where a communication is made with an adviser

- personally, by (or to) a party to pending or contemplated legal proceedings, and
- for the purpose of receiving or giving legal advice in respect of those proceedings.

C13 As already mentioned (para C2), the section may apply to communications with unqualified persons coming within the definition of "adviser" in s 1.

C14 The communication must be made by or with the client personally (see paras 75-82 of the Discussion Paper). In certain circumstances, however, an agent can take the place of the client if specifically entrusted with the task of instructing the lawyer on the client's behalf. This is true under the law as it stands now. But this is a much narrower type of agency than the one envisaged by s 1(2). Where that section applies (eg, under ss 4 and 5) it is sufficient that the person is authorised to carry out any task which involves communicating with the legal adviser. That wider notion of agency does not apply to the client's agent under this section (see s 1(3)). However, a different rule applies to agents of the legal adviser, such as the adviser's clerk, employee or other representative. They may routinely accept communications on the adviser's behalf (s 3(2)).

4 Privilege for preparatory materials for a proceeding

- (1) A person who is a party to, or contemplates on reasonable grounds becoming a party to, a proceeding (referred to in this subsection as the "party") has a privilege in respect of
- (a) any communication between the party, or that party's adviser, and any other person,
 - (b) any information compiled or prepared by the party or that party's adviser,
 - (c) any information compiled or prepared at the request of the party, or that party's adviser, by any other person,
- if a substantial purpose of making or receiving the communication or compiling or preparing the information was to prepare for the proceeding.
- (2) Notwithstanding subsection (1), a court may order the disclosure in a proceeding of a communication or information for which a person has a privilege under that subsection if the court considers that, in the interests of justice, the need for the communication or information to be disclosed in the proceeding outweighs the need for the privilege.

Definitions: **adviser**, **proceeding**, s 1

COMMENTARY

Section 4

C15 This section confers a privilege for trial preparations, and corresponds with what is currently known as "litigation privilege" under the common law. Unlike that privilege, however, it is not absolute, but is liable to be overridden in the court's discretion - see s 4(2). And the definition of the term "adviser" in s 1 removes questions which might have been raised about the status of legally unqualified advisers, such as the "McKenzie" friend (see para C2).

C16 *Section 4(1)* covers all trial preparation, whether it takes the form of communications with witnesses or others who may be able to provide helpful information, or involves instead collating and ordering available data. The work may be done by the adviser or by the client. Either of them may commission another person to do the work. The critical requirement is that the work be done "with a substantial purpose" of preparing for proceedings. The "substantial purpose" test differs from that used in the present law. Currently this must be the "dominant" purpose. Section 4 will cover more cases than did the "dominant purpose" test, and, it is hoped, will be somewhat easier to apply. The effect will not necessarily be to deprive the court of more information than does the present law, since, where the privileged information is significant, the claim to privilege may be overridden (ss (2)). That is not the case under the present law; see Discussion Paper, paras 116-123.

5 Privilege for general legal advice

- (1) This section applies to all legal advice except for advice for which a person has a privilege under section 3.
- (2) A person who requests legal advice from an adviser has a privilege in respect of any communication between that person and that adviser if the communication was
 - (a) intended to be confidential; and
 - (b) made in the course of and fairly referable to the advisory relationship between the person and the adviser; and
 - (c) made for the purpose of the adviser giving legal advice to the person or the person receiving legal advice from the adviser.
- (3) Notwithstanding subsection (2), a court may order the disclosure in a proceeding of a communication for which a person has a privilege under that subsection if the court considers that, in the interests of justice, the need for the communication to be disclosed in the proceeding outweighs the need for the privilege.

Definitions: **adviser, proceeding**, s 1

COMMENTARY

Section 5

C17 *Section 5(2)* corresponds with the present common law privilege for communications made to obtain general legal advice. The legal requirements for protection are the same as those of the present law. However, the term "adviser" covers a wider group of people. It includes those who give legal advice as part of the normal duties of their occupation or employment, or when performing duties for voluntary organisations, such as community law centres, which give legal advice to the public - s 1 (see para C2). It is expected that those who give advice on taxation and other specialist matters will be able to receive confidential communications more securely than they can at present.

C18 Under *section 5(3)*, the privilege will become a qualified one under the statute whereas presently it is absolute. The court may be called upon to determine whether to override the privilege (though it is expected this will happen relatively infrequently). The court will then consider the importance of the information to the lawsuit before it. It will also have regard to how private the information is, and whether the advice which had been sought related to the legal issues being contested in the current proceedings, or to some quite different matter.

C19 The client, when communicating with an adviser, does of course need some assurance that what passes between them will not be able to be used in ways detrimental to the client's interests - but protection must be commensurate with the purposes for which legal advice was originally sought. Further, the client should not be allowed to use the privilege as a means of preventing the court from examining transactions carried out on the client's behalf or finding out the purposes they were intended to achieve.

6 Privilege for settlement negotiations

- (1) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of
 - (a) any communication between that person and any other person who is a party to the dispute if the communication was
 - (i) intended to be confidential, and
 - (ii) made in connection with an attempt to settle the dispute between the persons, and
 - (b) a confidential document that contains the terms of an agreed settlement of the dispute.
- (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document which that person has prepared, or caused to be prepared, in connection with an attempt to negotiate a settlement of the dispute.
- (3) Notwithstanding subsections (1) and (2), a court may order the disclosure in a proceeding of a communication or document for which a person has a privilege under those subsections if the court considers that, in the interests of justice, the need for the communication or document to be disclosed in the proceeding outweighs the need for the privilege.

Definitions: **proceeding**, s 1

COMMENTARY

Section 6

C20 *Section 6(1)* corresponds to the "without prejudice" rule in the present law. That rule, which protects statements made in the course of settlement negotiations, applies to communications made between the parties in an attempt to settle the dispute (para (a)). It can also apply to documents which record any agreement which has been reached (para (b)). An example would be where two parties to a dispute have reached a private compromise, which they wish to keep secret from another party who is proceeding against them both. The section makes it clear that the protection it confers is to be treated as a "privilege"; the present legal position is unclear.

C21 The confidential nature of the communication will normally be established when one of the parties to a dispute uses the words "without prejudice", but their intention can be made clear in other ways. Once established, the privilege belongs to both parties, not just to the party who makes the communication. Its basic purpose is to ensure that a party who offers to settle a case is not made to appear to be admitting liability, if the offer is rejected. The privilege is a "joint" privilege and neither party can waive the privilege, or disclose the information, over the objection of the other (see s 13(5)).

C22 *Section 6(2)* applies the privilege to documents made by one party prepared in connection with attempts at settlement, but not in fact communicated to the other. Examples would be preparatory notes about possible points of agreement, or information compiled at the request of the other party as a pre-condition for negotiation. Here the privilege would belong only to the party who prepared the document.

C23 The privilege applies only to the settlement of civil proceedings. Criminal proceedings cannot be compromised.

C24 The privilege is qualified by the court's general power to order disclosure if the circumstances warrant it (ss(3)). In current practice, this is normally done where the dispute has been settled, and one party seeks to enforce the agreement. Another example is where someone makes a "without prejudice" communication containing a fact which could detrimentally affect the legal position of the other party once they know about it. An example would be if a negotiator admitted committing an act of bankruptcy. (Having that knowledge, the other party could

(Section 7 appears on p 206.)

not enforce any settlement if the negotiator became bankrupt.) The law has not crystallised into an exhaustive set of exceptions which can be included as a statutory list. Nor is it clear that the court will invariably order disclosure when one of these disintitling events occurs. These qualifications are therefore best expressed in the form of a judicial discretion to disallow a claim to privilege where the circumstances require it.

7 Discretion as to compellability of married persons and persons in relationship in the nature of marriage

A court may direct that a person who is legally married or is a partner in a relationship in the nature of marriage (including a relationship between two persons of the same sex) is not compellable to give evidence for

- (a) the prosecution in a criminal proceeding against his or her spouse or partner; or
- (b) a person who in a criminal proceeding is a co-accused of his or her spouse or partner.

Definitions: **proceeding**, s 1

COMMENTARY

Section 7

C25 This section creates a new rule about when a marriage or de facto partner will be obliged to testify against their spouse or partner in criminal proceedings. The present law is found in s 5 of the Evidence Act 1908, which applies only to husband and wife. De facto partners have no protection. The new provision will extend protection to de facto relationships (including same-sex relationships). It will be for the courts to determine the precise boundaries of the provision.

C26 The section provides that the court may order that a marriage or de facto partner of an accused in criminal proceedings is not to be compelled to testify at the request of the prosecution or a co-accused person. An accused may require his or her own partner to testify. In this, the new section follows the present s 5.

C27 Section 5 laid down a clear rule that the spouse may not be required to testify. The new section confers, instead, a discretion on the court to make that determination in the circumstances of the particular case. The effect of this change will be that where a partner objects to testifying, the court must look at the nature of the offence charged, and the particular relationship involved. It will decide whether damage or hardship would be caused to the partner of the accused, or to the relationship, if that person is required to testify; and if so whether that is sufficient to warrant making an order. It may be that the offence is only a minor one, or that the testimony required is unconnected with the personal relationship of the two partners. Or there may be an overriding public interest, for example, the safety of children in their household, which makes it essential that a partner testify. The balancing process will be little different from that undertaken under s 11 of the code. The only difference will be that any order made will excuse the marriage or de facto partner from testifying altogether, whereas an order under s 11 will relate only to particular parts of the witness's requested testimony.

C28 The most acute problem in exercising the discretion is likely to be encountered in prosecutions for violence against marriage or de facto partners. It may be difficult to discern, for example, whether a battered wife's reluctance to testify stems from a genuine and realistic desire to remake the marriage, or from the husband's threats and pressure, or his unconvincing and deceitful promises to mend his ways. No rule is satisfactory to deal with this problem. A rule which requires the wife to testify for the prosecution leaves that decision largely in the

(Section 8 appears on p 210.)

hands of the police (though, if the wife still refuses to testify, the court will determine what penalty should be imposed). The present law, which says the wife need never testify for the prosecution, if she does not wish to do so, leaves the wife unduly exposed to threats, pressure and deceit by her husband. Section 7, which takes a middle path between these two, is advanced as the least unsatisfactory way of dealing with the problem.

C29 Where there is some doubt whether the marriage or de facto partner will be required to testify, an application can be made by the prosecution ahead of time under s 17(2) and (3).

C30 *Section 7* will be the only provision which deals expressly with the confidentiality of the relationship of husband and wife. Section 29 of the Evidence Amendment Act (No 2) 1980, which at present provides a privilege for communications made between spouses, will not be carried forward into the new legislation. Such communications, and other personal information a marriage or de facto partner is reluctant to disclose, can be dealt with in the exercise of the court's discretion under s 11.

8 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 his or her 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.

- (2) A person is a minister of religion for the purposes of this section if he or she 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.

COMMENTARY

Section 8

C31 *Section 8(1)* confers a privilege where a person seeks spiritual advice, benefit or comfort from a "minister of religion". This type of communication is to be distinguished from the more temporal counselling and support which the clergy may also offer, as do other marriage and family counsellors. Counselling of that kind is protected in the exercise of the court's discretion under s 11. There remains a core of spiritual counselling which is given absolute protection under this section. It is somewhat larger than is implied by the word "confession", used in the corresponding provision in present law (Evidence Amendment Act (No 2) 1980, s 31). But it is still restricted. It would by no means be true to say that all communications with clergy will be protected under s 8.

C32 *Section 8(2)* defines the term "minister of religion". The present law does so only in the most general terms (Evidence Act 1908, s 2). It is perhaps open to an interpretation limited to religions which are, from a New Zealand churchgoer's point of view, more traditional in liturgical style and organisational structure. The present definition makes it clear that a wider reading is intended. It requires only that there be a "religious or spiritual community", the "minister" being a person who is expected to respond to communications with spiritual advice, benefit or comfort.

9 Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists

- (1) This section applies to a person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct, but does not apply in the case of a person who has been required by an order of the court, or by other lawful authority, to submit himself or herself to the medical practitioner or clinical psychologist for any examination, test, or other purpose.
- (2) A person has a privilege in a criminal proceeding in respect of any communication made by the person to a medical practitioner or clinical psychologist which the person believes is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.
- (3) A person has a privilege in a criminal proceeding in respect of information obtained by a medical practitioner or clinical psychologist as a result of consulting with or examining the person to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

COMMENTARY

Section 9

C33 This section is largely based on the present s 33 of the Evidence Amendment Act (No 2) 1980, which applies only in criminal cases. It protects medical and psychological consultations relating to drug dependency or other conditions which may manifest themselves in criminal conduct. The reason for the provision is that society can reduce crime by encouraging potential criminals to seek help for such conditions. Without such a privilege, they will be discouraged from doing so because they are afraid that if they come forward they will be identified as criminals.

C34 *Section 9(1)* sets out the basic conditions which must be present before a medical or psychological consultation will be protected. Court-ordered consultations are not included. Unlike its predecessor, the section applies whether or not the client is a defendant in the criminal proceeding where privilege is claimed so it can be invoked where another associate of the client is charged with an offence. A person may be reluctant to seek professional help because that will have consequences in the criminal law, not only for themselves, but also for others with whom they are associated.

C35 *Section 9(2)* confers a privilege on what the client says in the course of a protected consultation, if the client believes that the disclosure is necessary to obtain treatment.

C36 *Section 9(3)* is new, and broadens the protection given under the present law. It confers a privilege on what the medical practitioner or psychologist learns as a result of examining the client. This information may be learnt from a physical examination, or from laboratory tests, or from the client's manner and hesitation in speaking, just as much as it is from what the client intends to convey by a communication. The ultimate diagnosis or assessment will often be based on a combination of these things. Therefore, this type of information is equally deserving of protection.

(4) A reference in this section to a communication to or information obtained by a medical practitioner or a clinical psychologist is to be taken to include a reference to a communication to or information obtained by a person acting in a professional capacity on behalf of a medical practitioner or clinical psychologist in the course of the examination or treatment of, or care for, the person by that medical practitioner or clinical psychologist.

(5) In this section

clinical psychologist means a psychologist registered under the Psychologists Act 1981 who is engaged in the diagnosis and treatment of persons suffering from mental and emotional problems;

drug dependency means the state of periodic or chronic intoxication produced by the repeated consumption, smoking, or other use of a controlled drug (as defined in section 2(1) of the Misuse of Drugs Act 1975) detrimental to the user, and involving a compulsive desire to continue consuming, smoking or otherwise using the drug or a tendency to increase the dose of the drug.

Definitions: **proceeding**, s 1; **controlled drug**, *Misuse of Drugs Act 1975* s 2; **medical practitioner**, *Medical Practitioners Act 1968* s 74

COMMENTARY

C37 *Section 9(4)* extends protection to communications made to, and information acquired by, other professionals who work under the instructions of the medical practitioner or psychologist, for example, a registered nurse or a laboratory analyst.

C38 In the case of psychologists, *section 9(5)* limits protection to cases where the person initially consulted is a registered psychologist. The psychologist must be one who diagnoses and treats people who are mentally or emotionally affected. In the case of medical practitioners, the person consulted must be a registered medical practitioner. This requirement is imposed by s 74 of the Medical Practitioners Act 1968 which defines the term "medical practitioner".

10 Informers

- (1) An informer has a privilege in respect of information that would disclose or is likely to disclose his or her identity.
- (2) A person is an informer for the purposes of this section if the person has supplied, gratuitously or for reward, information to an enforcement agency, or to a representative of an enforcement agency, concerning the possible or actual commission of an offence in circumstances in which the person has a reasonable expectation that his or her identity will not be disclosed.
- (3) An informer may be a member of the Police working undercover.
- (4) In this section, **enforcement agency** means the Police of New Zealand and a body or organisation which is responsible for the enforcement of an enactment.

COMMENTARY

Section 10

C39 *Section 10(1)* confers a privilege on informers, so as to protect them from disclosure of their identity. This protection is well-established under the existing law, although it had previously been categorised as an aspect of the general protection given to government secrets. It applies only in relation to those who supply information to assist in the enforcement of the criminal law.

C40 The section does not apply where the informer does not expect his or her identity to be kept secret (s 10(2)). Nor does it cover information about police techniques of investigation, or the use of vantage points. Assistance may be given to the police by members of the public in many other ways which do not involve passing on information, but these are not covered either. Protection can nevertheless be obtained in appropriate cases under s 12.

C41 *Section 10(2)* defines who is an informer. Protection was traditionally given to the "police informer", and was extended to those who gave information to other enforcement agencies only as a matter of discretion. The definition of "enforcement agency" in section 10(4) removes that distinction and confers protection on all informers, whether they inform to the police, or to any other body which has responsibility for law enforcement. That would include, for example, the Department of Customs.

C42 *Section 10(3)* clarifies the position as regards police undercover agents, whose identity will also be protected under the section.

C43 The privilege provided in this section is an absolute one and cannot be overridden in the court's discretion. There are, however, exceptions to the privilege (see ss 13-15).

11 Discretion as to confidential information

- (1) A court may, in the circumstances described in subsection (2), direct that a confidential communication, or confidential information, or information which would or might reveal a confidential source of information, must not be disclosed in a proceeding.
- (2) A court may give a direction under this section if the court considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in
 - (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
 - (b) preventing harm to
 - (i) the relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
 - (ii) relationships which are similar to the relationship referred to in subparagraph (i); or
 - (c) maintaining activities which contribute to or rely on the free flow of information.

COMMENTARY

Section 11

C44 *Section 11(1)* confers a power on the court to protect private confidential information from disclosure in court proceedings. It is based on s 35 of the Evidence Amendment Act (No 2) 1980, but the provisions of the section are somewhat broader. Like its predecessor, the statutory jurisdiction takes no account of whether the confidence originates from any defined relationship. As regards the relationships mentioned in earlier sections, it provides an additional basis for protection which may be invoked where the requirements for a privilege set out in those sections are not met (see s 11(4)).

C45 *Section 11(2)* establishes the basic principle on which the jurisdiction will be exercised. The public interest is the paramount concern. There is a public interest to protect confidences and private secrets, and to avoid the harm which is caused when that privacy is invaded. The extent of this public interest will vary according to the nature of the confidential material. There is an opposing public interest in ensuring that justice is done, and that courts determine factual issues with all available evidence. The strength of that public interest too varies in the individual case, according to the nature of the case and how useful the confidential information would be in resolving the dispute. Where in any particular case the first public interest appears more important to the court than does the second, the court may order that the confidential information not be disclosed.

C46 Paragraphs (a) and (b) describe in a general way the relevant harms which may result from disclosure. Paragraph (c) recognises, in this connection, the importance of the freedom of the press, and the possibility that if sources of information are revealed, this may make information more difficult to obtain in the future.

C47 Even where there is no relationship at all, information may still be "confidential". For example, according to ordinary usage a trade secret possessed by a sole trader, or the contents of a person's income tax return, may be "confidential". This is so even though the holder of the information owes no one else a duty of confidentiality.

- (3) When considering whether to give a direction under this section, the court must have regard to
- (a) the anticipated extent of harm which may result from the disclosure of the communication or information; and
 - (b) the nature of the communication or information and its likely importance in the proceeding; and
 - (c) the nature of the proceeding; and
 - (d) whether other means of obtaining evidence of the communication or information are or may be available; and
 - (e) whether means of preventing or restricting public disclosure of the evidence are available if the evidence is given; and
 - (f) the sensitivity of the evidence having regard to the time which has elapsed since the communication was made or the information was compiled or prepared and the extent to which the information has already been disclosed to other persons, and the court may have regard to any other matters which it considers relevant.
- (4) A court may give a direction under this section in respect of a communication or information whether or not the communication or information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by this Part.

Definitions: **proceeding**, s 1

COMMENTARY

C48 *Section 11(3)* provides a list of factors (not necessarily exhaustive) which the court should take into account in the balancing process. The importance of these factors will vary from case to case. Not all of them will necessarily weigh in favour or against disclosure in any particular case. The list points to the main initial points of enquiry, from which the decisive considerations are likely to emerge.

C49 The section, taken as a whole, is more comprehensive than its predecessor. The court may act of its own initiative; the point does not need to be taken by the witness (see s 17(2)). It may act in the interest of someone who is not a witness. Nor is it confined to communications or information which are the subject of a duty of confidence between two people. (For example, a sole trader's secret method of manufacture could be protected.) It applies, not only where a witness is testifying, but also where information is sought on discovery.

12 Discretion as to matters of state

- (1) A court may direct that a communication or information relating to matters of state must not be disclosed in a proceeding if the court considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in withholding the communication or information.
- (2) A communication or information relating to matters of state includes a communication or information
 - (a) in respect of which the reason advanced in support of an application for a direction under this section is one of those set out in sections 6 and 7 of the *Official Information Act 1982*; or
 - (b) which is official information as defined in section 2 of the *Official Information Act 1982* and in respect of which the reason advanced in support of the application for a direction under this section is one of those set out in paragraphs (b) to (k) of section 9(2) of that Act.
- (3) A court may give a direction under this section in respect of a communication or information whether or not the communication or information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by this Part.

Definitions: **proceeding**, s 1

COMMENTARY

Section 12

C50 *Section 12* allows the Government, and those affected by government actions, to have communications withheld in the wider public interest. The section puts the present doctrine of public interest immunity into statutory form. It is the counterpart to s 11. Whereas s 11 applies to private confidential information, s 12 applies to information whose confidentiality is important to the state or to the effective conduct of public affairs. The basic principle set out in s 12(1) is the same. When in any particular case it appears to the court that the public interest in preserving the confidentiality of information relating to the state or public affairs is more important than the public interest in disclosing it, the court may direct that the information not be disclosed.

C51 Under s 12(2), the term "matters of state" is defined to include any information where the reason advanced for protecting it corresponds with one of the reasons for protection recognised in the Official Information Act 1982. But the Act as drafted also recognises the possibility that, either now or at some future time, some "matter of state" not included in the Act will justify the court in upholding a claim to immunity. This in theory is the present legal position. Whether such a situation could ever arise is doubtful, since - independently of court proceedings - the applicant need only apply under the Official Information Act in order to obtain the information.

C52 Although it will usually be the Government which applies for a direction under this section the court may act of its own initiative or on the application of an interested person where there appears to be a wider public interest involved. This could occur, for example, in a situation where the information is not in the possession of the Government. It could also occur where a person affected by the disclosure believes there is a public interest in maintaining secrecy, but the Government has declined to oppose the application for disclosure.

C53 Unlike s 11, the section does not include lists of relevant types of interest or relevant factors. Ample general guidance on the public interest in the secrecy of official information, and the circumstances in which official information should be made available, will be found in the Official Information Act 1982.

13 Waiver

- (1) A person who has a privilege conferred by this Part may waive that privilege either expressly or impliedly.
- (2) A person waives a privilege conferred by this Part if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document
 - (a) in circumstances that are inconsistent with a claim of confidentiality; or
 - (b) if it is unfair in the circumstances for the person to retain the benefits of the privilege while taking the benefits of disclosure.
- (3) A person waives a privilege conferred by this Part if that person
 - (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
 - (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.
- (4) A person does not waive a privilege conferred by this Part in respect of a communication, information, opinion, or document which has been disclosed to another person if the disclosure resulted from a breach of confidence or otherwise occurred involuntarily.
- (5) A privilege conferred by section 6 (which relates to settlement negotiations) may be waived only by all the persons who have that privilege.

Definitions: **proceeding**, s 1

COMMENTARY

Section 13

C54 Waiver of a privilege occurs where privilege holders do something which shows they no longer wish to rely on the confidentiality of information, or which makes it unfair that they should be allowed to do so.

C55 *Section 13(2)* states the general rule which applies where the privilege holder voluntarily discloses or publishes the privileged information. In general, where that happens, privilege will be lost. But where there has been a limited disclosure, not inconsistent with the intention to preserve confidentiality, the court will have to determine whether it is unfair for the privilege to be retained (para (b)). For example, a privileged document may be shown to a few of the privilege holder's friends. Unless that action had some adverse impact on the party seeking disclosure, there would be no reason why privilege should be lost.

C56 *Section 13(3)* provides that the privilege is lost where the privilege holder puts the privileged information into issue in any proceeding, either directly, or else by instituting civil proceedings where the information must come into issue. For example, people who sue their lawyer for malpractice cannot rely on legal professional privilege to prevent disclosure of communications between them which are relevant to the defence of the claim.

C57 *Section 13(4)* deals with the case where a privilege holder has involuntarily disclosed or parted with privileged information. Where there is no fault or intention to disclose, privilege is not waived. The person in possession of the information may be ordered not to disclose it in court proceedings (see s 2(4)).

14 Joint and successive interests in privileged material

- (1) A person who jointly with some other person or persons has a privilege conferred by this Part in respect of a communication, information, opinion, or document
 - (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by this Part from having access or seeking access to the privileged matter; and
 - (c) may, on the application of an interested person who wishes the privilege to be maintained, be ordered by a court not to disclose the privileged matter in a proceeding.

- (2) A personal representative of a deceased person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document and any other successor in title to property of a person who has such a privilege
 - (a) is entitled to assert the privilege against third parties; and
 - (b) is not restricted by this Part from having access or seeking access to the privileged matterto the extent that a court is satisfied that the personal representative or other successor in title to property has a justifiable interest in the communication, information, opinion, or document.

- (3) A personal representative of a deceased person who has a privilege conferred by this Part in respect of a communication, information, opinion, or document and any other successor in title to property of a person who has such a privilege, may, on the application of an interested person who wishes the privilege to be maintained, be ordered by a court not to disclose the privileged matter in a proceeding.

Definitions: **proceeding**, s 1

COMMENTARY

Section 14

C58 *Section 14(1)* sets out the rights of joint privilege holders, as for example where two clients who are interested in a legal matter employ the same solicitor to deal with it on their behalf. A joint privilege holder may have access to all privileged material (para (b)), and may assert the privilege against third parties (para (a)). This is so even though the material has been provided by the other privilege holder. Further, the other privilege holder may if necessary be ordered not to disclose the material in court proceedings. (para (c))

C59 *Section 14(2) and 14(3)* apply the same principles to cases where there are successive privilege holders in time, for example,

- A privilege holder who has died, and the privilege holder's personal representative;
- A privilege holder who formerly owned property, and the privilege holder's successor in title (the communications or information relating to some matter of title).

However, the two privilege holders may not have precisely the same interests. For example, the Official Assignee, as successor in title to a bankrupt's property, has a right of access to the bankrupt's legal file concerning an earlier dispute over that property. But the Official Assignee ought not to have access to files relating to the defence of the bankruptcy proceeding itself. The final words of s 14(2) are designed to allow the court to take appropriate decisions in such matters.

15 Powers of court to disallow privilege

- (1) A court may disallow a claim of privilege conferred by this Part in respect of a communication or information if the court considers that the communication was made or received or the information was compiled or prepared to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence, a fraud, or other unlawful act.

- (2) A court may disallow a claim of privilege conferred by this Part in respect of a communication or information if the court considers that
 - (a) evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present his or her defence effectively; and
 - (b) other evidence to similar effect cannot reasonably be procured by the defendant.

Definitions: **proceeding**, s 1

COMMENTARY

Section 15

C60 *Section 15(1)* deprives a communication or information of its privilege, if it is made or compiled with an unlawful purpose. This corresponds to the present law, as it developed in relation to legal professional privilege. It has particular application in the case of "absolute" privileges, which cannot otherwise be overridden by the court in its discretion. Where the privilege is qualified, the court can take into account any unlawful purpose, and the need to discover and deal with crime, in the exercise of its discretion.

C61 The section differs from the existing law in some important respects. Most significantly, it has no application if the person claiming the privilege does not know of the unlawful purpose. That can occur, for example, when both client and solicitor, engaged in completing a property transaction, are the dupes of an associate of the client who is using the transaction for money-laundering (see *R v Central Criminal Court, ex p Francis* [1989] AC 346). At common law, such a transaction would not, it appears, be protected. Further, when the section does apply, it puts the matter in the discretion of the court, rather than operating as an automatic disqualification. For example, if a client threatened with prosecution goes to his lawyer, unwisely, with a half-baked and unlawful scheme to evade prosecution, which he immediately reconsiders and abandons, it may not be in the interests of a fair trial to force the lawyer to disclose what the client had said. Under the present law, the court would not appear to have any discretion in such matters.

C62 The reason for these limitations is linked with what is said in para C60. Since the section is only critical in those few cases where there are strong policy reasons for an "absolute" privilege, the considerations in favour of privilege are likely to be much stronger than they would be for the general run of professional privileges. It would not be satisfactory to commit the courts, in advance, to override the privilege, without regard to the innocence of the privilege holder, or to the particular circumstances of the case which may still make compulsory disclosure unfair.

C63 *Section 15(2)* corresponds with another established exception to the law of privilege, where the information is needed for the defence of an accused person. Again, this exception has been cast in the form of a judicial discretion. Stating the law in this way takes into account, in particular, the position where there are two

(Section 16 appears on p 232.)

accused, one of whom may claim that she needs information about what the co-accused has said to his own solicitor in order to defend the case.

16 Orders for protection of privileged material

- (1) A court may order that evidence must not be given in a proceeding of a communication, information, opinion, or document in respect of which a person has a privilege conferred by this Part and may make an order under this subsection
 - (a) of its own initiative; or
 - (b) on the application of the person who has the privilege; or
 - (c) on the application of an interested person other than the person who has the privilege.
- (2) A court may give a direction under section 7 (compellability of spouses and others) or under section 11 or 12 (discretionary protection of confidential information and matters of state) of its own initiative or on the application of an interested person.
- (3) An application under subsection (1) or (2) may be made at any time either before or after any relevant proceeding is commenced.
- (4) A court may give such directions as are necessary to protect the confidentiality of, or limit the use which may be made of,
 - (a) any privileged communication, information, opinion or document which is disclosed to a court or other body or person in compliance with a judicial or administrative order;
 - (b) any communication or information which is the subject of a direction under section 11 (confidential communications or information) or section 12 (matters of state and public affairs) but is disclosed to a court or other body or person in compliance with a judicial or administrative order;
 - (c) information which is given in evidence for the prosecution or a person in the circumstances described in section 7(a) or (b) by a person who is legally married or a partner in a relationship of a kind described in that section.

Definitions: **proceeding**, s 1

COMMENTARY

Section 16

C64 *Section 16* contains procedural provisions designed to meet the special requirements of claims for privilege.

C65 The privilege holder will normally be present in court and be able to object to disclosure of privileged information. But that will not always be the case. An illustration is where a lawyer is summoned to testify about the affairs of a client who is not a party to the proceedings. *Section 16(1)* allows a claim of privilege to be made either by an interested party, for example, the lawyer, or else to be initiated by the court itself. The claim may also be anticipated by the party intending to oppose the claim, who is also "interested".

C66 *Section 16(2)* applies the same principles to claims of marriage or de facto partners under s 7, and claims to the exercise of the court's discretion under ss 11 and 12. Strictly speaking these are not "privileges" and so a separate provision is required.

C67 *Section 16(3)* provides for making the application prior to, as well as during, court proceedings. The determination of the claim may be critical to the question of whether the case should proceed (as, for example, in the case of testimony by a battered wife). The parties should be able to have the matter settled so they will know whether or not to undertake the expense and trouble of court proceedings which will be futile if the witness is permitted not to testify.

C68 *Section 16(4)* allows the court, when it orders the disclosure of protected information, to limit the use which may be made of that information.

Summary of questions

Chapter 3: Legal professional advisers: current or contemplated litigation

- 1 Should there be any privilege for communications between clients and their lawyers? (para 46)
- 2 Should protection for communications with lawyers be absolute, or subject to the court's discretion? (para 54)
- 3 Should protection be confined to advice given by qualified lawyers? (para 65)
- 4 Should protection be extended to advice based on non-legal expertise? (para 70)
- 5 Should companies be protected in respect of communications made by their employees? (para 75)

Chapter 4: Legal professional advisers: other preparations for litigation

- 6 Is litigation privilege needed in criminal cases? (para 87)
- 7 Should litigation privilege be abolished in civil cases? (para 97)
- 8 Should the court be able to override litigation privilege in its discretion? (para 100)
- 9 Should the scope of the privilege be narrowed by adopting the "sole purpose" test? (para 103)
- 10 Is it sufficient to define the privileged preparations as those made "in contemplation of litigation"? (para 114)
- 11 Should the scope of the privilege be broadened by abolishing the "dominant purpose" test? (para 117)
- 12 Will a judicial discretion operate in a principled way? (para 124)

Chapter 5: Legal professional advisers: litigation not contemplated

- 13 Should the privilege for communications made with lawyers to obtain general legal advice be an absolute privilege? (para 131)

- 14 Is the exercise of judicial discretion an appropriate way to resolve questions about what a lawyer should disclose? (para 156)
- 15 Should the privilege be extended to other professionals who give advice on matters of law? (para 160)

Chapter 6: Legal professional advisers: limitations on claiming privilege

- 16 Should any unnecessary disclosure result in loss of the privilege? (para 171)
- 17 Should involuntary disclosure to a stranger result in loss of the privilege? (para 176)
- 18 Should the client be affected by the unlawful purpose of the lawyer, or of some other person? (para 185)
- 19 Should any "unlawful" purpose result in loss of the privilege? Or only a "criminal" purpose? (para 189)
- 20 Should the court have a *discretion* to override the privilege where information is sought by an accused? Or should there be a *rule* enforcing disclosure? (para 190)

Chapter 7: Settlement negotiations: statements made "without prejudice"

- 21 Is the "without prejudice" rule best seen as a privilege, or as a rule about the inadmissibility of unhelpful evidence? (para 202)
- 22 Should the "without prejudice" rule have its own defined exceptions? Or is it sufficient to provide a general judicial discretion to override the privilege? (para 206)

Chapter 9: Married persons: privilege and compellability

- 23 Should any protection be given for people who are required to testify against their spouses? (para 226)
- 24 Should protection extend to de facto and other family relationships? (para 236)
- 25 How should de facto partnerships be defined? (para 240)
- 26 Should the present privilege for communications between husband and wife be abolished? (para 242)

- 27 Should the present protection for communications with family counsellors be reviewed? (para 246)
- 28 Should the spouse or partner of an accused be a compellable witness in a criminal trial? (para 251)
- 29 Should compellability be governed by a rule with exceptions, or by a judicial discretion? (para 254)

Chapter 10: Religious and spiritual advisers

- 30 Should there be a special privilege for confessions and similar communications with a religious mentor? (para 267)
- 31 Should the privilege be an absolute one? (para 277)
- 32 Should the privilege be confined to "confessions"? (para 281)
- 33 Should the privilege be confined to practices within recognised religions and churches? (para 282)

Chapter 11: Doctors and psychologists

- 34 Should consultations with doctors be privileged? (para 290)
- 35 Should the present privilege, in civil cases, be assimilated into the procedures governing confidential information generally? (para 297)
- 36 Should the present privilege in criminal cases, where the illness may result in criminal conduct, be retained? (para 303)

Chapter 12: Informers

- 37 Should there be a special privilege for informers? (para 316)
- 38 Should the privilege extend to information given to any enforcement agency, not just the police? (para 323)
- 39 Should the privilege apply to protect police surveillance points and the like? (para 326)
- 40 Should the privilege be lost wherever the accused needs the information for the defence of a prosecution? (para 327)

Chapter 13: Journalists

- 41 Should journalists' sources be protected? (para 334)
- 42 Should there be an absolute or qualified privilege, specifically for journalists' sources? (para 346)
- 43 Should journalists' sources be protected by the general discretion for confidential information? (para 352)

Chapter 14: Introduction

- 44 Should the distinction that is now drawn between private confidentiality and public interest immunity be retained? (para 359)
- 45 Does the "weighing" rule involve a pure discretion or a closely directed judgment? (para 366)
- 46 Are the discretionary elements in s 35, and the Commission's proposals, too great? (para 369)
- 47 Are defined privileges better brought within the courts' discretionary powers rather than being dealt with separately? (para 377)

Chapter 15: Confidential relationships

- 48 Should a single discretionary power be used to protect a wide range of confidential information? (para 385)
- 49 Should people other than the witness be able to assert a claim to protection? (para 406)
- 50 Should a confidential relationship between two people be an essential prerequisite? (para 407)
- 51 Should protection be limited to communications? (para 410)
- 52 Should there be protection for information possessed by third parties? (para 410)
- 53 Is it helpful to include a list of relevant considerations in the statute? (para 414)

Chapter 16: The Crown

- 54 Should classes of protected government information be spelt out solely in terms of the reasons given for withholding information in the Official Information Act 1982? (para 431)
- 55 Should a list of factors relevant to protecting government information be included in the code provision? (para 434)
- 56 Should the immunity be able to be sought only by the Crown? (para 440)
- 57 Should the Crown be able to waive a claim for immunity? What is the effect of waiver? (para 443)
- 58 Should the code provide for "class claims" to immunity? (para 447)
- 59 Should the Crown continue to be exempted from the normal duty to "list" certain protected documents? (para 455)
- 60 Should those who object to a claim for immunity first show that they need the information for their use? (para 463)

Appendix A

Draft structure for an evidence code

(Note: This is an updated version of the draft structure in *Evidence Law: Codification* (NZLC PP14 1991))

PART 1 - PURPOSES

(Provisions set out in Appendix B, also see PP14)

PART 2 - GENERAL PRINCIPLES

(Provisions set out in Appendix B, also see PP14)

PART 3 - ADMISSIBILITY RULES (OR SPECIFIC EXCLUSIONS)

Division 1 - Hearsay Evidence

(See *Evidence Law: Hearsay* (NZLC PP15 1991))

Division 2 - Opinion Evidence and Expert Evidence

(See *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18 1991))

Division 3 - Rules for Criminal Proceedings

(See *Criminal Evidence: Police Questioning* (NZLC PP21 1992))

Division 4 - Character and Conduct Evidence

Includes:

Similar Facts

Previous Convictions

Credibility

Division 5 - Miscellaneous Exclusionary Rules

Division 6 - Waiver of Rules

PART 4 - PRIVILEGE AND CONFIDENTIALITY

(Provisions set out in this Discussion Paper)

PART 5 - THE TRIAL PROCESS

Division 1 - General Rules

- Burden of Proof
- Presumptions
- Standard of Proof

Division 2 - Judge and Jury

- Judicial Control of Proceedings
- Judge/Jury Functions
- Warnings
 - About Weight
 - About Use for Inadmissible Purposes
- Judicial Witnesses
- Judicial Notice

Division 3 - Witnesses

- Competency
- Manner of Giving Oral Evidence
- Oaths
- Ability of Judge/Jury to Give Evidence

Division 4 - Documents

(See *Evidence Law: Documentary Evidence and Judicial Notice* (NZLC PP22 1994))

PART 6 - MISCELLANEOUS

- Regulations
- Savings and Transitional
- Repeals
- Consequential Amendments

PART 7 - APPLICATION, DEFINITIONS AND COMMENCEMENT

- Application

Definitions
Commencement

Appendix B

Draft early sections for an evidence code

PART 1 PURPOSES

1 Purposes

The purposes of this Code are to:

- and
- (a) promote the rational ascertainment of facts in proceedings;
 - (b) help promote fairness to parties and witnesses in proceedings and to all persons concerned in the investigation of criminal offences; and
 - (c) help secure rights of confidentiality and other important public and social interests, and
 - (d) help promote the expeditious determination of proceedings and the elimination of unjustifiable expense.

PART 2 GENERAL PRINCIPLES

2 Fundamental principle - relevant evidence is admissible

- (1) All relevant evidence is admissible in proceedings except evidence that is excluded in accordance with this Code or any other Act.
- (2) Evidence that is not relevant is not admissible in proceedings.
- (3) Evidence is relevant for the purposes of this Code if it has a tendency to prove or disprove a fact that is of consequence to the determination of a proceeding.

3 General exclusion

In any proceeding, the court shall exclude evidence if its probative value is outweighed by the danger that the evidence may:

- (a) have an unfairly prejudicial effect; or
- (b) confuse the issues; or
- (c) mislead the court or jury; or
- (d) result in unjustifiable consumption of time; or

(e) result in unjustifiable expense.

Appendix C

Existing statutory provisions

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