

Preliminary Paper 25

THE PRIVILEGE AGAINST
SELF-INCRIMINATION

A discussion paper

*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 SP 23534, Wellington
by 29 November 1996

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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Preface

THE LAW COMMISSION'S REFERENCE on criminal procedure has the following purposes:

- (1) To ensure that the law relating to criminal investigations and procedures conforms to the obligations of New Zealand under the International Covenant on Civil and Political Rights and to the principles of the Treaty of Waitangi.
- (2) 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 . . . and to make recommendations accordingly.

The criminal procedure reference needs to be read together with the evidence reference which has the following 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.

Both references were given to the Law Commission by the Minister of Justice in August 1989 and the Commission is proceeding with them by stages. A report on *Disclosure and Committal* (NZLC R14, 1990) and an issues paper on *The Prosecution of Offences* (NZLC PP12, 1990) have been published. A discussion paper, *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) and a final report, *Police Questioning* (NZLC R31, 1994) followed. Discussion papers on the prosecution system and on juries are also to be published this year.

Many aspects of this paper are also relevant to the evidence reference. The paper therefore needs to be considered with the publications under that reference. Two papers published in April 1991 on principles for the reform of evidence law and codification of evidence law are particularly relevant to this paper, along with the discussion papers on privilege (NZLC PP23, 1994) and documentary evidence (NZLC PP22, 1994). The Commission has previously referred to the privilege against self-incrimination in Part I of *Criminal Evidence: Police Questioning*, in the context of the right of silence.

The Law Commission's work has been ably assisted by consultants: His Honour, Judge Harvey, who gave general advice on reform options; Ms Caren Wickliffe, who advised on Treaty of Waitangi and te ao Māori issues; Mr Stephen Kós, who advised on the application of the privilege to corporations; Mr Richard Mahoney, who critiqued the penultimate draft of the paper; and Mr Garth Thornton QC, who drafted the legislative provisions. The Commission has also sought information from organisations conducting investigations or prosecutions. A list of those organisations appears in Appendix A. The Commission also acknowledges the work of Janet Lewin, a senior researcher, who researched and drafted the paper.

This paper sets out the options for reform concerning the privilege against self-incrimination and contains preliminary conclusions, proposals, and draft provisions with an accompanying commentary.

Formal submissions or comments on this paper should be sent to the Director, Law Commission, PO Box 2590, Wellington, by 29 November 1996. Any initial inquiries or informal comments can be directed to Janet Lewin (04 473 3453).

Introduction

- 1 **W**E CANNOT BE REQUIRED by the State to provide information which may expose us to criminal liability. That is the essence of the privilege against self-incrimination, the subject-matter of this paper.
- 2 In this paper, the privilege against self-incrimination is kept distinct from two related concepts. The first is our general freedom to refuse to answer any questions and the second is the right of silence available to those suspected of or charged with crime.
- 3 To begin with the first and broadest idea, we are all generally free to refuse to say anything to anybody, especially to the State. That freedom is, however, subject to many limits, mainly imposed by statute. Therefore, in the public interest, we are required to provide information to protect the border (immigration, customs and agriculture forms), the revenue (tax returns), public health (communicable disease notifications) and financial and commercial probity (company returns), to give just a few examples. This paper does not in any general way scrutinise the various statutory powers compelling people to provide information in the public interest. It is concerned solely with the common law privilege against self-incrimination and the situations in which legislation reflects, removes or restricts that privilege.
- 4 The second idea referred to above, the right of silence, is often linked with, but is different from, the privilege against self-incrimination. The right of silence allows a suspect in a criminal investigation to refuse to answer questions, incriminating or not, put to him or her by a law enforcement officer. In addition, at trial, the existence of the right means that a defendant can choose not to testify at all. In New Zealand, the right largely precludes adverse comment being made at trial on the defendant's exercise of the right. Section 366 of the Crimes Act 1961 permits only judicial comment on the defendant's exercise of his or her right not to give evidence at trial.
- 5 In one sense, the right of silence is broader than the privilege, because it can be invoked in response to any question in a criminal context, whether self-incriminating or otherwise. In another sense, the right of silence is narrower than the privilege. The former applies only in the context of criminal investigations and proceedings, enabling a suspect or defendant to remain silent at the investigative stage and decline to testify in the proceedings against him or her. The privilege can be claimed in a variety of contexts, including civil discovery, disciplinary proceedings, before commissions of inquiry, and under examination on oath by a judicial officer. The privilege, like the right of silence, cannot be claimed by a criminal defendant who chooses to testify in the proceedings against him or her concerning a particular matter in issue in those proceedings (s 5(4)(a) Evidence Act 1908).

- 6 In some instances, legislation imposes an obligation on a person to provide information or answer questions (removing the right of silence), while expressly retaining the privilege against self-incrimination: see the discussion on legislation referring to the privilege in chapter 12. The privilege extends to the production of documents and, in limited circumstances, to other tangible evidence (although the situation varies from jurisdiction to jurisdiction). It is unlikely that the right of silence could legitimately be claimed in response to a demand for documents. In addition, while a sworn witness cannot invoke the right of silence, he or she may generally claim the privilege against self-incrimination as a reason for withholding testimony. In these particular contexts, there is an obvious difficulty in placing reliance on the right of silence as a support for the privilege.
- 7 When legislation removes or restricts the common law privilege, the courts or the legislature may prevent the use of the self-incriminating information disclosed. For example, s 49(3) and (4) of the Gas Act 1992 provides that no person shall be excused from disclosing incriminating information and replaces the privilege with protection from the use of the information in other proceedings against him or her. For other examples of provisions which explicitly remove or restrict the privilege, see the chart in Appendix B and the discussion in chapter 12.
- 8 There are many more provisions which may, depending on how they are interpreted by the courts, impliedly remove or restrict the privilege. For example, s 17 of the Securities Act 1978 gives the Securities Commission information-gathering powers, including the power to summons witnesses to appear before it to answer questions: see the discussion about that provision in chapter 14, beginning at para 373.
- 9 This separate study of the privilege against self-incrimination offers the opportunity to explore issues of criminal procedure which could not be considered in the Commission's paper on the general law of privilege (*Evidence Law: Privilege* (NZLC PP23, 1994), while taking in issues of wider scope than those discussed in the Commission's papers on the right of silence, confessions and police questioning, (*Criminal Evidence: Police Questioning* (NZLC PP21, 1992) and *Police Questioning* (NZLC R31, 1994).
- 10 To describe the privilege against self-incrimination as a "privilege" is itself somewhat misleading. It in fact confers a right to protection, and should be distinguished from other "privileges" discussed in NZLC, PP23 (for example, legal professional privilege), on the basis that it is a safeguard recognised in the New Zealand Bill of Rights Act 1990: see chapter 5.
- 11 The legislative proposals in the Commission's previous paper on the general law of privilege did not deal with the privilege's application at an investigation stage. In this paper, however, we look at the privilege against self-incrimination in investigations *and* proceedings. This is a reflection of the fundamental nature of the privilege. In addition, decisions made at an investigation stage impact upon the admissibility of evidence in proceedings.
- 12 A glossary follows this introduction, to assist the reader with some of the more technical language in the area. The reform issues considered in the paper are summarised following this introduction, and again at the beginning of each relevant chapter. The paper is organised into three parts: general considerations, the common law privilege, and legislation and the privilege.

- 13 In chapter 1, we examine the historical origins and common law applications of the privilege in various contexts. The interests said to justify the privilege are assessed in chapter 2. Chapter 3 gives consideration to an alternative to the common law approach – complete abrogation and replacement with a use immunity. In chapters 4 and 5, Māori dimensions and the Bill of Rights Act are considered. Chapters 6 to 11 consider contextual issues about the application of the common law privilege. These include the application of the privilege in civil contexts, to civil penalties, documentary and other evidence, to corporations and a claimant’s spouse, and to incrimination arising under foreign law. Chapters 12 to 15 analyse statutory developments in New Zealand affecting the common law privilege in particular contexts, and should not be confused with the more fundamental discussion in earlier chapters about whether the privilege should be completely removed in all contexts. Draft provisions and an accompanying commentary follow. Finally, there are appendices, a bibliography, and an index.
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Glossary

Abrogation of the privilege against self-incrimination occurs when a statutory provision explicitly provides that the common law privilege has been largely or completely removed in contexts in which it might otherwise have been claimed. Abrogation should not be confused with provisions removing or limiting the privilege in a particular context only.

Adversarial systems require the judge to be an impartial arbitrator of facts presented in evidence by the parties to proceedings, and imply some degree of equality between the parties. These systems are also known as accusatory, so named because a person or representative of the community makes an accusation of criminal offending against a suspect.

Anton Piller orders are orders made by judges in civil proceedings requiring parties on whom they have been served to answer questions and provide access to their premises for inspection purposes. They are used when one party fears that the other will conceal, remove or destroy incriminating evidence. The order is named after the English Court of Appeal decision in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

Civil penalties arise out of civil proceedings, and their aim is to punish or discipline the defendant rather than to compensate the plaintiff. Examples of civil penalties can include fines, disqualification and striking off. In this paper, the privilege against liability to a civil penalty is referred to as the *penalty privilege*.

Common law is a phrase used to describe the body of law applying in jurisdictions modelled on the English system, and which is judge-made rather than enacted by legislation.

Derivative use immunities are immunities from the admissibility of evidence discovered as a consequence of compelled self-incriminating information being given (eg, self-incriminating answers leading to the discovery of relevant documentary evidence). In this paper, derivative use immunities will be referred to by the less technical name *use fruits immunities*.

Inquisitorial systems are systems of justice in which the judge has an investigative as well as an adjudicative role and proceeds with an inquiry on his or her own initiative (unlike adversarial systems where the parties conduct investigations and present the evidence).

Mareva injunctions are orders made by judges in civil proceedings which freeze the assets of a party so that he or she cannot remove them to other jurisdictions, or otherwise deal with them, to forestall the effects of an adverse judgment. The case in which the injunction first applied was *Sociedade Nacional de Combustiveis de Angola UEE ("Sonangol") v Lundquist* [1990] 3 All ER 283.

Penalty privilege – see *Civil penalties* above.

Real evidence comprises an object put in evidence. It does not include a document relied upon as a record of an assertion or statement. Real evidence includes body samples, weapons, fingerprints, handwriting exhibits, identification evidence etc.

Testimonial evidence comprises a statement offered as proof of the truth of that which is asserted.

Transactional immunities are immunities from prosecution arising as a direct or indirect result of giving compelled self-incriminating information (eg, when self-incriminating evidence is compulsorily disclosed in civil proceedings, an immunity from subsequent criminal prosecution may be granted).

Use fruits immunities – see *Derivative use immunities* above.

Use immunities are immunities from the admissibility of self-incriminating information in proceedings (eg, when self-incriminating evidence is required in civil proceedings, an immunity from its use in other civil, or in criminal, proceedings may be granted).

Summary of Questions

Chapter 2

- 1 Is the privilege against self-incrimination effective in protecting valid interests?

Chapter 3

- 2 Can the interests the privilege protects be adequately safeguarded by abrogation and the provision of immunities in place of the privilege?

Chapter 4

- 3 Is the privilege compatible with te ao Māori?

Chapter 5

- 4 To what extent, and in which ways, can the New Zealand Bill of Rights Act 1990 shape legislative provisions affecting the privilege and influence their interpretation?

Chapter 6

- 5 Should the privilege in civil proceedings be removed by legislation?

Chapter 7

- 6 Should the lesser known limbs of the privilege against self-incrimination, the privileges against liability to a civil penalty, forfeiture, and ecclesiastical censure, be removed by legislation?
- 7 Should the penalty privilege extend to liability for compensatory and punitive damages?

Chapter 8

- 8 Should the privilege preventing the production of documentary evidence be removed by legislation?
- 9 Should the privilege apply to real evidence?
- 10 Should the privilege apply to a non-verbal action intended as an assertion?

Chapter 9

- 11 Should the privilege for bodies corporate be removed by legislation?

Chapter 10

- 12 Should the privilege apply to protect the claimant's spouse from incrimination?

Chapter 11

- 13 Should the privilege apply to protect the claimant from extraterritorial liability to prosecution or a civil penalty? Should the courts have a discretion to uphold or not uphold the privilege when the claimant faces extraterritorial liability?

Chapter 12

- 14 In which particular circumstances should the privilege be removed by legislation, how should this be done, and what kinds of immunities should be offered in place of the privilege?

Chapter 13

- 15 Is the removal of the privilege, and its replacement with a partial use immunity for oral disclosures, justified in the detection of serious fraud?
- 16 Should the Serious Fraud Office Act 1990 be amended and to what effect?

Chapter 14

- 17 When should a legislative provision be interpreted as removing the privilege?

Chapter 15

- 18 Should the Australian approach – of requiring the courts to give a person who makes self-incriminating disclosures in proceedings a certificate containing a use and use fruits immunity – be adopted in New Zealand? If so, what modifications, if any, should be made?
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Part I

GENERAL
CONSIDERATIONS

1

History and Scope of the Common Law Privilege

What the history of the English common law privilege does show is that the privilege was broadly conceived and applied. . . . it was not originally limited to incrimination, but protected against loss of reputation; it was not limited to defendants, but protected witnesses; and it was not limited to judicial proceedings, but came to restrict all of the agencies which then engaged in interrogation. It was asserted in adjudicative proceedings, pre-adjudicative examinations, and even in pre-charge inquiries. It was used as a defense against the Oath ex Officio, but also to fend off unsworn examination.¹

BRIEF HISTORY

- 14 **T**HERE IS DISAGREEMENT about the precise origins of the privilege against self-incrimination. Some commentators maintain that the privilege arose in the wave of opposition to two modes of questioning citizens in medieval England – namely, questioning under the inquisitional oath in the ecclesiastical courts and incriminating questioning in the Star Chamber. Opposition began in the thirteenth century and gathered momentum in the sixteenth century.²
- 15 Generally, the inquisitional oath consisted of a sworn statement by a defendant promising to tell the truth in response to any questions put by the court. A refusal to respond or give a sworn statement was regarded as tantamount to a confession of guilt. The sworn statement was frequently demanded without informing the defendant of the substance of the complaint, the incriminatory evidence, or the identity of his or her accusers (Levy, 46–47). The purpose behind the oath was to extract a confession and it was used most notably for religious dissenters, such as the Puritans. By the close of the seventeenth century, defendants began refusing to take the oath on the basis that “no man is bound to incriminate himself on any charge . . . in any court . . .”, and the inquisitional oath was abolished (Wigmore, 2250).
- 16 An alternative view of the privilege’s origins is that it arose with the adversarial criminal process and the emergence of defence counsel, at the end of the eighteenth century.³ One of the principal features of the adversarial process is that

¹ Herman, “The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)” (1992) 53 Ohio State Law Journal 497, 543.

² Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (2nd ed, Macmillan, New York, 1986), 23–24 and *Wigmore on Evidence* (McNaughton rev Little, Brown & Co, Boston, 1961), vol 8 para 2250–2253.

³ Langbein, “The Historical Origins of the Privilege Against Self-Incrimination at Common Law” (1994) 92 Michigan Law Review 1047, 1066–1067.

equal parties come before an independent fact-finder who listens to the allegations and responses. The rules of evidence, including the privilege against self-incrimination, are designed to maintain this equality between the respective parties.

- 17 The debate about when the privilege originated has carried over to North America. It is said that the Puritans, escaping religious persecution, brought the idea with them from England. Another view is that the privilege's development was linked to the role of trial by jury and the presumption of innocence in limiting governmental power.⁴
- 18 After the 1776 revolution, all the American states with a bill of rights incorporated a privilege against self-incrimination. The Federal Bill of Rights was ratified on 15 September 1791 and included a prohibition against compulsory self-incrimination in the Fifth Amendment to the United States Constitution. The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."
- 19 References to the privilege in a civil context can be found in the New Zealand law reports of last century. In *Holmes v Furness* (1884) 3 NZLR 417, for example, a claim to the privilege arose in the course of delivering interrogatories (ie, a set of questions put formally to a party in proceedings) and, in *Roskruge v Ryan* (1897) 15 NZLR 246, a claim arose in the context of discovery (ie, the process by which both parties disclose the existence and contents of documents relevant to the proceedings).
- 20 In more recent times, article 14(3)(g) of the International Covenant on Civil and Political Rights has upheld the right of silence and, in criminal investigative contexts, it largely encompasses the privilege.⁵ It provides that every person facing a criminal charge shall have the right "[not] to be compelled to testify against himself or to confess guilt." As far as it relates to investigations and proceedings involving offences or suspected offences, the privilege is also reflected in ss 23(4) and 25(d) of the New Zealand Bill of Rights Act 1990: see chapter 5 for a discussion of the relevant provisions of that Act.

SCOPE OF THE COMMON LAW PRIVILEGE IN NEW ZEALAND

Claiming the privilege

- 21 The privilege must be claimed: it does not automatically apply. There is no duty at common law for the person requesting information, or for a judge in the course of proceedings, to warn the person being questioned of his or her right to invoke it (*R v Goodyear-Smith*, unreported, High Court, Auckland, 26 July 1993, T 332/92, Anderson J).

⁴ See the competing viewpoints of Levy, 339–340 and Moglen, "Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination" (1994) 92 Michigan Law Review 1086, 1087. In any case, Benjamin Franklin hailed the privilege as one of the "common Rights of Mankind" in 1735; although for some time it was honoured more in the breach than the observance (Levy, 383).

⁵ The Covenant and Optional Protocol were adopted by the General Assembly of the United Nations on 16 December 1966. The New Zealand Instrument of Ratification was deposited on 28 December 1978. The International Covenant came into force in New Zealand on 28 March 1979.

- 22 When a witness has justifiably claimed the privilege but the claim has wrongly been disallowed in previous proceedings, the incriminating evidence should not be used in subsequent criminal proceedings (*Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461, 470). Therefore, when self-incriminating documents have been seized under an Anton Piller order and wrongly admitted in the court proceedings, the judge presiding in later criminal proceedings should refuse to allow the admission of the incriminating documents.

Testimonial evidence

- 23 Generally, the privilege applies only to testimonial evidence (ie, evidence which comprises a statement, rather than evidence admitted as an object). Wigmore describes the testimonial evidence rule as follows:

Unless some attempt is made to secure a communication – written or oral or otherwise – upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. (para 2265)

Testimonial evidence has been described as “the assertion of a human being offered as proof of the truth of that which is asserted” (Mathieson, 10): see chapter 8, para 194, for discussion of the application of the testimonial evidence rule.

- 24 In New Zealand, the privilege can be claimed for the contents of documents produced by the claimant (*Taranaki Co-operative Dairy Co Ltd v Rowe* [1970] NZLR 895). However, if a document’s contents can be proved by independent means, such as a lawful search and seizure, the privilege will not apply. This is because the privilege does not protect against incrimination, but rather against *self*-incrimination. In other words, the privilege can have no application when documents are seized independently of any compelled assistance by the person incriminated.
- 25 Although the Commission is not aware of any New Zealand case law directly on point, it appears that a person cannot invoke the privilege for documentary evidence when the document is put in evidence as an object, rather than as a statement. However, audio and video tapes come within the definition of “document” in s 2 of the Evidence Amendment Act (No 2) 1980. New Zealand courts are likely to apply the common law privilege to tapes when they are put in evidence as a statement.
- 26 In limited circumstances, the privilege will extend to the compelled *production* of real evidence (ie, an object), rather than to the real evidence itself. The Court of Appeal remarked in *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191, 194, that the act of producing an object might carry a sufficiently testimonial aspect to enable a claim of privilege to be made (eg, the act of producing a document might in some situations authenticate its existence, whereabouts, or validity).
- 27 Although the matter is not entirely beyond dispute, Mathieson suggests that the privilege does not permit samples of body fluids or substances to be withheld (242). In *King v McLellan* [1974] VR 773, the Supreme Court of Victoria, rejected an argument that the privilege entitled the withholding of a breath sample for alcoholic analysis. An analogy was drawn with fingerprints, rather than with self-incriminatory statements. As in Victoria, fingerprint evidence cannot be the subject of a privilege claim in New Zealand (s 57 Police Act 1958).

- 28 In other areas of the law, the privilege against self-incrimination is regarded as a relevant matter, although not applied directly, in determining the admissibility of non-testimonial evidence. In *R v Mei* [1990] 3 NZLR 16, for example, the admissibility of identification evidence, resulting from an improperly conducted identification parade, was in question. Although the court ultimately admitted the evidence, one of the factors it took into account, in concluding that the evidence was unfairly or oppressively obtained, was the spirit of the provisions which had been breached. Doogue J, delivering the judgment of the court, said:
- There is no doubt s 344B is designed to give a person charged certain basic protections in respect of identification parades conducted by the police. Section 344B(1) and (2) appear to be consistent with the principles that no person charged with an offence can be required to self-incriminate him or her self and is entitled to remain silent. In addition, the subsections appear to be designed to help protect the person charged from the risk of mistaken identification and to ensure there is no risk of unfair treatment in the absence of a solicitor. (23)

Meaning of compulsion

- 29 The privilege against self-incrimination is a privilege against compelled self-incrimination, rather than against self-incrimination itself. Justice Frankfurter's comments in *Culombe v Connecticut* 367 US 568 (1961), concerning the Fifth Amendment, suggest that there is not a generally accepted view of what constitutes compulsion:
- The self-incrimination clause is premised on a model of human conduct that views us as free will actors with fixed, pre-existing preferences – actors capable of exercising choice in the absence of coercion. Thus, it provides a defendant the right to choose whether to take the witness stand in his criminal case. But the right is broader than that, for it also forbids the use of out-of-court statements when the choice to speak was sufficiently constrained. How to find that point is susceptible to no precise solution . . .
- 30 The requisite element of compulsion appears to be generally present when a person
- is required by law to make self-incriminating disclosures (eg, via a subpoena, judicial order, an official's exercise of statutory powers etc), or
 - is under pressure to make self-incriminating disclosures in response to questioning by the police or other officials exercising criminal investigation powers, where the very purpose of the questioning is to establish whether an offence has been committed or who the offender is.
- 31 A consequence of the privilege being a privilege only against compelled self-incrimination is that it will not be claimable in contexts in which the person is a wholly voluntary participant, although there is a risk of subsequent prosecution or penalty. For example, the requisite element of compulsion may not be present when a person makes self-incriminating disclosures at a marae meeting, in the course of a dispute being arbitrated, or in a family meeting. However, in relation to family meetings, under s 37 of the Children, Young Persons, and Their Families Act 1989, admissions made in a Family Group Conference are privileged.⁶

⁶ For a discussion of the extent of the protection against self-incrimination provided, see Judge Harvey's article "Silence and Self-Incrimination Protections in the Children, Young Persons, and Their Families Act" (1995) 1 Butterworths Family Law Journal 247.

32 The privilege against self-incrimination is most often encountered when a witness is testifying, whether in a civil action or a criminal prosecution. It can also be claimed in the course of some other proceedings, such as commissions of inquiry or under examination on oath by a judicial officer (*Pyneboard Ltd v Trade Practices Commission* (1983) 45 ALR 609).

33 In the absence of legislation to the contrary, the privilege is a valid reason for refusing to respond to demands from government officials for information, even well before any proceedings (*Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 402). Cooke J said:

I respectfully agree with the majority view now prevailing in Australia that the privilege against self-incrimination is capable of applying outside Court proceedings. The common law privilege favours the liberty of the citizen, and, if a Court is not satisfied that a statutory power of questioning was meant to exclude the privilege, it is in accordance with the spirit of the common law to allow the privilege.

34 Some commentators have suggested that the compelled production of pre-existing documents (ie, documents existing before the demand for self-incriminating information) does not amount to compulsion to be a witness or confess guilt. This is because there is no compulsion to disclose information at the time when the contents of the document were prepared: see the majority decision in *Andresen v Maryland*, 427 US 463 (1976) to this effect. Others, such as the dissenting judge in *Andresen*, Justice Brennan, have said that this is an overly narrow interpretation of compulsion:

The door to one's house . . . is as much the individual's resistance to the intrusion of outsiders as his personal efforts to prevent the same. To refuse recognition to the sanctity of that door and, more generally, to confine the domination of privacy to the mind . . . den[ies] to the individual a zone of physical freedom necessary for conducting one's affairs. (486–487)

The application of the privilege to pre-existing documents is discussed further in para 88 and chapter 8.

35 In New Zealand, the courts have made no distinction between pre-existing and newly created documents. The privilege applies to both (*New Zealand Apple and Pear Marketing Board*, 191).

Who can claim the privilege?

36 The privilege can be claimed by a person when there is a risk of self-incrimination arising from information he or she gives. However, once a defendant chooses to give evidence in his or her own criminal proceedings, the defendant cannot claim the privilege against self-incrimination in response to questions about the charges which are the subject of the proceedings (s 5(4)(a) Evidence Act 1908). Witnesses in criminal or civil proceedings can claim the privilege when they are at risk of self-incrimination, but only in response to a specific question or request for other testimonial evidence.

37 The privilege cannot generally be claimed by one person on the ground that another person may be incriminated. Depending on the particular jurisdiction in which the privilege is claimed, there may be two departures from this stance – incrimination of a claimant's spouse and incrimination of a body corporate.

- 38 The privilege may apply to protect the claimant's spouse from incrimination. In New Zealand, it is unclear whether the common law privilege provides such protection. There is fairly old authority which suggests that the privilege extends to a claimant's spouse: see Bayley J's observations in *R v Inhabitants of All Saints, Worcester* (1817) 6 M & S 194, 200, and the more detailed discussion on the issue in chapter 10.
- 39 In New Zealand, the common law privilege extends to information supplied by a person representing a corporation (eg, the executive director) which is incriminating for the corporation, although not necessarily incriminating for the person (*New Zealand Apple and Pear Marketing Board*, 191). In practice, when a question of a corporation's ability to claim the privilege arises, the answer is often a matter of statutory interpretation. The application of the privilege to bodies corporate is discussed in chapter 9.
- 40 There is a wide range of legal entities potentially able to claim the privilege. Section 6 of the Acts Interpretation Act 1924 defines "person", when used in a summary or indictable offence, as including a body corporate (except when the contrary intention appears).⁷ Section 2 of the Crimes Act 1961 is broader still, defining "person" as including "any board, society or company, and any other body of persons, whether incorporated or not."

The nature of the risk of self-incrimination

- 41 The privilege can be claimed by a person when there is a risk of criminal charges being laid against him or her likely to result from any information the person gives. The term "criminal charge" is given a very wide meaning in this context. The privilege can apply to regulatory offences, not traditionally thought of as criminal (eg, see *New Zealand Poultry Board*, 394, where the Court of Appeal considered offences under the Poultry Board Regulations 1980).
- 42 The privilege against self-incrimination has more than one limb: see chapter 7 for discussion of the other limbs.⁸ The privilege not only protects the witness from self-incrimination leading to criminal prosecution, but also provides protection from liability to a civil penalty. The thinking behind the penalty privilege is revealed by Lord Esher's comments in *Martin v Treacher* (1886) 16 QBD 507, 512:

[A]lthough the penalty is not in strict law a criminal penalty, yet the action is in the nature of a criminal charge against the defendant . . .

⁷ See *Adams on Criminal Law* (Robertson ed, Brooker & Friend, Wellington, 1992), 2.27.03 for a discussion of corporate liability for criminal offences.

⁸ Traditionally, there were two other limbs to the privilege against self-incrimination which have never applied or are obsolete in New Zealand – forfeiture of estates or interests in land, and ecclesiastical censure. In relation to forfeiture, see *Earl of Mexborough v Whitwood Urban District Council* [1897] 2 QB 111, 115, where the English Court of Appeal upheld the privilege in an action to enforce a forfeiture of a lease for breach of covenant. For a discussion of ecclesiastical censure, see Bowen LJ's comments in *Redfern v Redfern* [1891] P 139, 147; *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, 257; *Nast v Nast & Walker* [1923] 1 All ER 1171. Because there is no established church in New Zealand, it is doubtful whether a witness could ever claim the privilege against ecclesiastical censure.

- 43 As the name suggests, the penalty privilege arises when there is a risk of penalty in civil actions (*R v Association of Northern Collieries* (1910) 11 CLR 738). The purpose of the penalty is “to punish the defendant for the alleged wrongdoing, rather than to provide a means of compensation for loss suffered by a plaintiff” (*E L Bell Packaging Pty Ltd v Allied Seafoods Ltd* (1990) 8 ACLC 1135, 1144). Liability to the imposition of a penalty in disciplinary proceedings will attract the penalty privilege, but liability to damages or the payment of compensation (including punitive damages) will not.⁹ Chapter 7 discusses the origins of the penalty privilege and whether the continued exclusion of damages from its ambit is justified.
- 44 In the House of Lords case, *Rio Tinto Zinc Corporation Ltd v Westinghouse Electric Corporation Ltd* [1978] AC 547, 581, Shaw LJ (in the Court of Appeal) discussed the degree of risk of self-incrimination required for the privilege to apply:
The question is, whether there is a recognisable risk? The principle which protects a witness from obligatory self-incrimination is not to be qualified by or weighed against any opposing principle or expedient consideration so long as the risk of self-incrimination is real in the sense that what is a potential danger may reasonably be regarded as one which may become actual if the witness is required to answer the questions or to produce the documents for which privilege is claimed.
- 45 As the above statement implies, the privilege against self-incrimination extends protection beyond information given that would directly incriminate a person to include information which might be used as a step towards obtaining evidence (Mathieson, 256). Information constituting a link in a chain of causation, or an individual element of a given offence, can be privileged (*Rank Film Distributors v Video Information Centre* [1982] AC 380, 412).
- 46 New Zealand follows the United Kingdom approach, as illustrated by Cooke J in *Busby*, 469:
The test generally applied has been whether answers may place the defendant in real and appreciable, not merely imaginary or fanciful, peril.
- 47 In order for the court to assess the degree of risk, some degree of damning material may have to be disclosed to it (*Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, 403–4). If the claim is upheld, any such compelled disclosure will be inadmissible in that or any later criminal prosecution (Mathieson, 256).
- 48 The “real risk” threshold which must be reached before the privilege arises may be determined in retrospect. The Court of Appeal has held that the person subsequently facing a charge of refusing to answer an inquiry need not have alluded to or contemplated the privilege at the time of the refusal. The privilege may nevertheless be relied on at trial as a justification for refusing to give evidence in response to a specific request (*New Zealand Poultry Board*, 402).
- 49 A witness cannot refuse to answer a question which tends to show that he or she committed a crime, if conviction and punishment are not possible (eg, because of a pardon or immunity from prosecution (*Sorby v Commonwealth* (1983) 46 ALR 237).

⁹ Section 8A of the Evidence Act 1908 is similar to the common law position:

A witness shall not be excused from answering any question relevant to the proceedings on the sole ground that to answer the question may establish or tend to establish that the witness owes a debt, or otherwise subject the witness to any civil liability.

- 50 Overseas authorities are divided on the question whether the privilege can validly be claimed when the risk of self-incrimination arises in a foreign jurisdiction. In chapter 11, the issue is discussed in detail.
- 51 The New Zealand Court of Appeal recently considered the issue in *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278. The Court of Appeal dismissed the appellants' argument that compliance with the request of the Commissioner of the Winebox Inquiry to produce documentation relating to the Cook Islands tax haven would leave them exposed to the risk of prosecution in the Cook Islands (McKay J dissenting).
- 52 At the time of publication, the Privy Council had confirmed the Court of Appeal's decision but no written decision has been produced. The Privy Council decision, dismissing the appeal by the three former European Pacific executives, was announced on 4 July 1996.
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The Interests Said to Justify the Privilege

Is the privilege against self-incrimination effective in protecting valid interests?

The privilege against self-incrimination stands in need of a convincing justification. To be sure, there is no shortage of eloquent testimonials to the hallowed place of the right to remain silent in the pantheon of Anglo-American liberties. But defenders of the privilege have yet to substantiate the misty rhetoric that cloaks the privilege in a haze of noble words.¹⁰

INTRODUCTION

- 53 **T**HIS CHAPTER TAKES ON THE TASK of piercing the “misty rhetoric” cloaking the privilege, by considering the interests which the privilege has been claimed to protect and whether they are valid reasons for the privilege’s retention. So that this is a meaningful discussion on a practical as well as theoretical level, an alternative to retaining the privilege is considered in chapter 3. Canada has abrogated the privilege by legislation and replaced it with an immunity from the use of the compelled self-incriminating disclosures.

THE INTERESTS THE PRIVILEGE PROTECTS

- 54 The interests which the privilege is said to protect have been summarised by Justice Goldberg in the United States Supreme Court case *Murphy v Waterfront Commission* 378 US 52, 55 (1964):

The privilege against self-incrimination “registers an important advance in the development of our liberty – one of the great landmarks in man’s struggle to make himself civilized.” It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing

¹⁰ Dripps, “Self-Incrimination and Self-Preservation: A Skeptical View” (1991) 2 University of Illinois Law Review 329.

him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty", is often "a protection to the innocent."

- 55 We now deal in turn with each of the interests referred to in *Murphy*. These are
- the avoidance of the cruel trilemma of self-accusation, perjury or contempt,
 - the preference for an accusatorial system,
 - the prevention of inhumane treatment and abuses,
 - the maintenance of a fair State-individual balance,
 - the protection of the human personality and individual privacy,
 - the unreliability of self-deprecatory statements, and
 - the protection of the innocent.

THE CRUEL TRILEMMA

- 56 In *Brown v Walker* 161 US 591, 637 (1896), Justice Field (minority) attempted to explain what is cruel about compelling a person to choose between self-incrimination, perjury and contempt:
- The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought.
- A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement.
- 57 Despite the "obviousness" of the cruelty of compelled self-incrimination, it is difficult to answer the following questions satisfactorily:
- Why it is more cruel to incriminate oneself than to be incriminated by another person or by independently produced real evidence. Neither of which forms of incrimination is protected by the privilege.
 - Why the privilege should apply to save the claimant from what is in essence a moral "trilemma", when there are other competing interests of the State, the victim, or the parties to proceedings, which require that relevant disclosures be made.
 - How an innocent person is necessarily exposed to the "trilemma" of self-incrimination, perjury or contempt. In some cases (eg, when the witness is innocent), disclosure of the information sought may prevent him or her from facing any of these consequences.
 - How there is a risk of perjury or contempt when the self-incriminating information is sought in investigative contexts rather than in proceedings.
- 58 The cruel trilemma rationale links in with some of the other interests reflected in *Murphy*, such as preventing inhumane questioning techniques, obtaining reliable evidence, and securing the individual's right to privacy. However, these are separate interests in their own right. The rationale does not appear to add anything of value to the other interests which the privilege is said to protect and, in the Commission's view, does not by itself provide sufficient reason to retain the privilege.

PREFERENCE FOR AN ACCUSATORIAL SYSTEM

- 59 New Zealand has an accusatorial or adversarial justice system which we adopted as part of the common law. Features of this system which intertwine with and give rise to the privilege include the following:
- A representative of the State makes an accusation of criminal offending against a person. The parties are contestants. Due process and the rules of evidence, including the privilege, have been designed to ensure that the contest between the parties is conducted fairly: see the discussion on preventing inhumane treatment and abuses below.
 - In criminal proceedings, the accuser has the onus of proving the accusation beyond reasonable doubt. There is a presumption of innocence and the accuser must prove the accusation without the compelled assistance of the defendant.
 - There is an emphasis on equality of the parties because the truth is said to be best discovered by assertions on both sides of the question, rather than by the domination of the weaker by the stronger party. The privilege has a role in maintaining balance between the parties: see the discussion of the need for a fair State-individual balance below.
 - The rules of evidence are designed to ensure that relevant and reliable information is presented to the court, rather than irrelevant information or information the probative value of which is eclipsed by its prejudicial effect: see the discussion of the unreliability of self-deprecatory statements below.
- 60 In inquisitorial justice systems (eg, France and Germany), the judge has an investigative as well as adjudicative role. Therefore, there is not so much a contest between the parties, but rather an emphasis on the judge establishing the truth. In this paper, the respective merits and disadvantages of the accusatorial and inquisitorial systems are not debated. Instead, an assumption is made that an inquisitorial system is unlikely to replace our current system; not least because of New Zealand's historical and cultural imperatives. The issue for present discussion is whether the privilege is a desirable component of an accusatorial system. We turn now to the other interests which the privilege is said to protect in order to assess this.
- 61 In civil proceedings, the preference for an accusatorial system is not a directly relevant or strong justification for the privilege. However, it is conceivable that witnesses in civil proceedings might be pressured by State enforcement agencies to divulge self-incriminating information which could be used in criminal investigations and proceedings.

PREVENTION OF INHUMANE TREATMENT AND ABUSES

- 62 The privilege against self-incrimination has been described as "part of the common law of human rights" (*Sorby v Commonwealth of Australia* (1983) ALR 237, 249, and as a "fundamental bulwark of liberty, standing apart from other forms of privilege" (*Pyneboard Pty Ltd v Australian Trade Practices Commission* (1983) 45 ALR 609). Accordingly, it has been recognised in many human rights documents. For examples, see article 14(3)(g) of the International Covenant

on Civil and Political Rights and ss 23(4)(b) and 25(d) of the New Zealand Bill of Rights Act 1990.¹¹

- 63 It could be argued that the scope of “inhumane treatment and abuses” (referred to by Justice Goldberg in *Murphy*) is quite narrow, on the basis that “inhumane” reads down “abuses” as well as “treatment”. Therefore, the privilege’s role in preventing abuses may be limited to the most extreme interrogative abuses, such as torture and violence. However, this approach would be too literal, concentrating on the wording in *Murphy*, rather than on the ills which the privilege might assist in addressing. The rationale is capable of applying in a much wider range of cases, including when the witness has been subject to oppression, undue psychological pressure, or procedural abuses (eg, government “fishing expeditions”, questioning without providing legally required safeguards etc).
- 64 How can a claim of privilege prevent ill-treatment and abuses? Once the privilege is invoked, questioning may temporarily cease, enabling the questioner to re-examine the appropriateness of his or her approach and to provide the witness with information about why he or she is being questioned. In addition, the hiatus in questioning may also allow the person being questioned to take stock and consider his or her options. As the Commission recognised in *Police Questioning* (NZLC R31, 1994), para 95, in relation to criminal suspects:
The circumstances in which a suspect is placed will be many and varied. There will be circumstances in which it is in the interests of both guilty and innocent suspects to remain silent. Equally, there will be circumstances in which it is in suspects’ interests to answer questions. Either way, the circumstances may not be susceptible of quick assessment and the information disclosed as a basis for questioning, as well as the questions themselves, may reveal considerations which affect or alter a suspect’s decision.
- 65 The possibility that a witness may claim the privilege also encourages thorough investigative practices, ensuring that officials take account of all the available avenues of inquiry, rather than relying solely on the self-incriminating disclosures of the person being investigated. As Wigmore says:
Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources . . . If there is a right to answer, there soon seems to be a right to the expected answer, – that is to a confession of guilt. Thus the legitimate use grows into unjust abuse; ultimately, the innocent are jeopardised by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognised. (para 2252)¹²
- 66 The European Commission on Human Rights has recognised that the privilege against self-incrimination is a component of a defendant’s right to a fair trial under article 6(1) of the European Convention for the Protection of Human

¹¹ Article 14(3)(g) says that every person facing a criminal charge shall have the right “[not] to be compelled to testify against him or to confess guilt.” The Bill of Rights Act provisions are discussed fully in chapter 5.

¹² For the privilege to be effective in preventing abuses, those from whom self-incriminating disclosures are sought need to be aware of it: see the discussion in chapter 12 on this issue.

Rights and Fundamental Freedoms (in force on September 3 1953). In *Ernest Saunders v United Kingdom* (Report of the Commission No. 19187/91), the European Commission considered evidence-taking procedures leading up to the trial of Saunders, who was the former chief executive of Guinness plc. Statements taken by inspectors, acting under the statutory powers in s 432 of the Companies Act 1985 (UK) were admitted in the applicant's subsequent trial for fraud offences.¹³ The Commission held:

[T]he privilege against self-incrimination is an important element in safeguarding an accused from oppression and coercion during criminal proceedings. The very basis of a fair trial presupposes that the accused is afforded the opportunity of defending himself against the charges brought against him. The position of the defence is undermined if the accused is under compulsion or has been compelled.

- 67 Critics of the suggestion that the privilege prevents inhumane treatment and abuses have argued that there are alternative protections available (eg, Hon Justice Thomas "The So-Called Right to Silence" (1991) 14 *New Zealand Universities Law Review* 299, 322). In New Zealand, when a person is detained or arrested for a suspected offence, he or she has several rights under s 23 of the New Zealand Bill of Rights Act 1990. These are designed to prevent abuses of power by investigating officials (eg, the right to be told of the reasons for the arrest or detention, and the right to counsel).
- 68 The Commission does not believe that the existence of other safeguards removes the need for the privilege to prevent abusive investigative techniques. As recognised in para 64 above, the situations in which a person may be asked to give self-incriminating information are many and varied, and the extent and effectiveness of other safeguards provided will also vary. The rights contained in s 23 of the Bill of Rights Act arise only when a person has been arrested or detained under any enactment for an offence or suspected offence. Yet, a person may be compelled to make self-incriminating disclosures when there is no arrest or detention for an offence or suspected offence: see chapter 12 for several such examples. In those circumstances, the Bill of Rights Act protections will not be available, although the privilege will be claimable if the requisite element of compulsion is present.
- 69 In some investigative contexts, specific legislation may provide safeguards from abuse. For example, if a shareholder or director is examined by a liquidator under s 261 of the Companies Act 1993, he or she has the right to representation by counsel and the examination must be recorded in writing or on tape etc (s 265). However, these protections may not always be adequate to prevent investigative abuses. Counsel may be unavailable, inexperienced, or without sufficient knowledge to effectively advise the person who is being asked for information. In relation to video-taped interviews, taping does not prevent abusive questioning techniques occurring before the taped interview, and these may not be detectable in viewing the tape. Therefore, a person's ability to claim the privilege will provide a useful backstop to other safeguards.

¹³ This case is discussed in Gilchrist, "Crime Reporter", *Solicitors Journal* 14 October 1994, 1046. In an earlier case, *Funke v France* (1993) 16 EHRR 297, the European Court of Human Rights also held that article 6(1) includes the right of anyone charged with a criminal offence to remain silent and not to contribute to incriminating himself or herself.

- 70 Recognising the possible availability of safeguards other than the privilege in questioning contexts, we consider that no one procedural safeguard can completely guarantee proper methods of questioning, but several different safeguards in combination may do so. Despite being only one in an inter-connecting series of safeguards, the privilege is required to prevent abuses.

FAIR STATE-INDIVIDUAL BALANCE

- 71 The interest in ensuring the parties are equal has been criticised by Justice Thomas in the context of his article on criminal suspects and the right of silence, already cited in para 67. He said:
- [T]here is no logic in maintaining a balance between prosecution and accused for its own sake, simply because there is no sound reason why the full resources of the state should not be directed to the task of preventing and arresting criminal activity. What is important is that those who are accused in that process receive a fair trial, and this may require that they be provided with resources to counter those available to the Crown. What it does not mean is that the accused, because he or she is at a disadvantage in relation to the state, should obtain a compensating “boost” unrelated to the imbalance in those resources. (309)
- 72 The Commission agrees that balance as an end in itself is not a justification for giving criminal suspects a compensatory “boost”. However, the interest in maintaining a fair State-individual balance reflects two other important concerns, which in some circumstances may justify the individual’s claim of privilege.
- 73 The first of these concerns is the individual’s right to be free from intrusion by the State, unless good cause can be shown for it. This concern is acknowledged in Justice Goldberg’s statement in *Murphy*, quoted in para 54. The witness’s affairs are his or her own concern and, in the absence of compelling reasons to the contrary, should be free from State intervention (*Entick v Carrington* (1765) 19 State Tr 1029). The privilege enables individuals to resist demands for self-incriminating information which constitute unwarranted intrusions by State representatives. As the number of information gathering powers which remove or restrict the privilege contained in Appendix B illustrates, there are many situations in which Parliament has decided that the State’s need for information outweighs the individual’s right to be left alone.
- 74 The second concern, in keeping with the accusatorial system, is to ensure that there is a fair contest between equal parties in proceedings. The alternative is domination by the strongest, most influential or wealthiest which, in a contest between the State and the individual would usually, although not invariably, be the State.¹⁴ When a person claims the privilege in an investigation, fairness and equality are fostered by requiring the State representative to re-examine the information-gathering approach, possibly provide further information before the individual will make the disclosures sought, and conceivably gather evidence independently of compelled assistance from the individual. The need for

¹⁴ Large corporations may sometimes have advantages over the State because of the human and financial resources at their disposal, as might influential and wealthy individuals.

balance and the requirement that the State must mount its case independently of the individual is most relevant in the context of criminal investigations and proceedings, where the State makes allegations and prosecutes the defendant.

- 75 The concern to maintain a fair State-individual balance will not normally be a compelling reason for the privilege when the State is not one of the parties to investigations or proceedings. However, the privilege may sometimes operate to prevent the State from obtaining evidence from disclosures made in those contexts to use in other investigations or proceedings in which it is a party; for example, by preventing the disclosure of the information in court when representatives of the State are present.
- 76 The interest in maintaining a fair State-individual balance should not be confused with the proposition that whether or not the privilege applies in a particular context depends on balancing competing considerations. That is a separate idea and one which is based on a misunderstanding of the privilege against self-incrimination. When the prerequisites for the privilege's application in a given context have been met, the privilege should not be qualified by competing considerations. As discussed in chapter 5, the privilege is reflected in the Bill of Rights Act 1990 and cannot be lightly limited or removed: see s 5 of the Act. Furthermore, as Herman observes, the balancing approach contains risks:
- [T]hat those who strike the balance will do so either carelessly or with their thumb on the scale, and that those who observe the balancing either will give it less scrutiny or will accept the results with silent resignation. (527)

PROTECTION OF HUMAN PERSONALITY AND INDIVIDUAL PRIVACY

- 77 In *Brown v Walker*, Justice Field said:
- The common law privilege was intended to reflect the values inherent in individual sovereignty. These values are autonomy, dignity and privacy. Underlying them are separate interests in bodily integrity and mental integrity (repose, peace of mind, and control of information about one's self). (637)
- 78 Privacy and similar values can be protected by a successful claim to the privilege, because the claim protects a person from disclosing personal knowledge or information, and also prevents the use and dissemination of that information in proceedings. Therefore, the privilege safeguards privacy in a way that subsequent exclusion of improperly obtained confessions cannot.
- 79 Privacy interests are not absolute. Obviously, the weight accorded to them must be balanced against other community interests and needs. This is recognised in s 6 of the Privacy Act 1993, which contains privacy principles governing access to and for the collection, storage and security of personal information. The principles are not absolute but allow for non-compliance in certain circumstances, for example, to avoid prejudice to the maintenance of the law, including the prevention, investigation, and detection of offences.
- 80 The need to balance competing interests, in order to ascertain whether privacy rights will prevail in any given case, does not lead to the conclusion that the privilege's role in protecting privacy interests is unfounded. It merely indicates that those interests do not always predominate, particularly in the law enforcement context.

- 81 Some critics of the privacy interest supporting the privilege dispute its application to documents, on the basis that they are inanimate objects, as distinct from part of a person's consciousness:
- [I]t is not easy to see how an interest in mental privacy justifies privilege for pre-existing documents. Can the argument for freedom from intrusion into consciousness coherently extend to a decision to hand over something that exists independently of the suspect's consciousness.¹⁵
- 82 There may be good arguments for removing the privilege for pre-existing documents, and this issue will be discussed further in chapter 8. However, we suggest that there is a recognisable privacy interest in preventing disclosure of pre-existing documents. Conceivably, outside access to pre-existing written information may sometimes be more intrusive and damaging to the individual than verbal disclosures. For example, when a person is compelled to show his or her personal diary to another person, there will be a sense of violation and intrusion.
- 83 In chapter 9, we consider the applicability of the privacy rationale to corporations and suggest that bodies corporate have interests in maintaining confidentiality akin to privacy. However, the personal aspect of feeling intruded upon, experienced by human beings, is clearly not present when a corporate body is required to produce documentation about its operations.

UNRELIABILITY OF SELF-DEPRECATORY STATEMENTS

- 84 A person who is asked questions which could lead to criminal prosecution or a civil penalty is faced with a choice of lying, telling the truth, keeping silent or a mixture of all three. Witnesses in proceedings risk penalties for contempt of court for failing to answer questions. Given these choices, some people will perjure themselves by telling self-protecting lies. The existence of the right of silence and the privilege means that there is another option – that of remaining silent.
- 85 In the Commission's view, the extent to which individuals actually avoid telling deliberate and calculated self-protecting lies by claiming the privilege is limited. It is difficult to predict the thought processes of witnesses under suspicion. The existence of protection may not prevent the need to lie. This is because people may calculate that appearing to co-operate, while in fact lying, would be less damaging to their interests than remaining silent. Invocation of the privilege may carry with it the suggestion that there is something to hide. Furthermore, in order to remove all risk of detection, a person may still be tempted to lie, or destroy or physically alter evidence, even if the privilege or an immunity is available.
- 86 The interest which the privilege protects – of obtaining reliable evidence – is more persuasive when there is some element of compulsion (either overt or inherent) in the particular situation which leads a person to make unreliable statements in response to the pressure. In face-to-face criminal investigations, for example, the context and nature of the questioning carry a risk that the

¹⁵ Dennis, "Instrumental Protection, Human Rights or Functional Necessity? Reassessing the Privilege Against Self-Incrimination" (1995) 54 *Cambridge Law Journal* 342, 357.

resulting confession may be unreliable.¹⁶ The Commission examined the right of silence and confessions in the criminal investigation context in *Criminal Evidence: Police Questioning* (NZLC PP21, 1992) and will produce a final report on the topic in the coming year.

- 87 In addition to any actual inducements offered to suspects to make false confessions, individual character traits, disability, or the suspect's current state of mind, may make him or her more susceptible to misleading the questioner. In particular, young suspects may be more likely than adults to submit to the pressure exerted during an interview, while at the same time being potentially less aware of the right to remain silent or of the privilege against self-incrimination.¹⁷
- 88 The concern to obtain reliable evidence is less relevant in some other contexts in which the privilege can at present be claimed. If, for example, a document is already in existence at the time of the demand, there is likely to be less risk that the evidence produced will be unreliable than if an enforcement officer extracts an oral confession from a suspect. This is because the document exists independently of any compulsion. The person required to produce the document is not so likely to succumb to immediate pressure and give false evidence.¹⁸
- 89 Bodies corporate are in a different position from individuals when being questioned by officials, although individual officers or members may be intimidated into giving false evidence on their own behalf.¹⁹ The reliability rationale is also less persuasive when it is applied to people outside an investigative context. In proceedings, the witness gives evidence in front of others and, if he or she is a party, may be represented by counsel. The potential liability to contempt is not perhaps as immediate as the pressure which individuals may experience during questioning at the police station.

PROTECTION OF THE INNOCENT

- 90 In the face of an official investigation, or in circumstances where there is a risk of civil penalty if the witness makes self-incriminating disclosures, he or she may be
- guilty and remain silent,
 - guilty and persuade the questioner that he or she is innocent,
 - guilty and make damaging admissions or confessions,
 - innocent and remain silent,
 - innocent and persuade the questioner that he or she is innocent, and
 - innocent but make damaging admissions or confessions.
- 91 Silence can be consistent with innocence. For a number of reasons, an innocent person may not wish to try to persuade the official of his or her innocence.

¹⁶ See, for example, Mirfield, *Confessions* (Sweet & Maxwell, London, 1985), 63–68, and s 20 of the Evidence Act 1908 which aims to prevent unreliable confessions as a result of interrogative suggestibility or pressure.

¹⁷ See chapter 4 concerning Māori suspects.

¹⁸ For a discussion of the causes of false confessions, see Gudjonsson & MacKeith "Retracted Confessions: Legal, Psychological and Psychiatric Aspects" (1988) 28 Med Sci Law 190.

¹⁹ For a discussion of the "rules of attribution" whereby the actions of a company's agent are attributed to the company, see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).

These include, fear, confusion, disability, poor communication skills, unawareness of the circumstances leading to investigation, and the attitude of the investigator.²⁰ These reasons might also apply when the person is asked to produce documents. For example, the document might contain something adverse which wrongly suggests culpability.

- 92 Much of the criticism of the right of silence and the privilege against self-incrimination focuses on the protection of the innocent and the conviction of the guilty. In relation to the right of silence, Justice Thomas, for example, suggests that it is frequently the hardened and the guilty who remain silent and successfully escape detection and punishment:

[T]he right works for the guilty. The compliant, the weak and the impulsive admit their guilt. Sophisticated, experienced and hardened criminals, or those receiving legal advice early enough, use the rule to their advantage and so avoid conviction. Suspects in certain kinds of cases invariably remain silent. Persons charged with dealings in drugs are an example. (304)

- 93 This is a serious objection to the right of silence, but one which does not appear to have been substantiated. In three surveys conducted in 1992, the Commission tested the assumptions that hardened criminals have greatest recourse to, and benefit most from, silence before and at trial (in these contexts the right of silence rather than the privilege against self-incrimination). The three surveys explored the right of silence at a police station, silence before and at jury trials, and the right of silence before and at trial recorded by Crown solicitors in cases in which they were involved. The results of these surveys were largely supportive of each other and showed that

- a majority of those defendants who did not make statements to the police were convicted,²¹
- more defendants made statements to the police when charged with serious offences (ie, tried in the High Court) than when charged with less serious offences (ie, tried in the District Court),
- a majority of those defendants who did not give evidence at trial were convicted, and
- suspects with criminal records were more likely to make statements to the police than those without.

- 94 The survey results raise the possibility that, in practice, the jury might draw inferences adverse to a defendant from his or her silence. Therefore, remaining silent may not assist the innocent to avoid conviction or liability to a civil penalty. This may provide some support for the idea that silence is a hollow right. However, we suggest that the situation is not so clear-cut, for a number of reasons.

- 95 First, the results do not show
- how many innocent or guilty people suspected of wrongdoing, who did not make statements, avoided prosecution, or

²⁰ For a more comprehensive list of reasons, see the comments of Jeffries J in *R v Andrews* [1992] 3 NZLR 62, 70–71 and *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), para 27.

²¹ We cannot say that the defendants' silence caused their conviction, but there is a significant correlation between silence and conviction. The results will be discussed more fully in the Commission's final report on the right of silence and confessions. However, a brief account of the surveys' methodology and design is contained in Appendix C.

- how many of those defendants who in the survey remained silent were in fact innocent or guilty.

There is no basis for concluding that most innocent or guilty people who remain silent are either acquitted or convicted. Assuming that most people who are convicted are guilty, and given the significant correlation between silence and conviction in the survey results, it follows that many guilty people are not evading conviction by remaining silent.

- 96 Second, even if a few guilty people avoid detection by remaining silent, there is no real way of knowing what effect removing the right of silence and the privilege against self-incrimination would have on crime detection rates or on interrogation and case preparation methods.²²
- 97 Third, the privilege is not essential for all or most innocent witnesses, and it may not help the innocent more than the guilty. Rather, it can help some innocent people. The acquittal or vindication of those people is important, and the privilege's role in this respect should be preserved.

CONCLUSIONS

- The privilege has been claimed to uphold a number of interests, but no one interest predominates or applies in every situation in which the privilege can currently be claimed.
- The avoidance of the "cruel trilemma" of perjury, contempt and self-incrimination is not a convincing reason for the privilege's retention. The "trilemma" is a moral one which should not override the public interest in the availability of all the relevant information.
- However, the privilege is a desirable component of, and consistent with, an accusatorial system. This is because (along with other rights and rules) it enables the parties to investigations and proceedings to take part in a relatively equal and fair contest, so that from that contest an impartial adjudicator can establish the truth.
- The privilege is not restricted to preventing inhumane treatment and abuses of a physical nature but has a role in preventing other oppressive and degrading treatment, and procedural abuses.
- The privilege assists in fostering proper methods of questioning because, once claimed, it requires the questioner to evaluate his or her investigation techniques and to provide necessary advice to the witness. In addition, it enables the person being questioned to assess his or her position and, if the claim is legitimate, it can also prevent further questions.

²² Sections 34 to 37 of the Criminal Justice Act 1994 (UK) provide that the exercise of the right of silence, either before or during trial, can lead to adverse inferences being drawn. However, it is too soon to ascertain what effect, if any, this has had on crime and conviction rates. Some two months after the Act came into force, it was suggested that suspects were relying on the right of silence less frequently (Enright, "Crime Notes" (1995) June, *New Law Journal Practitioner* 64). Whether or not this enabled the police to prosecute more guilty people is unclear.

For recent New Zealand cases on the extent of the jury's right to draw inferences from a refusal to provide self-incriminating evidence, see *R v Martin* [1992] 1 NZLR 313, *R v McRae* (1993) 10 CRNZ 61, and *R v Andrews* [1992] 3 NZLR 62, 66.

- The privilege is likely to be most useful in preventing inhumane treatment and abuses in criminal investigations, because of the context and the offence-focused nature of the questioning.
- Although there are a number of other procedural safeguards which assist in preventing abuses, none alone guarantees prevention. The privilege is no less valuable because it is one of several safeguards.
- The privilege plays a role in preventing unwarranted intrusions from the State because, once it is legitimately claimed, self-incriminating information need not be given.
- To an extent, the privilege equalises the parties' respective positions in investigations and proceedings involving the State. This is achieved by requiring the State to obtain its evidence independently of a person's compelled assistance, and by giving the witness some defences against the strength of the State.
- When the State is not one of the parties to investigations or proceedings, the concern to maintain a fair State-individual balance will not normally be a compelling reason for the privilege. However, the privilege may sometimes operate to prevent the State from obtaining disclosures made in those contexts to use in other investigations or proceedings in which it is or may become a party.
- The privilege protects privacy interests. These are not absolute, particularly in the law enforcement area.
- The privilege safeguards privacy in a way that the subsequent exclusion of improperly obtained confessions cannot. This is because the privilege prevents the intrusion at the outset.
- The role the privilege plays in preventing unreliable admissions is most obvious in the criminal investigative context where the potential for pressure and suggestibility is greatest.
- We doubt that the privilege effectively removes a person's need to lie to avoid detection.
- There are several reasons consistent with innocence why a person may wish to remain silent (eg, fear, confusion, disability, poor communication skills, unawareness of the circumstances leading to the investigation, and the attitude of the investigator).
- There is no evidence to suggest that remaining silent allows guilty people to escape detection. Rather, in the Commission's surveys on the right of silence, there is a significant correlation between remaining silent and conviction.
- There is no way of knowing how many people who claim the privilege are in fact innocent or guilty.
- Even if a few guilty people may avoid conviction by claiming the privilege, it is hard to know what effect removing the privilege would have, either on crime detection rates or on interrogation and case preparation methods.
- The privilege protects some innocent defendants from conviction.

3

Retention or Abrogation

Can the interests the privilege protects be adequately safeguarded by abrogation and the provision of immunities in place of the privilege?

INTRODUCTION

- 98 **I**N THIS CHAPTER, we consider whether abrogation of the privilege, and its replacement with a statutory immunity, serves the interests behind the privilege which have been identified in the preceding chapter. Of the four jurisdictions referred to in this paper – United Kingdom, United States, Australia and Canada – Canada is the only country which has abrogated the privilege. The other jurisdictions, like New Zealand, have made piecemeal encroachments (either by case law or legislation) on the privilege in particular circumstances. Australia has recently enacted legislation which provides a certificate of immunity process for witnesses in federal court proceedings. A witness who makes self-incriminating disclosures is in return given a certificate of immunity from use and derivative use of the disclosures in other court proceedings. However, the common law privilege has been retained alongside that process. In chapter 15, we consider this, the most recent legislation of a comprehensive nature concerning the privilege, comparing it with the various proposals made throughout the paper.

THE CANADIAN PROVISIONS

- 99 Prior to abrogation in 1893, the common law privilege, including the privileges against liability to a civil penalty and forfeiture, applied in Canada. The oath of the witness, that he or she believed that the answer might be self-incriminating, was necessary for a claim of privilege to be upheld by the courts (*Ellis v Power* (1882) 6 SCR 1, 7). Co-existing with the penalty privilege, was case law to the effect that, in civil cases, the witness could not refuse to answer a question on the basis that the answer would tend to show that he or she owed a debt, or would otherwise be exposed to a civil action.²³ It was unclear whether the common law privilege applied to the discovery and production of documents. Furthermore, the privilege appears to have been restricted to testimony in proceedings, rather than applying in investigative contexts or in response to the exercise of statutory powers to demand information. As discussed in chapter 12, the privilege applies in those contexts in New Zealand, unless removed by legislation.

²³ Sopinka, *The Law of Evidence in Canada* (Butterworths, Canada, 1992), 736.

- 100 In 1893, the Canada Evidence Act was amended to abolish the common law privilege of a witness to refuse to answer self-incriminating questions in criminal and civil proceedings (despite the fact that there was probably no privilege in Canada in civil proceedings: Sopinka, 737). The intention appears to have been to abrogate the privilege completely, even though the possibility of the privilege being claimed in investigative contexts was not explicitly closed off.
- 101 In what is now s 5(1) of the Canada Evidence Act 1985, the privilege has been replaced with a limited form of use immunity which is restricted to oral testimony in criminal proceedings by individuals. The immunity does not extend to documentary evidence or to bodies corporate and other artificially created legal personalities. The immunity does not provide the witness with protection from the use of the self-incriminating information in civil, as distinct from criminal, proceedings. Therefore, there is no protection from liability to a civil penalty. Nor does the section contain a use fruits immunity which prevents the admissibility in other proceedings of evidence discovered as a result of the self-incriminating disclosures made.
- 102 Section 5(1) provides that “No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him . . .”. Section 5(2) says:
 Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him . . . , and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence.
- 103 There is no obligation on the court to inform the witness of the immunity, even if the witness is unrepresented (Stuart, *Charter Justice in Canadian Criminal Law* (Thomson Professional Publishing, Canada, 1991), 89).
- 104 Section 13 of the Canadian Charter of Rights and Freedoms (which was enacted as an appendix to the Constitution Act 1982) offers broader protection than, but co-exists with, s 5(2). It says:
 A witness who testified in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
- 105 Section 13 has been described as follows by Justice McIntyre in the Supreme Court of Canada decision *Dubois v The Queen* (1985) 22 CCC (3d) 513:
 Section 13 of the Charter provides a much wider protection. In the clearest terms it gives the right to a witness who testifies in any proceeding not to have any incriminating evidence so given used to incriminate him in any other proceedings. This is a protection going far beyond that accorded by s 5(2) of the Canada Evidence Act. It does not depend on any objection made by the witness giving the evidence. It is applicable and effective without invocation and even where the witness in question is unaware of his rights. It is not limited to a question in respect of which a witness would have been entitled to refuse to answer at common law and its prohibition against the use of incriminating evidence is not limited to criminal proceedings. It confers a right against incrimination by the use of evidence given in one proceedings in any other proceedings.

- 106 In addition to s 13, s 11(c) of the Charter upholds the right of a person “not to be compelled to be a witness in proceedings against that person in respect of the offence.” This is the right of silence at trial. On occasion, s 7 of the Charter has been interpreted to supplement the safeguards contained in s 5 of the Canada Evidence Act and ss 11 and 13 of the Charter. Section 7 provides:
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- 107 Although there have been conflicting decisions, s 7 has been relied upon to
- grant a right of silence before trial, despite the limited scope of s 11(c) (*R v Herbert* (1991) 57 CCC (3d) 1 (SCC)), and
 - provide a use fruits immunity for anyone compelled to testify, in addition to that provided by s 13 (*BC Securities Commission v Branch* (1995) 123 DLR (4th) 462 (SCC)).
- 108 It seems that s 7 cannot be relied upon to provide a residual right to remain silent extending beyond s 11(c) to non-penal cases (*Belhumeur v Comite de Discipline du Barreau du Quebec* (1988) 54 DLR (4th) 105). Nor is there any residual right against self-incrimination that would protect a defendant in a civil action from discovery proceedings, pending the determination of criminal proceedings arising out of the same facts (*Seaway Trust Co et al v Kilderkin Investments Ltd et al and two other actions* (1986) 29 DLR (4th) 456 (HCJ)).
- 109 The advantages of the Canadian approach, or a similar approach based on complete abrogation and the provision of more extensive immunities, might be seen to include the following:
- Simplicity and consistency, in contrast to New Zealand’s piecemeal approach to the privilege (illustrated in Part III of this paper). The latter approach includes preservation, partial or total removal, or legislative silence, in the various contexts in which legislation imposes statutory powers to compel self-incriminating information from witnesses. In one provision, the Canadian approach addresses the different contexts in which the privilege might have otherwise arisen.
 - Relevant information is available to enable officials to carry out their statutory obligations and for courts to decide cases based on all the relevant evidence.
- 110 The claims of simplicity and consistency can be overstated. As the above discussion of Canadian case law illustrates, the three provisions in the Charter impacting on the privilege, and their co-existence with s 5 of the Canada Evidence Act, leave potential for a variety of different interpretations. For example, in the Canadian case law, there have been differing views on the meaning of “other proceedings”: see *Knutson v Saskatchewan Registered Nurses’ Association* (1990) 75 DLR (4th) 723. In that case, the Saskatchewan Court of Appeal said that the use of a transcript of evidence from a criminal trial, resulting in the conviction of a nurse for theft in disciplinary proceedings against that nurse, did not violate s 13. In addition, in contrast to *Dubois*, “other proceedings” was said to mean criminal proceedings.
- 111 Does the approach of abrogating the privilege and providing immunities in its stead protect the interests which the privilege currently safeguards, or should the privilege be retained? In the following discussion, the Commission suggests that the answer to those questions is that New Zealand should retain the

privilege rather than follow Canada's approach of abrogation and replacement with a limited statutory immunity. This is despite the realisation that not all the interests claimed for the privilege are persuasive, and those which are persuasive are not individually persuasive in every situation in which the privilege currently applies.

THE INTERESTS THE PRIVILEGE PROTECTS

The cruel trilemma

- 112 In chapter 2, the Commission concluded that the desire to avoid the cruel trilemma of self-incrimination, perjury and contempt is not in itself a convincing reason for the privilege's existence. Therefore, it is unnecessary to consider whether the Canadian approach meets this objective.

Preference for an accusatorial system

- 113 The Canadian approach suggests that the privilege, as distinct from a statutory immunity preventing the use of self-incriminating information, is not a *necessary* component of an accusatorial justice system, in that Canada has an accusatorial system and has abrogated the privilege. However, as the discussion in chapter 2 illustrates, the privilege safeguards several worthwhile interests (eg, protecting the innocent and preventing unreliable admissions). Therefore, although the privilege may not be necessary in an accusatorial system, it is nevertheless desirable.

Prevention of inhumane treatment and abuses

- 114 The approach of abrogating the privilege and providing immunities in its stead does not prevent abuses at the time when a person is compelled to give self-incriminating information. It instead restricts the use of self-incriminating information once disclosures have been compelled. In comparison, the common law privilege forestalls abuses at the earlier as well as the later stages.

Fair State-individual balance

- 115 Complete abrogation does not allow individuals to be free from unwarranted intrusions by the State at the point when the self-incriminating information is compelled, although the use immunity provides some protection in proceedings at later points. Because the risk of self-incrimination is not a reason to refuse to answer questions, abrogating provisions make no distinction between unwarranted intrusions which should not be authorised in particular contexts and the legitimate exercise of statutory information-gathering powers. In addition, immunities cannot have a role in equalising the positions of the parties, or in fostering fairness prior to proceedings, which is the very point when the need for balance is arguably greatest.

Protection of human personality and individual privacy

- 116 Use immunities cannot protect privacy at the point when the self-incriminating information is sought, although they can limit subsequent use of the information.

Unreliability of self-deprecatory statements

- 117 The Canadian approach appears to be based, at least in part, on the assumption that providing witnesses with a use immunity will remove their fears and encourage them to make reliable disclosures. This feature of immunities can be overstated. At the investigative stage, immunities do not prevent unreliable self-incriminating disclosures arising from interrogative suggestibility, as distinct from deliberate lying. In addition, the Commission concluded in chapter 2 that the existence of the privilege is unlikely to encourage people to give truthful information, as distinct from deliberately lying to avoid detection, punishment or other untoward or feared consequences. The same can be said of immunities.
- 118 Furthermore, the Canadian use immunities do not (at least on their face) prevent the self-incriminating disclosures from being used to discover and admit other evidence against the person (ie, derivative evidence in proceedings). Even if the Canadian immunity is broadened to include a use fruits immunity, the witness might still be vulnerable to people using the information once it has been disclosed in open court. The fear of this happening may prevent many people from giving reliable information, even though an immunity is offered.

Protection of the innocent

- 119 As already noted, abrogation does not allow witnesses to remain silent. Instead, the focus is on limiting the extent to which compelled information can be used in other proceedings. Therefore, innocent people who wish to remain silent, because of some reason consistent with innocence (ie, fear, uncertainty, disability etc), must nevertheless give the information sought, with the attendant risk that they will be liable to criminal prosecution or the imposition of a civil penalty.

CONCLUSIONS

- New Zealand should not follow the Canadian approach of abrogating the privilege against self-incrimination, but should preserve the privilege.
- The Canadian approach suggests that the privilege is not a necessary component of an accusatorial justice system, in that Canada has an accusatorial system and has abrogated the privilege. However, the privilege is a desirable component of an accusatorial system.
- The approach of abrogating the privilege and providing a statutory immunity in its stead does not prevent questioning abuses at the time when self-incriminating information is compelled from a person.
- Abrogation and immunities in place of the privilege do not allow individuals to be free from unwarranted intrusions by the State at the point when the compelled disclosures are sought. No distinction is made between legitimate and unwarranted intrusions.
- At least on their face, the Canadian use immunities do not prevent the use of self-incriminating information as a springboard to obtain independent evidence against the witness.

- Even if the Canadian legislation contained an explicit use and use fruits immunity, protection equivalent to the privilege would not be provided. This is primarily because the witness might still be vulnerable to people using the self-incriminating information once it has been disclosed in open court.
 - The privilege safeguards privacy in a way that the subsequent operation of immunities cannot. The privilege prevents the intrusion at the outset.
 - Immunities cannot prevent or identify unreliable disclosures which are made as a result of pressure arising from questioning.
 - It is doubtful that the privilege or immunities effectively prevent people from deliberately and calculatedly lying to avoid detection.
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4 Te ao Māori

Is the privilege compatible with Te ao Māori?

INTRODUCTION

- 120 **T**HIS CHAPTER FOCUSES ON aspects of te ao Māori which are relevant to, or may be affected by, the privilege against self-incrimination.²⁴
- 121 The chapter has been written on the following basis:
- Parliament has the right to make laws for all New Zealand citizens;²⁵
 - the adversary system, and the basic rules of evidence arising from it, will be retained and will continue to apply to Māori and Pākehā; and
 - this is not the place to consider the comparative merits and drawbacks of a separate judicial system for Māori, because the paper focuses on one aspect of the law of privilege, rather than on the criminal justice system as a whole.
- 122 The Māori dimension includes traditional values, culture, and law. In this context, the use of the word “traditional” is not intended to imply that these aspects of Māori society are of historical interest only. It is clear that Māori customary law (tikanga) continues to operate in New Zealand. Nor is te ao Māori monolithic in nature. It encompasses the range of Māori experience. In this chapter, the Commission stresses that it is neither its role nor its place to state definitively what tikanga is and welcomes submissions on any inaccuracies or omissions.
- 123 In assessing whether the privilege is compatible with te ao Māori, we have borne in mind that the interests which the privilege protects are themselves culturally conditioned (eg, the presumption of innocence etc). They are products of English jurisprudence and make sense within an essentially European-based justice system. In that context, the privilege offers an important and effective protection to both Māori and Pākehā. Within a traditional Māori context, the explanations for the privilege and the privilege itself may look foreign. We turn briefly to three particular aspects of te ao Māori which highlight this foreignness.

²⁴ Under s 5(b) of the Law Commission Act 1985, the Law Commission must “take [] into account te ao Māori (the Māori dimension)” in making its recommendations.

²⁵ This stems from article 3 of the Treaty of Waitangi, which contains a double-limbed guarantee of legal equality between Māori and other citizens, and of actual enjoyment of social benefits (Department of Justice, *Principles for Crown Action on the Treaty of Waitangi*, 1989, 10).

SPEAKING RIGHTS

- 124 In 1840, article 3 of the Treaty (ie, the guarantee of legal equality) confirmed the right of silence and the privilege on Māori and Pākehā alike. A participant in a hui (held in relation to the Commission's prosecutions project) observed that the right to speak and to be heard is valued and that the right of silence is a foreign concept to Māori.²⁶
- 125 Speaking rights on a marae are closely associated with the concept of mana. The mana of the marae is associated with the mana of the people on the paepae.

INDIVIDUAL v COLLECTIVE RESPONSIBILITY

- 126 New Zealand laws and processes have their origins largely in Western-Christian traditions. They are based upon a concept of individual rights protected by the ideals of impartial application, equality of treatment before the law, and procedural fairness. Crime is primarily seen as being committed against society, rather than against the individual. Therefore, the Crown seeks redress on society's behalf.²⁷ Culpability is attached to the individual offender, though there are some defences which ameliorate this, and mitigating factors may be taken into account in sentencing. In the vast majority of cases in which the defendant pleads not guilty, an accusatorial, adjudicative, retributive model of justice is applied to determine whether an alleged offender is guilty and to decide the punishment.
- 127 The traditional Māori approach is built around kinship obligations. Individuals are seen as possessing individual rights, but also collective responsibilities. Therefore, an offender is not commonly regarded as solely to blame for his or her crimes. The whanau may also be held accountable. Complementing this is the concept that the action has not hurt merely one other individual, but also the, or another, whanau.
- 128 Traditionally, redress was not sought by a distant entity, such as the Crown, but by the victim's and the offender's respective whanau (sometimes chiefs and elders from the community might also have been involved). In each case, utu, or the price of compensation, was mediated through ritualised kōrero (speeches) and was acknowledged by both parties as a just and appropriate means of settling the dispute (Jackson, 40). This method of dispute resolution reflects a close relationship between the victim, offender and the judge and jury: a relationship which can be retributive, rehabilitative and a deterrent (Jackson, 110–111).
- 129 Another aspect of collective responsibility which contrasts with Western-Christian ideas is that intentions may be a minor consideration.²⁸ A person can be held responsible because the wrong occurs within his or her sphere of mana or accountability, rather than because he or she committed, or participated in, an illegal act.²⁹ However, this is true only of some transgressions. The

²⁶ The hui was held at the Commission on 21 November 1994.

²⁷ M Jackson, *The Māori and the Criminal Justice System, He Whaipanga Hou – A New Perspective* (Department of Justice, Wellington, 1988), 134.

²⁸ However, it should be noted that there are Western-Christian legal concepts which reflect ideas of collective responsibility. For example, in tort law, vicarious liability imposes liability on one person for the conduct of another. Thus, an employer is liable for the wrong done by an employee if the latter was acting in the course of his or her employment.

²⁹ Patterson, *Exploring Māori Values* (Dunmore Press, Palmerston North, 1992), 149.

circumstances of the particular case, such as the nature of the offence, the standing of the victim or the offender in the community, where the offence was committed, the age of the offender, will all be relevant.

- 130 Generally speaking, the Pākehā rights-centred approach means that if nobody can be proved to have caused the wrong, nobody need accept legal, as distinct from moral, responsibility. When responsibility is determined by way of an accusatorial process, principles of justice require proper safeguards to ensure that the Crown and its agents do not overwhelm the rights of the individual. As already discussed, the privilege against self-incrimination is an important protection in this context and contributes to the integrity of the accusatorial system.
- 131 However, when responsibility is collective, the burden of culpability and punishment is more evenly spread. Power is likely to be more evenly balanced between two whanau than it is between the Crown and an individual. Also, tikanga operates outside the formal justice system. In this context, the need for safeguards analogous to the privilege against self-incrimination is diminished.
- 132 Māori within the predominantly Pākehā system may be more likely to make admissions of guilt resulting from the psychological compulsion caused by the cultural shame of whakāmā.³⁰ An admission of guilt may be seen as a quick way of resolving matters (although this reaction is not restricted to Māori). Families, seeing themselves as collectively responsible, may sometimes pressure the individual into confessing guilt. The concept of “befriending” is also relevant, in the sense that the duty entailed in it to help the whanau could lead a person to take responsibility for an offence he or she has not committed.³¹
- 133 Little published research is available on Māori cultural responses to offending and to investigation. The Commission’s surveys on the right of silence (see Appendix C) provide general information on these issues. However, they do not indicate precisely whether Māori and Pākehā regard existing rights differently from each other, nor the level of awareness of existing rights among suspects.³² Further research is needed. In particular, research is needed on the extent to which people are aware of their rights and exercise them (including the privilege against self-incrimination and the right of silence) and on the extent to which Māori do not take up their rights and instead plead guilty.

RESTORATION AND HEALING

- 134 Tikanga places an emphasis on encounter, acknowledgment and restoration: Violations of tapu demand to be redressed through tika [justice], pono [integrity/faithfulness to tika] and aroha [love]. But an essential part of healing and reconciliation is encounter – preferably in person, or at least through the iwi [tribe] . . . Here is one reason why some Māori are seeking an alternative justice system,

³⁰ Jackson, 134.

³¹ “Manāki” is often translated as “to entertain or befriend, to show respect or kindness”. In the present context, it is used to express something deeper – namely, the generosity and help relatives owe to each other (Patterson, 149).

³² The Commission arranged for the collation of information about the effect ethnicity has on the exercise of the right of silence in police stations. Unfortunately, the data collected on this was not reliable, due to spasmodic recording and categorisation.

one that involves the extended family and tribe, and one which gives scope for encounter. Without acknowledgement and encounter, injustice will never truly be resolved.³³

- 135 Tikanga requires the alleged offender to face his or her accusers and admit wrongdoing and harm to the victim. There is an expectation that the offender and his or her whanau will restore the balance that has been upset by the wrongdoing. In this context, there are no concepts akin to non-compellability, the presumption of innocence and the privilege.
- 136 The privilege against self-incrimination is not inherently incompatible with a model of restorative justice which emphasises encounter and acknowledgment, despite the fact that healing is generally achieved through discussion and dispute resolution, rather than through silence. The privilege is still an important protection when the individual has not committed, and does not admit to, any wrongdoing: in this case, the restorative model has no application. If the individual has agreed to submit to dispute resolution, he or she could be said to have “waived” the privilege, although this might vary from case to case, depending on the setting and circumstances.
- 137 There may be a tension between accepting responsibility and the harm that can result to an individual and his or her whanau through failure to recognise liability. This could result in some Māori failing to fully utilise their rights within the legal system. If this is so, it is all the more important that special efforts be made to disseminate appropriate information to the community about the privilege.

CONCLUSIONS

- Under the Treaty of Waitangi, Māori are guaranteed formal legal equality with other New Zealand citizens and are entitled to the same rights and privileges (including the privilege against self-incrimination) as other New Zealanders.
- The privilege is a product of Pākehā jurisprudence and reflects the predominantly Pākehā values, culture and traditions which underlie that jurisprudence (eg, the presumption of innocence).
- The privilege is likely to be largely inapplicable or inappropriate in a marae-based setting. Compulsion exerted upon people on the marae to make self-incriminating disclosures may sometimes interfere with marae processes.
- Although the concept of the privilege may be foreign to tikanga, it does not seem to be incompatible with te ao Māori, or the principles of the Treaty. This is because the witness has a choice about whether he or she invokes it.
- In the context of investigations or proceedings of a judicial nature, when there is testimonial compulsion for a witness to produce evidence, the privilege is an important safeguard for both Māori and Pākehā.
- Effective invocation of the privilege by some Māori may be less likely in those contexts because of its apparent foreignness to tikanga. Initiatives should be taken to ensure that the right to, and nature of, the privilege is discussed in those contexts in which the privilege could normally be invoked.

³³ Tate, “The Unseen World” (1990) 5 *New Zealand Geographic* 90–91.

- This topic would benefit from empirical research on the extent to which people are aware of the privilege against self-incrimination and the right of silence and on the extent to which Māori invoke the right and the privilege, considering them valuable, or instead plead guilty.
 - The Commission invites submissions from the community on the conclusions in this chapter.
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5

New Zealand Bill of Rights
Act 1990

To what extent, and in which ways, can the New Zealand Bill of Rights Act 1990 shape legislative provisions affecting the privilege and influence their interpretation?

INTRODUCTION

- 138 **T**HE PROVISIONS in the New Zealand Bill of Rights Act 1990 relevant to the privilege against self-incrimination include ss 23(4) and 25(d) and s 27(1). The right to counsel in s 23(1)(b) is also relevant to the privilege, as the High Court in *R v P* [1990–92] 1 NZBORR 311, 321 recognised:
It is a question of upholding the right of the defendant to have his rights notified to him before he says something which may or may not incriminate him.
- 139 Section 23(4) provides that everyone who is arrested or detained under any enactment for an offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right. Section 25(d) says that everyone who is charged with an offence has, in relation to the determination of the charge, the right not to be compelled to be a witness or to confess guilt. Section 27(1) provides:
Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- 140 Legislation which removes or restricts the privilege against self-incrimination is not inapplicable merely because it is inconsistent with the above provisions. This is the effect of s 4 of the Bill of Rights Act. However, when such legislation is introduced to the House, it will be vetted for compliance with those provisions and, under s 5, be authorised only if it prescribes such reasonable limits "as can be demonstrably justified in a free and democratic society".
- 141 Sections 23(4), 25(d) and 27(1) of the Bill of Rights Act are not identical to the privilege. The differences and similarities will be discussed further below. Section 28 of the Act provides that an existing right or freedom shall not be held to be removed or restricted by reason only that the right or freedom is not included in the Act, or is included only in part. This means that where the Bill of Rights Act provisions are narrower than the common law privilege, they cannot be interpreted as limiting it. The common law privilege still applies unless other legislation removes or restricts it.

SECTION 23(4)

- 142 Section 23(4) (right of person arrested or detained under any enactment for an offence or suspected offence to refrain from making any statement and to be informed of that right) is the right of silence, applicable when offences are investigated. However, s 23(4) encompasses the privilege against self-incrimination only in relation to oral statements, not in relation to the production of documents. Section 23(4) is broader than the common law privilege against self-incrimination in that, for the right to apply, the information sought need not be self-incriminating. It is narrower than the common law privilege, in that it applies neither to documents nor in all the circumstances in which a witness can be compelled to incriminate himself or herself (ie, the section is restricted to compulsion by way of arrest or detention for an offence or suspected offence). In other words, the common law privilege applies in some contexts in which s 23(4) does not: see chapter 12 for examples.
- 143 The courts have recognised that s 23(4) is applicable in some civil contexts. In *Official Assignee v Murphy* [1993] 3 NZLR 62, for example, Thomas J held that there can be a “detention” under the examination provisions in the Insolvency Act 1967. However, the words “offence or suspected offence” in s 23(4) mean that the civil contexts in which s 23(4) applies will be limited. For example, the provision will be inapplicable when the risk of self-incrimination concerns the imposition of a civil penalty rather than prosecution for an offence.
- 144 The Bill of Rights Act provisions and jurisprudence impacting on the privilege are useful in showing the desirable direction for reform of aspects of the common law privilege which are unclear or unsatisfactory. For example, s 23(4) includes the right of the person being questioned to be told he or she is not required to make a statement. The common law privilege does not require this. As the Court of Appeal decision in *R v Mallison* [1993] 1 NZLR 528, 532 indicates, advice of rights is often necessary in order that people may fully utilise them. There the court said that it was not only necessary that rights be conveyed, in the sense of advice given to a party, but that the party understands the advice.

SECTION 25(d)

- 145 Section 25(d) (right of person charged with an offence not to be compelled to be a witness or confess guilt) applies once a person has been charged with an offence, and is again not entirely synonymous with the privilege. The privilege's application is not limited to criminal proceedings. In addition, s 25(d) goes further than the privilege, which is generally a privilege in respect of answering particular questions, rather than a privilege of refusing to answer any questions at all: see chapter 7 for a discussion of one exception relating to actions for civil penalties.
- 146 Section 25(d) has been modelled on, and closely resembles, article 14(3)(g) of the International Covenant on Civil and Political Rights, which provides that every person facing a criminal charge shall have the right “[not] to be compelled to testify against himself or to confess guilt.”

SECTION 27(1)

- 147 Although New Zealand courts have not determined whether s 27(1) (right to the observance of the principles of natural justice by tribunal or public authority) encompasses the privilege against self-incrimination, freedom from self-incrimination is arguably implicit in the right to natural justice. This issue is particularly significant because s 27(1) is applicable in civil contexts, whereas s 24(3) may apply only to a limited extent in civil contexts (see the discussion of *Murphy* above), and s 25(d) not at all.
- 148 Before the Bill of Rights Act was enacted, the Court of Appeal held in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 that answers given under the compulsion of Anton Piller orders may not be used to prosecute the person answering. The point has been made in *Adams* (Robertson, ch 10.16) that it would be possible for a court to hold that such a result was now dictated by s 27(1). In *Adams*, the suggestion is also made that the right to natural justice guaranteed in s 27 encompasses the right to freedom from self-incrimination, and that this is not limited to the proceedings themselves, but can occur at an earlier point:
- [Section] 27 provides a wide “catch-all” right to fair trials which may permit Courts to hold that rights not specifically covered elsewhere in the Bill of Rights are nevertheless implicit in the right to natural justice. An example would be the right not to make incriminating statements prior to trial and prior to arrest or detention.
- 149 Paciocco argues that the privilege meets the criteria of “fundamental justice” referred to in s 7 of the Canadian Charter of Rights and Freedoms.³⁴ Section 7 states that:
- Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- 150 New Zealand courts have yet to decide whether natural justice is synonymous with fundamental justice. Furthermore, Paciocco’s inclusion of the privilege within the criteria of “fundamental justice” might be attributable to the fact that there are no equivalents to ss 23(4) and 25(d) in the Canadian Charter. In relation to the latter, s 11(c) – “right not to be compelled to be a witness in proceedings against that person in respect of the offence” – comes closest.³⁵
- 151 The application of s 27 to the early stages of an investigation or to civil inquiries may be restricted, depending on the meaning of “determination” in s 27(1). In one case, *R v K* (unreported, High Court, Hamilton, 5 May 1995, M 58/95, Hammond J) the court took a very narrow view of the word’s scope, in deciding that it had no application to the exercise of prosecutorial discretions in laying charges:
- As to s 27(1), it seems to me that section does not extend to the prosecutor’s role. Even assuming for the purposes of argument that a prosecutor is a “public authority”, such a person does not make “a determination” of the defendant’s rights. In the criminal justice process that is attended to by the relevant judicial officer.

³⁴ “Self-Incrimination: Removing the Coffin Nails” (1989) 35 McGill Law Journal 73, 103.

³⁵ On s 11(c), there is a long line of cases flowing from *R v Herbert* (1991) 57 CCC (3d) 1 (SCC).

LIMITS ON BILL OF RIGHTS ACT RIGHTS

152 The privilege reflected in ss 23(4), 25(d) and 27(1) is not absolute, as the earlier reference to s 4 of the Act indicates. However, the terms of ss 5 and 6 of the Act lend support to the contention that proposed encroachments on the privilege should be weighed against the interests the privilege protects and should impair the privilege as little as possible. Section 5 only authorises limits on rights contained in the Act which are “reasonable” and “prescribed by law”. These words suggest the need for a degree of specificity in legislation curtailing the privilege. This is reinforced by s 6, which states:

Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

CONCLUSIONS

- There are three provisions in the New Zealand Bill of Rights Act 1990 which reflect, but are not identical to, the common law privilege against self-incrimination – ss 23(4), 25(d) and 27(1).
- The Bill of Rights Act provisions reflecting the common law privilege co-exist with, and do not restrict or remove, it.
- Sections 23(4) and 25(d) are largely restricted to the context of criminal investigations and proceedings, whereas s 27(1) is capable of a wider application.
- Proposed encroachments on the privilege should be specifically enacted, weighed against the interests the privilege protects, and should impair the privilege as little as possible. This is consistent with the “reasonable limits” test in s 5 of the Bill of Rights Act.
- Section 5, together with s 6 of the Bill of Rights Act (ie, interpretations should be consistent with the rights in the Act where possible), points to the need for specificity in legislation curtailing the privilege.
- The Bill of Rights Act provisions and jurisprudence impacting on the privilege may be useful in showing the direction for reform of aspects of the common law privilege which are unclear or unsatisfactory (eg, advice of the privilege’s application).

Part II

THE
COMMON LAW
PRIVILEGE

6 Civil Proceedings

Should the privilege in civil proceedings be removed by legislation?

INTRODUCTION

- 153 **T**HIS CHAPTER LOOKS AT THE CASE for removing the privilege, together with other issues surrounding its application in civil proceedings.
- 154 Section 4 of the Evidence Act 1908 expressly preserves the privilege against self-incrimination for the *parties* to a civil suit. This does not limit the common law privilege's availability to other witnesses in civil proceedings.
- 155 In New Zealand, the privilege against self-incrimination has long been recognised as an established ground for resisting civil discovery (*Taranaki Co-operative Dairy Co Ltd v Rowe* [1970] NZLR 895, 901).
- 156 However, in some proceedings of a civil nature, the privilege has been statutorily removed or restricted. For example, under s 70 of the Insolvency Act 1967, bankrupts and other people examined by the court or by the Official Assignee or a District Court Judge under the Act, must answer all questions relating to their business or property etc.
- 157 With the growth of statutory regulation, a wrongful act which attracts civil liability often additionally constitutes a criminal offence. Therefore, witnesses (usually defendants) in civil proceedings can sometimes claim the privilege in those proceedings because of the subsequent risk of criminal prosecution. Paradoxically, a defendant's position may be improved if he or she is liable to criminal proceedings.³⁶ Another paradox is that, although the privilege exists in civil proceedings because of the risk to the witness of criminal prosecution, it is not generally available to criminal defendants once they choose to testify in the proceedings in which they are being prosecuted.

CRITICISM OF THE PRIVILEGE IN CIVIL CONTEXTS

- 158 The availability of the privilege, before and during civil proceedings, has been strenuously criticised, particularly in England. In *A T & T Istel Ltd v Tully* [1993] AC 45, Lord Templeman (for the majority) referred to the privilege in civil proceedings as:
- an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money. (35)

³⁶ Cotton, "Company Directors and the Privilege Against Self-Incrimination in Civil Proceedings: Is Use Immunity the Answer? Part 1" (1994) 15 *The Company Lawyer* 99, 100.

- 159 *A T & T Istel* concerned a Mareva injunction which required the defendant to disclose documents relating to the defendant's dealings with the plaintiff's money, despite the defendant's claim of privilege. The House of Lords ordered compliance with the Mareva injunction, on the basis that there was unlikely to be a real risk of self-incrimination to the defendants in criminal proceedings as a result of disclosure. This was because para 33 of the disclosure order provided:
- No disclosure made in compliance with [the order] shall be used as evidence in the prosecution of the offence alleged to have been committed by the person required to make that disclosure or by any spouse of that person. (55)
- 160 Additionally, a letter issued by the Crown Prosecution Service indicated that no use would be made of any disclosure in any subsequent criminal proceedings. This included a use fruits immunity prohibiting the admissibility of information discovered as a result of compliance with the order.
- 161 The reasons given by Lord Templeman for dismissing the application of the privilege in civil proceedings included the following:
- The defendant could not rely on the privacy rationale to prevent him disclosing his dealings because they were with the plaintiff's money. Therefore, those dealings were the plaintiff's as well as the defendant's business (52).
 - There was nothing improper or cruel in the threat of contempt of court which the defendant faced for refusing to comply with the order, and it was contrary to fair play for the defendant to prevent the plaintiff from recovering damages caused by the defendant's wrongdoing (52).
 - The privilege can be justified on only two grounds – discouraging ill-treatment of suspects and discouraging the production of dubious confessions. Neither of these considerations arises in civil proceedings. It is difficult to see any reason why the privilege should enable the defendant to refuse to produce relevant documents which speak for themselves (53).
 - There is no reason why the privilege "should be blatantly exploited to deprive the plaintiff of its civil rights and remedies" if the privilege is not necessary to protect the defendant (ie, because of the use immunity contained in para 33, referred to above).
- 162 Lord Templeman may have been influenced by the report of the Lord Chancellor's Department which recommended the abrogation of the privilege in civil proceedings and its replacement with a limited use immunity for incriminatory statements or admissions alone (Lord Chancellor's Department, *The Privilege Against Self-Incrimination in Civil Proceedings*, London, 1992). The principal justification cited in the report for this approach was that the privilege places innocent parties in civil proceedings at a considerable disadvantage because of the criminal acts of others (6).
- 163 The Commission takes a different approach from that adopted in *A T & T Istel* and by the Lord Chancellor's Department, in the following respects:
- Their Lordships appear to have assumed that only guilty parties benefit from the privilege in civil proceedings. However, the common law privilege can be claimed in civil proceedings by all witnesses, not just by parties. Witnesses may have committed no wrongdoing in relation to either of the parties, but nevertheless require the privilege's protection.

- Their Lordships' comments imply that every defendant who claims the privilege in civil proceedings is negligent or culpable. As already noted in chapter 2 of this paper, there may be several reasons consistent with innocence why a person may claim the privilege in a particular situation (eg, a desire to maintain privacy).
- Their Lordships' observations do not take account of the point that a witness in civil proceedings may have more need of the privilege, or its statutory equivalent, than a defendant in criminal proceedings. This is because the criminal defendant will not be required to testify at all (Cotton, 164).
- Their Lordships refer to only two interests the privilege protects. For example, the privilege's role in protecting the innocent and in maintaining a balance between the State and the individual is not mentioned. In addition, the two rationales accepted by them do not necessarily preclude the privilege's application to all civil proceedings. Their Lordships' comments refer to documents in existence before a demand for the supply of self-incriminating information was made. As is noted in chapters 2 and 8, the case for retaining the privilege for pre-existing documents is not compelling.
- In the absence of statutory regulation, protection approaching that provided by the privilege cannot be *guaranteed* in undertakings like those contained in the court order in *A T & T Istel*, discussed above. Such orders might not, in particular cases, provide immunity from use of information derived from the self-incriminating disclosures in the civil proceedings (eg, a use fruits immunity), nor immunity from liability for a civil penalty as distinct from for a criminal offence.
- When the State is one of the parties to the civil proceedings or attempts to obtain admissions of criminal offending from the defendant, the interests represented by the privilege – of maintaining a balance between the State and the individual – will be relevant.
- As already noted, in New Zealand, s 23(4) of the Bill of Rights Act (right of arrested or detained person to refrain from making a statement) and s 27(1) (right to observance of the principles of natural justice) might encompass the privilege in some civil contexts.
- Finally, as the discussion of the privilege's history in chapter 1 indicates, far from being a relic, the privilege has shown itself to be an evolving and adaptable common law rule.

164 The Commission's view is that broad context (ie, civil or criminal investigations or proceedings) should not alone determine the privilege's availability in any given case. The risk of self-incrimination in the particular circumstances should be taken into account.

ANTON PILLER ORDERS

165 In civil proceedings, the privilege has generated particular criticism when it has been used to thwart Anton Piller orders. Anton Piller orders originally raised no real argument concerning self-incrimination. This was because the party on whom the order was served was not required to actively disclose anything. The documents etc already existed and awaited discovery through a search, as when incriminating articles are located and seized under a search warrant. Difficulties arise from comparatively recent widening of the order to include a further direction that there be a disclosure of information and

documents which would not necessarily be found by the search alone. The forced disclosure of information and documents can in some instances serve to incriminate the party who is the subject of the order. In the normal course of civil proceedings, such a possibility of self-incrimination would be a valid reason to resist the order for discovery (*Taranaki Dairy Co Ltd*, 895).

- 166 Although Anton Piller orders began as a remedy for cases involving intellectual property, they have now been used more widely in civil litigation. Some disquiet has been expressed that these orders are being granted too readily when the normal avenues of discovery should have been pursued (eg, see *Columbia Picture Industries Ltd v Robinson* [1986] 3 All ER 338). Surprise is the essence of an Anton Piller order and the defendant suddenly confronted with such an order is placed in a vulnerable position, with none of the legislated protections of a criminal search warrant (for those, see s 198 Summary Proceedings Act 1957).
- 167 In the English case *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, 424, the House of Lords reluctantly held that the privilege was available to prevent discovery and interrogatories under Anton Piller orders, and said that abrogation was a matter for Parliament.³⁷ The result was that Anton Piller orders were largely ineffective because invocation of the privilege could eliminate the plaintiff's capacity to act quickly to prevent the removal, destruction or concealment of important evidence. In that case, the plaintiffs obtained an Anton Piller order permitting them to enter the defendants' premises and seize infringing copies of the plaintiff's films, and requiring the defendants to immediately produce documents and answer questions about the supply and sale of the infringing copies.
- 168 In s 72 of the Supreme Court Act 1981 (UK), Parliament quickly reversed the position, at least in the limited area of intellectual property infringement. Section 72 provides that the privilege cannot be invoked in civil proceedings for intellectual property infringement or passing off, but the statements elicited are inadmissible against the maker in proceedings for a related offence. The use immunity provided does not extend to documents.
- 169 The New Zealand Court of Appeal's decision in *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461 contrasts with the narrow statutory use immunity contained in s 72 of the Supreme Court Act. The court dealt with the self-incrimination objection to compliance with an Anton Piller order by directing that any information or documents which the party was required to produce and which were incriminating were not admissible "in any criminal proceeding for any offence relating to the subject matter of the action in which the order ha[d] been made." Additionally, the parties seeking disclosure were required to give an undertaking not to use the material in any criminal proceedings nor to make it available to the police.
- 170 In chapter 8, the Commission has proposed that the privilege should not be able to be claimed for documents already in existence when a demand for their production is made. If this proposal is implemented, the privilege would not be claimable in response to Anton Piller orders for the seizure of documents. However, the person upon whom such an order is served would still be able to invoke the privilege if asked to make self-incriminating oral statements about anything seized.

³⁷ For a more recent English case on Anton Piller orders, see *IBM United Kingdom Ltd v Prima Data International Ltd* [1994] 4 All ER 748.

171 In chapter 2, we considered ways in which claiming the privilege can forestall abuses of power by investigators. Conceivably, the privilege might also have a role in preventing the arbitrary exercise of Anton Piller orders in relation to demands for oral information.³⁸

CONCLUSIONS

- The privilege should not be removed across the board in *all* civil proceedings.
- The degree and risk of self-incrimination varies depending on the particular situation.
- A person compelled to make self-incriminating disclosures in one context can be unfairly prejudiced in another as a result.
- Witnesses who are not parties in civil proceedings benefit from the privilege as well as parties who have an interest in escaping accountability for their negligent or culpable actions or omissions. In addition, the parties in civil proceedings are not always negligent or culpable. Therefore, it is incorrect to suggest that the privilege only protects wrongdoers in civil proceedings.
- A witness in civil proceedings may have more need of the privilege, or its statutory equivalent, than a defendant in criminal proceedings. This is because the criminal defendant will not be required to testify at all, although once a criminal defendant chooses to testify, he or she cannot claim the privilege for matters in issue in the proceedings.
- In the absence of statutory regulation, protection approaching that provided by the privilege (ie, a use and use fruits immunity extending to actions potentially involving the imposition of a civil penalty) cannot be guaranteed.
- The interest in maintaining a fair State-individual balance may be relevant in some civil proceedings (eg, when the State is one of the parties or when its representatives become interested in the proceedings for the purposes of a criminal prosecution).
- Section 23(4) of the Bill of Rights Act 1990 (right of arrested or detained person to refrain from making a statement) and s 27(1) (right to observance of the principles of natural justice) encompass the privilege in some civil contexts.
- Far from being a relic, the privilege has shown itself to be an evolving and adaptable common law rule.
- The privilege should not be able to be claimed by a person upon whom an Anton Piller order has been served, in relation to the production of documents already in existence. The privilege should still be claimable in response to demands for oral information. This is consistent with the position the Commission takes in chapter 8.

³⁸ For a discussion of some other options for preventing abuses, such as restrictions on the mode of service, attendance of a solicitor etc, see Wilkinson, "Recent Developments Affecting Anton Piller Orders" (1993) 23 Hong Kong Law Journal 79.

7

Civil Penalties, Forfeiture, and Ecclesiastical Censure

Should the lesser known limbs of the privilege against self-incrimination – the privileges against liability to a civil penalty, forfeiture, and ecclesiastical censure – be removed by legislation? Should the penalty privilege extend to liability for compensatory and punitive damages?

[A] party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure . . .³⁹

LIABILITY TO A CIVIL PENALTY

Origins and current law

- 172 **T**HE PENALTY PRIVILEGE applies to prevent liability to penalties imposed in civil proceedings; hence the name “civil penalty”. Civil penalties are penalties which are designed to punish or discipline the defendant rather than to compensate the plaintiff. Therefore, damages awarded against a defendant in civil proceedings do not comprise a civil penalty (*E L Bell Packaging Pty Ltd v Allied Seafoods Ltd* (1990) 8 ACLC 1135, 1144).⁴⁰
- 173 As already noted, s 8A of the Evidence Act 1908 states that a witness will not be excused from answering any questions relevant to the proceedings on the sole ground that the answers would leave the witness vulnerable to a debt or civil liability. We suggest that “civil liability” should not be interpreted to include liability to a civil penalty, the primary aim of which is to punish. Rather, s 8A should be interpreted in a way which is consistent with the rule in *E L Bell Packaging Pty Ltd*.

³⁹ Bowen LJ, *Redfern v Redfern* [1891] P 139, 147.

⁴⁰ In *Bell*, the Victorian Supreme Court held that proceedings by the plaintiff for debts owed to it by a defendant company under s 556 of the Companies (Victoria) Code were not proceedings for a penalty. Murphy J stated:

[T]he action, in my opinion, is clearly not an action for a penalty. It is an action, given it is true by statute, to recover money lost by a third party, in circumstances specified in which a director of an allegedly insolvent company has authorised or permitted it to continue to trade to the direct detriment of the third party. (1130)

- 174 Australian authorities reveal that exposure to liability to statutory police disciplinary proceedings has attracted the protection of the penalty privilege (*Police Services Board v Morris* (1985) 58 ALR 1), as has an application for removal of the chairperson of the State Rail Authority of New South Wales (*Taylor v Carmichal* (1984) 1 NSWLR 421), and an action against union officers under the Trade Practices Act 1974 (*Navair Pty Ltd v Transport Workers Union (Aust)* (1981) 52 FLR 177).
- 175 There are two types of actions which may result in the imposition of a civil penalty:
- civil actions, the object of which is to impose a civil penalty; and
 - civil actions in which the witness's incrimination leads to the imposition of a civil penalty.
- 176 It is not entirely clear which proceedings fall into which category; although McNicol suggests that the distinction *is* relevant in Australia. In the former situation, the courts may refuse to order discovery at all because of the inherent liability to the civil penalty (eg, see *Master Builders' Association (NSW) v Plumbers and Gasfitters Employees' Union (Aust)* (1987) ATPR 40-786, referred to in McNicol, at 190). In the latter situation, the claimant will be required to make a specific claim to the privilege for particular documents or questions, as and when they arise.
- 177 The first of the two types of civil actions (ie, civil actions the object of which is to impose a civil penalty) appears to have originated from judicial hostility to common informers' suits for penalties (*Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609, 621 Murphy J). A common informer was a person who took proceedings for breaches of certain statutes, solely for the penalty which, according to the statute, was paid to the one who gave information of the breach. At common law, when a common informer sued for a penalty, the courts refused to assist in any way and allowed the person sued to avoid giving any evidence at all (*Earl of Mexborough v Whitwood Urban District Council* [1897] 2 QB 111, 115 Lord Esher). The second type of civil action (ie, where a penalty is imposed in civil proceedings) may have attracted the privilege's protection because civil penalties are roughly akin to sentences imposed in criminal proceedings (ie, they are designed to punish the defendant).
- 178 In *Pyneboard*, the court confirmed that the penalty privilege generally is not confined to discovery and interrogatories. It is available at common law as well as equity, and is distinct from, although often associated in discussion with, the privilege against liability to conviction for a criminal offence (614). The court also said that it was "not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings" (617). Although it is not entirely clear, it appears that the penalty privilege can be claimed by a person when compelled disclosure takes place outside the context of civil proceedings (eg, in the course of a criminal investigation). In other words, the compulsion, as distinct from the risk of imposition of a penalty, need not arise in civil proceedings.
- 179 The Commission is not aware of many cases in which the penalty privilege has been claimed and upheld in New Zealand; although under common law it clearly still applies. One case in which the existence of the penalty privilege has been recognised is *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435. That case considered a pecuniary penalty proceeding under s 80 of the

Commerce Act 1986, where the judge required the defendant to disclose briefs of evidence and documents on which it was relying, in advance of the trial. The Court of Appeal affirmed the existence of the penalty privilege, but held that it was not a ground for limiting the court's power to order the advance exchange of briefs of evidence in such proceedings. Cooke P said:

In principle we can see no ground for limiting the Court's power by reference to the privilege to which reference has been made. All that happens when there is an order for the exchange of briefs before trial is that each party has the advantage of seeing evidence that may be called by the other party. Neither party, however, is bound to call evidence in terms of the brief or otherwise. There is no compulsion to answer any question. If a defendant wishes to preserve the right to call evidence, it is necessary for that defendant to comply with the timetable. ... Essentially, it is no more than a means of ensuring that the right to call evidence is preserved. (437)

180 New Zealand legislation does not refer to the penalty privilege consistently. Sometimes, both the privilege against self-incrimination and the penalty privilege are individually mentioned. For example, s 49(3) of the Gas Act 1992 provides that no person is excused from giving information sought under subs (1) "on the ground that compliance with that requirement could or would tend to incriminate that person or subject that person to any penalty or forfeiture". On other occasions, the penalty privilege is not specifically referred to. For example, see s 267(1) of the Companies Act 1993, which provides that a person is not excused from answering a question in the course of being examined under ss 261 and 266 of the Act on the ground that the answer may incriminate or tend to incriminate that person.

181 In England, the penalty privilege has been recognised in legislation. Section 14(1)(a) of the Civil Evidence Act 1968 (UK) confines the privilege to "criminal offences under the law of any part of the United Kingdom and penalties provided for by such law". Proceedings for recovery of a penalty extend to claimants who would otherwise expose themselves to fines under the European Economic Community Treaty (Cmnd 5179-II) (*Rio Tinto Zinc Corporation Ltd v Westinghouse Electric Corporation Ltd* [1978] AC 547, 637).

Should the penalty privilege be abolished?

182 In *Pyneboard*, Murphy J (minority) considered the origins of the penalty privilege (ie, in his view, the judicial hostility to common informers' suits for penalties). He said that such a privilege, especially available outside judicial proceedings, is difficult to justify and that:

[i]t is an absurd state of the law if a witness, in a civil or criminal trial, can lawfully refuse to answer because the answer may tend to expose him or her to some ecclesiastical censure, or to forfeiture of a lease, or to a civil action for penalties, but may not refuse if the exposure is to some other civil loss, such as an action for damages, even punitive damages. In so far as such absurdity has been introduced or maintained by judicial decision (see *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742; *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253 at 257) it can and should be erased by judicial decision. Whatever their standing in judicial proceedings, I see no reason for recognizing such privileges outside judicial proceedings. (621)

- 183 Civil penalties can be as severe as criminal offences and can be feared by the witness and investigated by officials in much the same way. These similarities suggest that the rationales behind the privilege identified in chapter 2 will be applicable, at least in some situations, to liability to a civil penalty. For example, a public servant suspected of, and asked questions by, his or her employer about suspected disciplinary offences may be pressured into making unreliable admissions and may be vulnerable to abuses of power. Because of the likely power imbalance between the State employer and the employee, the penalty privilege may redress a fair State-individual balance. In addition, the person will have an interest in maintaining privacy and might, although innocent, wish to remain silent as a protective measure.
- 184 There are good reasons why the privilege does not apply to compensatory damages in civil proceedings. An extension to the penalty privilege to take in civil actions would give the privilege an unjustifiably broad span, especially when compared to the burgeoning number of statutory powers which require individuals to supply information. It would, for example, enable a defendant in civil proceedings to refuse to answer any questions focusing on his or her alleged negligence or wrongdoing, because of the risk that the plaintiff might be awarded damages.
- 185 The aim of punitive damages is in part to punish the defendant, but they also have the effect of compensating the plaintiff. In addition, they are seldom awarded and it may be difficult to assess whether there is a real risk of the imposition of such penalties in a particular situation. In other words, it would be difficult to ascertain when a claim to the penalty privilege, based on the risk of liability to punitive damages, was legitimate. For these reasons, the Commission does not propose extending the privilege to encompass protection from liability to punitive damages.
- 186 *Murphy J* does not distinguish between the traditional penalty privilege claimed to resist discovery per se and the more specific penalty privilege in response to demands for particular information. The original rationale for blanket claims to prevent any discovery no longer applies, because actions are no longer brought by common informers. However, the more specific penalty privilege appears to have developed alongside, and is akin to, the privilege against self-incrimination.
- 187 The Commission inclines to the approach adopted recently in s 128 of the Evidence Act 1995 (Aust). Section 128(1)(c) confirms the penalty privilege as well as the privilege against self-incrimination in court proceedings. Section 128 is also a useful model because it does not include both kinds of civil penalty referred to above. Subsection (1) does not contemplate blanket claims to the privilege (ie, a witness can object to giving "particular evidence"). Subsection (2) authorises the courts to assess claims to the privilege in relation to "particular evidence". However, as the common law privilege co-exists with s 128, it may still be open to a person to claim the penalty privilege to prevent making any disclosure in proceedings brought primarily for a civil penalty. This avenue should be expressly closed off in the Commission's proposed Evidence Code. For further discussion of the Australian Evidence Act, see chapter 15.

- 188 The Commission differs from Murphy J in his view that the penalty privilege should be removed. In New Zealand, the Court of Appeal has recognised that the privilege against self-incrimination can be claimed in a broader range of contexts than merely judicial proceedings and procedures (*Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 402). To be consistent, the same approach should apply to the penalty privilege.

Statutory references to the penalty privilege

- 189 In Part III of this paper, we highlight the lack of consistency and clarity of treatment concerning civil penalties in statutory provisions which expressly preserve or remove the privilege in particular contexts. The Commission proposes a statement in the Evidence Code to the effect that references to the privilege against self-incrimination and to incrimination in legislation should be interpreted as encompassing the penalty privilege and liability to a civil penalty, unless the contrary intention is clear on the face of the provision. Those provisions which already distinguish between the two privileges should be re-examined, bearing in mind the need for consistency. For as the majority said in *Pyneboard*, when considering a provision which abrogated the privilege against self-incrimination:

[I]t is irrational to suppose that Parliament contemplated that a person could be compelled to admit commission of a criminal offence yet be excused from admitting a contravention of the Act sounding in a civil penalty. (620)

FORFEITURE AND ECCLESIASTICAL CENSURE

- 190 In *Pyneboard*, Murphy J also criticised the continuation of the privileges against liability to forfeiture (ie, of estates or interests in land for breach of covenant) and ecclesiastical censure (for adulterous behaviour by members of the clergy). In relation to forfeiture, he said:

In England, this probably arose out of the special regard for land rights originally secured by feudal tenures and later by entailing and other devices. The privilege against forfeiture seems to have been confined to forfeitures of realty, particularly leases. The recognition of such a privilege in modern Australia is, in my opinion, not justified. (621)

He had this to say about ecclesiastical censure:

Any rationale for this privilege in England, where there is an established Church, does not apply to Australian circumstances. In Australia ecclesiastical censure is irrelevant to judicial procedures as well as to non-judicial procedures for obtaining information from public purposes. The privilege should not be recognized as part of the common law in Australia. (621)

- 191 The privilege against liability to ecclesiastical censure seems never to have applied in New Zealand, because there is no one established church. The Commission agrees with Murphy J's observations about the inappropriateness of these two limbs of the privilege in contemporary times. The privileges should be expressly removed in the proposed Evidence Code. In relation to ecclesiastical censure, this course of action removes any doubt about its applicability in New Zealand.

CONCLUSIONS

- Subject to the following conclusions, the penalty privilege should continue to be available, but the privileges against liability to forfeiture and ecclesiastical censure should be removed by a provision in the Commission's proposed Evidence Code.
 - The penalty privilege should not operate to enable a person to avoid disclosing all information. For the claim of privilege to be legitimate, it should be made in response to a demand for particular information.
 - The penalty privilege should not be extended to take in potential exposure to a civil action for damages or punitive damages.
 - There should be a statement in the Code that references to the privilege against self-incrimination and to incrimination in legislation should be interpreted as encompassing the penalty privilege and liability to a civil penalty, unless expressly excluded. Provisions distinguishing between the two privileges should be re-examined.
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8 Documentary and Real Evidence

Should the privilege preventing the production of documentary evidence be removed by legislation? Should the privilege apply to real evidence? Should the privilege apply to a non-verbal action intended as an assertion?

INTRODUCTION

- 192 **I**N NEW ZEALAND, the privilege can be claimed in response to questioning and demands for the production of documents, pre-existing or created at the time of the demand.⁴¹ For example, see *Taranaki Co-operative Dairy Co Ltd v Rowe* [1970] NZLR 895, 901, where the Court of Appeal held that the privilege could be claimed in response to an order for discovery.
- 193 The privilege does not appear to apply to real evidence admitted as an object or exhibit (eg, a handwriting sample, weapon, body sample) rather than as an evidentiary statement, although the act of producing documents or other things may constitute a statement in some cases (eg, when it clarifies the existence, possessor or accuracy, of evidence). In *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191, 194–195, the Court of Appeal commented to this effect.⁴² Nor can the privilege be claimed in response to a search warrant, because there is no testimonial act of production on the part of the person giving the information when documents or objects are seized by another person.
- 194 The limitation of the privilege to testimonial statements and production is a reflection of the testimonial disclosure rule. As already noted in chapter 1, Cross describes testimonial disclosure as “the assertion of a human being offered

⁴¹ New Zealand courts are also likely to apply the common law privilege to audio and video tapes put in evidence as a statement.

⁴² For example, McMullin J said:

There may be cases where permission to examine an object would involve a person in a testimonial disclosure of an incriminating nature eg, if possession of a specific class of fruit constitutes an essential element of an offence, the act of allowing such fruit to be examined in response to a request to do so may be taken as an admission by the person complying that he has possession of it. But in the present case one of the respondent's directors had already admitted that there were red delicious apples in its cool store. Therefore, any permission granted to inspect them could be seen simply as a response to the inspection request brought about by that admission, not as an independent testimonial assertion of possession. (195)

as proof of the truth of which is asserted".⁴³ In *Sorby v Commonwealth* (1983) 46 ALR 237, 244, Gibbs CJ explained the limits in scope of the testimonial disclosure rule:

The privilege prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of the witness, as to the condition of his body. For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he may be identified, or to speak or to write so that the jury or another witness may hear his voice or compare his handwriting. That this was the significance of the distinction between "testimonial" and other disclosures was recognised in *R v McLellan*, where it was held that the protection afforded by the rule against self-incrimination did not extend to entitle a person who had been arrested to refuse to furnish a sample of his breath for analysis when required to do so.

- 195 In this chapter, whether the privilege should be able to be claimed for documents, real evidence, or non-verbal assertions is considered. The main issues in the area are traversed by focusing on the United States case law, which first recognised and then restricted the Fifth Amendment's application to documents. The Commission's proposals will follow.

DOCUMENTS

- 196 The United States case law has developed a set of rules for determining the circumstances in which the privilege will apply to documents and real evidence, in the absence of legislation in a particular context. Traditionally, the application of the privilege to documents has reflected the belief that an individual's private papers are an extension of that person's mind and thoughts (*Boyd v United States* 116 US 616, 627–30 (1886)). That case concerned a subpoena requiring the defendant to produce his books, invoices, and papers for the enforcement of customs law. The court said:

[W]e are unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. (633)

- 197 In *Shapiro v United States* 335 US 1 (1948), the Supreme Court said that the Fifth Amendment protection did not extend to records which were required to be kept for official governmental purposes (the required records rule). The privilege did not apply because Shapiro was required to keep the records and they were unprotected public documents rather than protected private papers (352–353).⁴⁴
- 198 The court in *Andresen v Maryland* 427 US 463 (1976) overruled *Boyd*, holding that the Fifth Amendment only protects witnesses against compulsion to make a testimonial disclosure and that in *Boyd* and *Andresen* there had been no compulsion at the time the defendant recorded his testimonial statements. At the time the defendants expressed their thoughts on paper, they were not being compelled: see also *Fisher v United States* 425 US 391, 402–414 (1976).

⁴³ Mathieson, 10.

⁴⁴ For a discussion of this case see Tarallo, "The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End its Silence on the Rationale Behind the Contemporary Application of the Privilege" (1992) 27 New England Law Review 137, 155.

REAL EVIDENCE

- 199 As in New Zealand, the privilege cannot be claimed in the United States for real evidence produced as an object rather than as a statement (*Schmerber v California* 384 US 757 (1966)). In that case, the defendant was arrested at a hospital while being treated for injuries from a car accident. The police officer directed a doctor at the hospital to take a blood sample, and an analysis of the alcohol percentage showed that the defendant was intoxicated. The analysis report was introduced at trial, and the defendant was convicted of driving under the influence of alcohol. The majority said that the Fifth Amendment was limited to communicative acts on the part of the person to whom the privilege applies (Justice Brennan, 761). The court remained open to the possibility that physical evidence obtained from the body of a suspect may in some circumstances contain a sufficiently testimonial content to enable the privilege to apply:
- Some tests seemingly directed to obtain "physical evidence", for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard". (764)
- 200 The minority of four judges in *Schmerber* criticised undue reliance on the testimonial disclosure rule, commenting that the words "testimonial" and "communicative" are not models of clarity and precision, and Justice Black said:
- In the first place it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature". The sole purpose of this project which proved to be so successful was to obtain "testimony" from some person to prove that the petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that the petitioner was more or less drunk. (774)
- 201 The United States authorities show the range of evidence which is beyond the shelter of the Fifth Amendment because of the testimonial disclosure rule. This includes standing in a lineup, re-enacting a crime, shaving a beard or moustache, trying on clothing, dyeing hair, demonstrating speech characteristics, furnishing handwriting samples, fingerprints, blood-alcohol and breathalyser evidence and urine tests.
- 202 As in the New Zealand *Apple and Pear Marketing Board* case, the United States courts have recognised that the act of producing documents or real evidence, rather than having them seized, might have a communicative aspect of its own in some cases. In *Fisher*, for example, the court said that production of documents might conceivably indicate the tax-payer's belief that the documents produced were those described in the subpoena. In *Doe v United States* 487 US 201, 209 (1988), the court confirmed that the privilege applied in cases in which the act of producing the evidence would testify to the existence, possession, or authenticity of the things produced.

THE COMMISSION'S PROPOSALS

Pre-existing documents and real evidence

- 203 The Commission is of the preliminary view that the privilege should not apply to pre-existing documents or real evidence in existence at the time their possessor is asked to produce them, for a number of reasons:
- As has already been observed in this chapter and in chapter 2, the fact that there is no compulsion at the point when the information is created means that the likelihood of the compulsion causing the evidence to be unreliable, or for the information to be created from abuses of power, is minimal.
 - Innocent people need not fear that they will speak rashly or ill-advisedly, as the document containing, or thing comprising, the relevant information is already in existence.
 - Although testing and analysis methods may on occasion be called into question, pre-existing evidence is generally less likely to be unreliable than, for example, confession evidence. Therefore, the rationale behind the privilege of preventing the compelled disclosure of unreliable evidence does not so readily apply.
 - While privacy concerns are relevant to pre-existing evidence, particularly personal diaries, we suggest that they should not prevail over the concern to obtain all relevant evidence. They do not currently prevail in relation to such evidence seized pursuant to a search warrant.
 - In relation to pre-existing evidence, the concern behind the privilege of maintaining a fair State-individual balance may be adequately addressed by the prohibition on unreasonable search and seizure in s 21 of the New Zealand Bill of Rights Act 1990.

Newly created documents and real evidence

- 204 In the Commission's view, the position is different for documents or video or audio tapes newly created in response to a demand for them (eg, in a police station where a suspect writes a confession or makes a confession which is recorded onto a tape).⁴⁵ The risk of unreliable admissions being made, abuses occurring, and innocent individuals being compromised and overborne, is similar to that arising from oral statements. The compulsion to give information is imposed more or less contemporaneously with the actual giving of the information: see chapter 2 for more detailed discussion of why the privilege is most useful in investigative contexts.
- 205 It is not envisaged that the current law concerning such things as finger-prints, body samples etc should be changed. The privilege should not be claimable as a means of refusing to produce such evidence. This is primarily because of the comparative reliability of the other evidence, the absence of a communicative aspect coming from the person supplying the evidence and, pragmatically, the importance of such evidence as a means of detecting offenders.

⁴⁵ In recommending that the privilege should remain for newly created documents, we emphasise that the category does not include documents created independently of the investigator's specific request (eg, documents created to conceal evidence).

Non-verbal assertions

- 206 As already observed, in limited circumstances, the New Zealand Court of Appeal has been prepared to conceive of the privilege applying to a communicative aspect in the act of producing documents or objects (eg, where possession constitutes an offence). Our preliminary view is that the provisions in the Evidence Code concerning the privilege should not close off this avenue. It appears artificial for the law to make distinctions between, for example, telling the police where the body is, producing the body, or showing where it is. Claims of privilege should be able to be made more broadly for non-verbal self-incriminating assertions which may constitute a self-incriminating acknowledgment that the person has committed a crime. However, the Commission particularly welcomes submissions in this difficult area.

CONCLUSIONS

- The Evidence Code should limit the privilege's application to oral statements, statements contained in newly created documents (including audio and video tapes) in response to a demand for their creation, and to non-verbal action intended as an assertion.
- The privilege should not be claimable for pre-existing documents or real evidence or in response to a requirement that a person give fingerprint, body sample etc, evidence.
- In relation to pre-existing evidence, privacy interests should not prevail over the concern to obtain all relevant evidence. Such interests do not currently prevail in relation to evidence seized pursuant to a search warrant.
- In relation to pre-existing evidence, the concern behind the privilege of maintaining a fair State-individual balance may be adequately addressed by the prohibition on unreasonable search and seizure in s 21 of the New Zealand Bill of Rights Act 1990.
- There is generally no communicative aspect in producing pre-existing evidence. However, when there is a communicative aspect to an action (eg, when the act of production is itself an acknowledgement that an offence has been committed), the privilege should be claimable. This is the Commission's preliminary view, and it invites submissions on this difficult area.
- The privilege should be available in response to demands for documents to be created (eg, in a police station where a suspect writes a confession), because the risk of unreliable admissions being made and abuses occurring is similar to that arising in relation to oral statements.

9

Corporate Claims to the Privilege

Should the privilege for bodies corporate be removed by legislation?

INTRODUCTION

- 207 **T**HIS CHAPTER assesses whether the privilege against self-incrimination should apply to bodies corporate. What is being examined is the claim of privilege by or on behalf of a corporate body, rather than by its individual officers and directors on their own behalf. In practice, the distinction cannot always be drawn so clearly. In many cases, the representative of the corporation giving evidence or acting on the corporation's behalf may also be the individual who has committed offences under the corporation's cloak.⁴⁶ Nevertheless, the following discussion proceeds on the basis that corporate liability is distinct from any personal liability of a corporate representative.
- 208 The arguments for and against the privilege's applicability focus on one type of corporate body – companies. This is because debate about the privilege's application to artificial legal personalities arises most often in relation to them. However, much of the discussion in this chapter is relevant to incorporated societies, and the Commission's proposals refer to "bodies corporate" generally.
- 209 It should be borne in mind throughout the following discussion that corporations differ from individuals in several important respects:
- corporations cannot be imprisoned;
 - corporations cannot give evidence, but must do so through their officers and employees;
 - members of corporations have limited liability;
 - corporations are susceptible to higher fines than individuals (eg, under the Commerce Act 1986, Fair Trading Act 1987, and Resource Management Act 1991);
 - corporations can be wound up if penalties imposed exceed the corporation's assets; and
 - corporations operate through, and share information with, third parties (ie, their officers and employees).

⁴⁶ As already cited, the Privy Council has considered the agency relationship between a company and officers acting on its behalf in *Meridian Global Funds Management Asia v Securities Commission* [1995] 3 NZLR 7 (PC).

NEW ZEALAND POSITION

Relevant case law

210 In New Zealand, a corporation may claim the privilege against self-incrimination at common law. The Court of Appeal reached this conclusion in *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191.

211 In that case, the respondent, who had an orchard and roadside shop, refused to allow an inspector from the Apple and Pear Marketing Board to see apples which a director of the business had told him were in the business's cooler. The respondent was charged, under reg 9 of the Apple and Pear Marketing Regulations 1975, with refusing to allow fruit in its possession to be examined by an officer of the Board. The issue of whether the privilege could be claimed by corporations was not canvassed in detail by the court, but it found:

There seems no policy reason why a corporation should not avail itself of the rule. A corporation acts and makes statements through certain responsible officers ... It is identified in law with the acts and defaults of its directors and officers, and it may make admissions through them. Indeed, in this case ... the actions and statements of the directors ... led to the bringing of the charge ... If then the prosecution may prove its case by the out of Court statements of its directors, it seems reasonable that the company should be entitled to claim self-incrimination when it speaks through them. (196)

The Court of Appeal's comments suggest that officers of a corporation can claim the privilege on the corporation's behalf for both oral and documentary disclosures. The Australian case law, referred to below, has taken a different tack.

212 New Zealand corporations range in size and complexity from the corner dairy to huge organisations with many subsidiaries and overseas connections. Many, if not most New Zealand corporations, are small individual or family-owned businesses. These, it is said, should not be distinguished from natural persons (*New Zealand Apple and Pear Marketing Board*, 197).

Statutory considerations

213 In practice, whether a corporation is able to claim the privilege in a particular context will usually be a matter of statutory interpretation. While certain legislation (eg, the Commerce Act 1987, the Secret Commissions Act 1910, the Companies Act 1993 and the Unit Trusts Act 1960) removes the privilege in particular contexts, use immunities replace the privilege. Other legislation (eg, the Corporations (Investigation and Management) Act 1989 and the Securities Act 1978) confers broad powers on officials and bodies to investigate areas of activity peculiar to corporations. The privilege is not expressly removed, and it is unclear whether there is a positive duty to co-operate.

214 Section 29 of the New Zealand Bill of Rights Act provides:
Except where the provisions of this Bill of Rights *otherwise provide*, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons. [Emphasis added]

There is nothing expressly ruling out the application of the privilege provisions in the Bill of Rights Act to corporations. It is at present unclear whether the

provisions which refer to the right to remain silent in the Act (ie, ss 23(4) and 25(d)) are provisions which “otherwise provide” within the meaning of s 29 above. It is unlikely that the right in s 23(4), of everyone who is arrested or detained to refrain from making any statement and be informed of that right, applies to corporations, as they cannot be physically arrested or detained.

- 215 The position is less certain in relation to the right of everyone who is charged with an offence not to be compelled to be a witness or confess guilt (s 25(d)). A corporation cannot be a witness; therefore, the right may not extend to corporations. On the other hand, in New Zealand at least, corporate officers may speak for the corporation, and this fact might suffice for the purposes of the section.
- 216 If the right to the observance of the principles of natural justice in s 27(1) encompasses the privilege (discussed in chapter 5), there is nothing in the language of that section to preclude its application to corporations.

THE SITUATION OVERSEAS

Australia

- 217 Section 187 of the Evidence Act 1995 (Aust) expressly precludes claims to the privilege by bodies corporate, for the purposes of a Commonwealth law, a law of the ACT or a proceeding before a federal or ACT court. Before the Act was passed, the High Court of Australia held that the privilege against self-incrimination could not be claimed by corporations (*Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 178 CLR 477). Subsequently, the full court of the Federal Court held that the privilege against liability to a civil penalty was also unavailable to corporations (*Trade Practices Commission v Abbco Ice Works* (1994) 52 FCR 96).
- 218 Prior to the *Caltex* decision, the Australian cases recognised practical difficulties when corporations claimed the privilege, including issues about to whom a subpoena or notice to supply information should be addressed and upon whom it should be served. Problems arose when the corporate officer or director made a claim to the privilege on the grounds that the answers or production sought would incriminate the corporation.⁴⁷
- 219 The Australian cases suggest that a party seeking production of documents avoided corporate claims to the privilege by directing the subpoena for production to a particular officer of the corporation, rather than to the corporation itself (eg, see *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union (Aust)* (1987) 71 ALR 501, 518). Any claim to the privilege was then defeated, provided that the documents did not incriminate that officer personally. Because the command of the subpoena was addressed to the individual, rather than to the corporation, the only question of self-incrimination arising was in relation to the individual. It is presently unclear whether New Zealand courts might in future follow the Australian authorities (as already noted, there has been a paucity of New Zealand case law on the issue of corporate claims to the privilege).

⁴⁷ See McNicol, 161, where these issues are thoroughly canvassed.

- 220 In *Caltex*, the court also assumed that the preceding Australian case law precluded corporate claims to the privilege for oral testimony. In practice, corporate officers could only invoke the privilege on behalf of a corporation in response to requests for the production of documents or the answering of interrogatories (eg, see Deane, Dawson and Gaudron JJ, 155).
- 221 In addition, the Australian cases suggest that, at common law, a claim to the privilege could not be made in relation to production of another person's property. This principle worked to circumvent claims by corporate officers or directors when production of corporate documentation was sought (conceivably, this could occur in New Zealand). Conversely, a director or officer may have been able to avoid production on the basis that she or he did not in fact have possession of the documents; rather they were in the possession of the corporation. The court in *Trade Practices Commission v Arnotts Ltd* (1990) ATPR 41–010, for example, held that a director subpoenaed to produce documents was not bound to produce them because the corporation was the owner of the documents and it had forbidden their production. Similarly, principles of master and servant duties were relevant: see *Eccles & Co v Louisville & Nashville Railroad Co* [1912] 1 KB 135, where the court held that an employee was not obliged to produce an employer's documents if production would violate the duty owed by the servant to the master.

Canada

- 222 As already noted, in Canada, the privilege has been abrogated and the testimonial immunity in s 5 of the Canada Evidence Act 1985 does not extend to corporations; neither do ss 11(c) and 13 of the Charter (right to silence of witnesses).⁴⁸

United Kingdom

- 223 At least at common law, the privilege continues to apply to corporations (*Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395).

United States

- 224 The Fifth Amendment only applies to natural persons (*Hale v Henkel* 202 US 43 (1906)). Constitutional considerations underlie this approach. The guarantees of the Fifth Amendment cannot be abrogated without providing the protection of an effective immunity. Therefore, there is a concern that extending the privilege to collective entities could create very real problems for the government in the investigation and prosecution of offending by very large and powerful organisations: see *Caltex Refining Co v State Pollution Control Commission* (1991) 74 LGRA 46, 52.
- 225 A more restrictive approach has been taken in some cases suggesting that corporate officers are not even entitled to claim the privilege on their own behalf. In *Bellis v United States* 417 US 88 (1974), for example, the court held:
- [A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.

⁴⁸ See *R v Amway Corp* (1989) 56 DLR (4th) 309 and *B C Securities Commission v Branch* (1995) 123 DLR (4th) 462 (SCC).

ARGUMENTS FOR AND AGAINST APPLYING THE PRIVILEGE

Human dignity, privacy and bodily integrity

- 226 One common argument against the application of the privilege to corporations is that they are incorporeal entities, without thoughts or emotions, and are unable to feel physical pain or discomfort. As Lord Denning said in *British Steel v Granada Television* [1981] AC 1096, 1127 (somewhat against the tide of English authorities):
- [I]n these Courts, as in the United States, the privilege is not available to a corporation. It has no body to be kicked or soul to be damned.
- 227 Critics of the “no body to be kicked or soul to be damned” line of argument say that while corporations cannot be physically detained or imprisoned or suffer a breach of dignity when their privacy is invaded, analogous consequences may arise.⁴⁹ Corporations can be severely penalised by incriminating disclosures. Sometimes “punishment” takes a form which destroys the corporation (eg, winding up). In addition, although corporations do not have personal thoughts and feelings, they have a substantial interest in maintaining their reputations and the confidentiality of their operations.
- 228 The Commission’s stance is somewhere between these two positions. Although corporations can suffer many disadvantages from disclosing incriminating information, the very personal sense of intrusion and fear of physical imprisonment which individuals may experience is lacking. Of course, corporate representatives may experience a sense of intrusion and fear when they are personally at risk of self-incrimination.

Reliability and protection from inhumane treatment and abuses

- 229 Linked to the “no body to be kicked or soul to be damned” argument is the contention that corporations cannot be pressured into giving unreliable testimony and cannot be subjected to improper treatment: two of the concerns the privilege seeks to address.
- 230 Much corporate crime is conducted through the use of documents, and the degree of testimonial compulsion leading to unreliability is far less than with face-to-face questioning. The reliability rationale behind the privilege is largely inapplicable.⁵⁰ Similarly, the rationale of preventing improper treatment and abuses, when compulsion involves physical abuses of power or overly strenuous questioning, will be inapplicable. However, officers answering questions on behalf of a corporation may be vulnerable to these investigative approaches.
- 231 When a small corner dairy is under investigation, the owner or employee responding to questioning on the business’s behalf will in reality usually comprise the business itself. However, in that eventuality, he or she will be able to claim the privilege on his or her own behalf (at least under New Zealand law).

⁴⁹ Letter from S Kos to the Commission dated 1 February 1995.

⁵⁰ See Mason CJ’s and Toohy J’s comments to this effect in *Caltex* at 137 and the discussion in chapter 2.

Fair State – individual balance

- 232 The privilege's interest in maintaining the balance of power between individual and State, including the State's onus of proof, is reflected in du Parq LJ's additional comments in *Triplex Safety Glass*:
- [I]t would not be in accordance with principle that any person capable of committing, and incurring the penalties of, a crime should be compelled by process of law to admit a criminal offence. (409)
- 233 In *Caltex*, Mason CJ and Toohey J (135–138) objected to this approach, for these reasons. First, in general, a corporation is usually in a stronger position vis-à-vis the State than is an individual. This is because of the comparatively greater resources of corporations than individuals and the complexity of many corporate structures. Second, the onus of proof – beyond reasonable doubt – on the Crown would remain unimpaired if corporations were compelled to produce incriminating books and documents. Third, the judges also pointed to corporations' reliance on documentation to commit crime, and concluded that corporations have a significant advantage in shielding criminal activity if the privilege applies to documents.
- 234 There is scope for fraud to be concealed effectively in large corporations with complex structures and unclear chains of command. However, as already noted above, in New Zealand, the majority of corporations are more in the nature of small family businesses than giant conglomerates with complicated structures.
- 235 The judges' second argument touches on the issue of whether the abrogation of the privilege necessarily encroaches on the State's burden of proof.⁵¹ Even if abrogation would have no effect on the burden of proof, a narrow exception for corporations alone is unwarranted.
- 236 In *Caltex*, the judges' second and third arguments overlook the fact that individuals can indulge in many of the illegal activities which corporations commit with documentation. They can, for example, run assets through trusts, shift information to places of safety (ie, warehousing), shift documents offshore, launder money, commit tax evasion etc. In other words, the nature of complex transactions does not differ greatly between corporations and individuals. The documentation used is much the same. The solution the Commission has suggested in the preceding chapter is the removal of the privilege for pre-existing documents, rather than making a narrow exception in the law for corporations' documents.

Protection of the innocent

- 237 As discussed in chapter 2, the basis of the privilege's role in protecting the innocent from conviction is that silence does not always indicate guilt – there may be legitimate reasons for silence. In the context of corporate claims to the privilege, a corporation may have reasons other than guilt for not wishing to produce self-incriminating, pre-existing documents (eg, the material in the documents might give a misleading impression of guilt). However, in the corporate context, this rationale is open to the criticism that the privilege might shelter the corporation or individual officers who are guilty of wrongdoing.

⁵¹ For a discussion of the effect on the burden of proof of removing the right of silence, see *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), paras 15–25.

The corporation could shelter behind an officer's claim on his or her own behalf, or an officer could shelter behind the privilege invoked on behalf of the corporation. In the Commission's view, the removal of the privilege would reduce (but not entirely prevent) these occurrences.

- 238 If the privilege for corporations were removed, officers not incriminated in any way by the information which they are asked to supply would not be able to protect the corporation by claiming the privilege. However, it is accepted that, in some cases, the respective liabilities of the corporation and the officer will not be clearly demarcated. If an officer is personally suspected of wrongdoing, his or her claim to the privilege on the corporation's behalf is in a sense artificial. With the removal of the privilege for corporations, the officer would be required to "come out into the open" and invoke the privilege on his or her own behalf. For these reasons, the removal of the privilege for corporations is likely to enhance the detection capabilities of the police and Serious Fraud Office in relation to white collar crime.
- 239 As noted above, the Court of Appeal in *New Zealand Apple and Pear Marketing Board* held that because a corporation cannot give evidence and the case against a corporation can be gathered by recourse to its officers' statements, those statements should attract the privilege on the corporation's behalf. A corporation cannot make statements on its own behalf. However, despite this, the privilege is essentially a privilege against *self*-incrimination. In the Commission's view, the privilege should only be available to the person who is asked to supply evidence which incriminates him or her personally. In other words, the risk of prosecution or penalty is born by the person who chooses whether or not to give the incriminating information.

CONCLUSIONS

- The privilege for bodies corporate is distinct from the privilege which representatives may be able to claim on their own behalf.
- The privilege for bodies corporate should be removed by the Commission's proposed Evidence Code.
- The privilege is a privilege against *self*-incrimination rather than a privilege exercised on another person's behalf.
- The removal of the privilege for bodies corporate may reduce the incidence of officers and employees sheltering behind the body's privilege, and vice versa.
- At present, there is a risk that claims of privilege by bodies corporate can be circumvented, depending on to whom the subpoena is addressed.
- Bodies corporate, as distinct from their officers, cannot be pressured into making unreliable statements, nor do they suffer abuses of power of a direct physical or psychological nature.

10 Incrimination of Spouses

Should the privilege apply to protect the claimant's spouse from incrimination?

240 IT IS NOT CLEAR whether the privilege against self-incrimination can be claimed by a witness on behalf of his or her spouse under common law in New Zealand. There is an English case to the effect that the privilege would extend to disclosure tending to incriminate spouses. In *R v Inhabitants of All Saints, Worcester* (1817) 6 M & S 194, 200, Bayley J said:

If she had thrown herself on the protection of the Court on the ground that her answer to the question put to her might criminate her husband, in that case I am not prepared to say that the Court would have compelled her to answer; on the contrary, I think she would have been entitled to the protection of the Court.

More contemporary statements, suggest that the common law privilege may be "restricted to the person claiming it and not anyone else."⁵²

241 Historically, a wife and husband were treated as one for legal purposes: see Blackstone, *Commentaries* (19th ed, Sweet, London, 1836) vol 1, 442. Therefore, at common law, the privilege could be said to be restricted to the person claiming it, yet still extend protection to the spouse of that person. Furthermore, under common law, spouses were incompetent to testify against one another. By virtue of ss 4 and 5 of the Evidence Act 1908, and s 29 of the Evidence Amendment Act (No 2) 1980, a person is now competent to testify *against* his or her spouse but cannot be compelled to do so. The Commission will be considering the separate issue of spousal compellability in upcoming work within the evidence reference.

242 In the United Kingdom, s 14(1)(b) of the Civil Evidence Act 1968 extends protection in civil cases to cover incrimination of the spouse of the person questioned. However, the Commission does not favour this approach and is of the view that the privilege against self-incrimination should be removed in relation to spouses.

243 Essentially, the privilege is a privilege against *self*-incrimination. Nowadays, the argument that the incriminating disclosures about one spouse could somehow self-incriminate the other spouse making them is not compelling. This is not to discount the possibility that evidence given by one spouse in

⁵² Lord Diplock in *Rio Tinto Zinc Corporation Ltd v Westinghouse Electric Corporation Ltd* [1978] AC 547, 637: see also Murphy J's comments in *Rochfort v Trade Practices Commission* (1983) 57 ALJR 31, 37.

proceedings brought against the other could have undesirable consequences, both social and financial for the family unit. However, the competence and compellability provisions, already alluded to, largely address this concern.

- 244 The English position is also open to the criticism that it is out of date. It makes no provision for de facto relationships in the nature of marriage, including same-sex relationships.
- 245 The scope and efficacy of the privilege for communications between husband and wife is discussed fully in chapter 10 of the Commission's discussion paper *Evidence Law: Privilege* (NZLC PP23, 1994). Briefly, the Commission recommended that the spousal privilege recognised in s 29 of the Evidence Amendment Act should not be carried forward into the proposed Evidence Code. Where necessary, the court should 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 such evidence to be given (paras 245, 263). This approach is distinct, and gives rise to separate issues, from the privilege against self-incrimination.
- 246 There are a limited number of statutory provisions in New Zealand that extend the privilege against self-incrimination to answers which incriminate the spouse of a witness in specific circumstances. Section 18 of the Petroleum Demand Restraint Act 1981, for example, provides that no person shall be required under ss 13 or 17 to answer any question if the answer would tend to incriminate the person or his or her spouse (for further examples, refer to Appendix B). These provisions should be examined, with a view to removing the privilege for spouses.

CONCLUSIONS

- The issue of whether the privilege against self-incrimination can be claimed by a person to protect his or her spouse from criminal liability or civil penalty should not be confused with the completely distinct spousal privilege or with the issue of spousal compellability.
- It is unclear whether the common law privilege any longer applies to prevent claimants' spouses from being incriminated.
- The Evidence Code should restrict the protection given by the privilege against self-incrimination to the person claiming it.
- In relation to the privilege against self-incrimination, the idea that a person's identity should not be legally separate from his or her spouse is out-dated and discriminates between married couples and de facto, including same-sex, couples.
- The statutory provisions in New Zealand legislation which extend the protection given by the privilege against self-incrimination to spouses in particular situations should be examined, with a view to removing the privilege for spouses.

11 Incrimination Under Foreign Law

Should the privilege apply to protect the claimant from extraterritorial liability to prosecution or a civil penalty? Should the courts have a discretion to uphold or not uphold the privilege when the claimant faces extraterritorial liability?

NEW ZEALAND

- 247 **L**EGISLATIVE PROCEDURES provide for the taking of evidence overseas for a New Zealand court or in New Zealand on behalf of a foreign court: see, for example, Part IV Evidence Amendment (No 2) Act 1980; ss 48–48F Evidence Act 1908; ss 12, 18 and 31–33 Mutual Assistance in Criminal Matters Act 1992. In each of these, the privilege is expressly preserved, but it is not clear whether the privilege extends to incrimination occurring in the foreign country. Section 48D, for example, says that a person has “the same right to refuse to answer any question, . . . on the ground of privilege . . . as if the proceedings were pending in the High Court”. Subsection (2) provides that no person shall be compelled to produce any document that he or she could not be compelled to produce if the proceedings were pending in the High Court.
- 248 As has already been noted in chapter 1, the New Zealand Court of Appeal has recently considered the application of the privilege against self-incrimination when liability arises overseas: see *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278.⁵³ That case involved proceedings for judicial review, in which the plaintiffs asked that the Commission of Inquiry’s ruling be set aside. The ruling required them to give evidence before the Commission of Inquiry into the Cook Islands Tax Commission of Inquiry (otherwise known as the Winebox Inquiry). The plaintiffs argued (among other things) that the Cook Islands secrecy legislation enabled them to invoke the privilege, preserved by s 6 of the Commissions of Inquiry Act 1908 (NZ). Section 6 provides:
- Every witness giving evidence, and every counsel or agent or other person appearing before the Commission, shall have the same privileges and immunities as witnesses and counsel in Courts of law.
- 249 Section 227(3) of the Cook Islands International Companies Act 1981–2 states that any person who divulges any information about the membership, ownership, officers, affairs (etc) of an international or foreign company registered under the Act commits an offence against the Act. Sections 340–347 of the Cook Islands Act 1915 provide a procedure for extradition from New Zealand to the Cook Islands.

⁵³ At the time of publication, the Privy Council had confirmed the Court of Appeal’s decision, but no written decision has been produced. The Privy Council decision, dismissing the appeal by the three former European Pacific executives, was announced on 4 July 1996.

- 250 Four out of the five Court of Appeal judges held that the privilege could not be claimed in the particular case. The judges reached this conclusion by two different avenues. Cooke P, supported by Henry J and Thomas J, held that the privilege does not extend to liability arising overseas. Richardson J, supported by Henry J and Thomas J, said that the privilege was inapplicable in the case because there was no existing criminal liability, only a risk of prosecution in the Cook Islands for testifying before the Commission of Inquiry.

OTHER JURISDICTIONS

- 251 Overseas authorities are divided on the question of whether the privilege can be claimed for liability occurring under a foreign jurisdiction's law. There have been conflicting authorities in England (eg, *United States v McRae* (1868) LR 3 Ch Court of Appeal 79, for, and *King of the Two Sicilies v Willcox* (1851) 1 Sim NS 301, 61 ER 116, against). In *Davison*, McKay J for the minority followed *McRae*, in which Lord Chelmsford allowed the defendant's objection to answer interrogatories on the basis that his answers could lead to forfeiture of his property in the United States (347). McKay J distinguished *King of the Two Sicilies*, suggesting that the privilege was not extended in that case because the court did not have the law of Sicily before it (344). In the present case, the Cook Islands statutes were before the Court of Appeal. More recent English case law, such as *Arab Monetary Fund v Hashim* [1989] 1 WLR 565, denies the extension of the privilege. However, this reflects s 14(1)(a) of the Civil Evidence Act 1968 (UK), which confines the privilege to "criminal offences under the law of any part of the United Kingdom and penalties provided for by such law". In *Davison*, Thomas J said that because s 14(1)(a) has overturned *McRae*, the persuasiveness of that case has been weakened (350).
- 252 The United States appears to extend the privilege to incrimination under foreign law (eg, see *Murphy v Waterfront Commission of New York Harbour* 378 US 52 (1964)). However, as that case dealt with interstate rather than inter-country relations, it may not settle the question (*Davison*, Cooke P, 294 and Thomas J, 351). Certainly, Ciardiello says that the question remains open.⁵⁴
- 253 The Australian decisions also leave the issue open (eg, see *Jackson v Gamble* [1983] VR 552 and *Commissioner of Australian Federal Police v Cox* (1989) 87 ALR 163). However, the Evidence Act 1995 (Aust) expressly preserves the privilege in relation to liability to prosecution arising overseas (s 128(1)(a)).
- 254 When a claim of privilege is upheld, based on criminal liability arising overseas, s 128(2) and (5) of the Australian Act does not authorise the giving of a certificate of immunity, but the witness will be excused from giving the evidence (subs (4)). Incrimination under foreign law is outside the scope of the certification process because any immunity provided would be unenforceable in a foreign jurisdiction. In contrast with the Australian approach, the Canada Evidence Act 1985 abrogates the privilege and, as a consequence, no protection from incrimination under foreign law can be provided via the statutory immunity contained in s 5(2).

⁵⁴ Ciardiello, "Seeking Refuge in the Fifth Amendment: The Applicability of the Privilege Against Self-Incrimination to Individuals Who Risk Incrimination Outside the United States" (1992) 15 Fordham International Law Journal 722, footnote 3.

ARGUMENTS FOR AND AGAINST THE PRIVILEGE'S APPLICATION OVERSEAS

- 255 We now consider whether in New Zealand the privilege should extend to liability arising overseas or whether legislation should preclude this. The judges' decisions in *Davison* contain the main arguments for and against applying the privilege to liability occurring overseas. We briefly consider these, some additional arguments, and the justifications for s 14(1)(a) of the Civil Evidence Act (UK) in which the privilege was removed for liability arising overseas.

Relevance of the interests the privilege protects

- 256 In *Davison*, Thomas J reasoned that the privilege should not extend to liability arising overseas because the rationales behind the privilege are "less prevalent or pronounced" when the risk of liability arises overseas (352). It is true that in most cases the risk of prosecution or civil penalty imposed overseas will not be as imminent or likely as liability arising in the country in which the information has been compelled. In order for a person to be incriminated overseas, the foreign authorities must become aware of the disclosures made to officials of another State, often in a completely different context from that with which the foreign jurisdiction may be concerned. Cooke P recognised that the risk might have been more significant in the case before him if the Commissioner had sought to compel the plaintiffs to make disclosures in the Cook Islands rather than in New Zealand (294). However, it is doubtful, or at least uncertain, whether such a demand for information could have predominated over the Cook Islands secrecy laws: see Cooke P's discussion of *United States v First National Bank of Chicago* 669 F 2d 341 (1983), where he said:

It is said that where two states have jurisdiction each is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of a list of factors derived from the Restatement. (293)

- 257 At least one of the interests the privilege protects, discussed in chapter 2, is relevant in the same way as if the risk of liability arises in the country in which questions are asked. For example, the invasion of privacy and integrity of the human personality occurs at the point when disclosures are made and will be felt regardless of where liability arises. Nevertheless, we suggest that the other interests the privilege protects are less persuasive when the risk of liability arises overseas. This is because the officials compelling self-incriminating disclosures in New Zealand will not usually be representatives of the foreign State under which liability arises. Put another way, the New Zealand officials will not necessarily have any stake in incriminating the witness.

Sovereignty issues

- 258 Cooke P and Henry J said that when the privilege applies, it is absolute and allows of no discretionary relaxation (at least under common law):

Therefore, if the privilege applied to prevent prosecution for a breach of the Cook Islands secrecy law: it follows that the foreign State legislation which is arguably infringed would be given full recognition and therefore paramountcy over the wider interests directly relevant to the administration of justice in New Zealand.

(Henry J, 349: see also Cooke P's comments at 293 citing the Canadian case, *Spencer v The Queen* [1985] 2 CTC 310).

- 259 McKay J, on the other hand, contended that the privilege is not an absolute one, in that the prosecution or penalty feared must be reasonably likely to eventuate (344). Nevertheless, the requirement that there must be a “real risk” of self-incrimination is not particularly stringent, as Shaw LJ recognises in *Rio Tinto Zinc Corporation Ltd v Westinghouse Electric Corporation Ltd* [1978] AC 547, 581:

so long as the risk of self-incrimination is real in the sense that what is a potential danger may reasonably be regarded as one which may become actual . . .

In any case, the privilege *is* absolute in the sense that, once it applies, it cannot under common law be qualified by any competing principle (eg, territorial sovereignty).

- 260 Related to Cooke P’s and Henry J’s objection that foreign State legislation should not be given paramountcy over the administration of justice in New Zealand, is the difficulty that, if disclosures are made in New Zealand in return for a guarantee of immunity from use, the guarantee is not enforceable in the foreign jurisdiction where the risk of incrimination arises.

Practical difficulties

- 261 Aside from difficulties surrounding enforcement and the competing interests of two jurisdictions, courts are likely to experience practical difficulties in determining whether the risk presented by liability arising overseas is “real and appreciable”. In *Davison*, the Court of Appeal had the provisions of the Cook Islands legislation before it. However, in many cases, the laws and attitudes of the foreign jurisdiction will not be so accessible; although this risk can be overstated as communication technology advances.

- 262 The difficulties of determining whether claims based on liability arising overseas are legitimate are perhaps most debilitating when enforcement officers and officials, as distinct from courts, seek to make such a determination on the spot.

- 263 Section 14(1)(a) of the Civil Evidence Act 1968 (UK) which rules out the application of the privilege to foreign incrimination appears to have been enacted mainly to address practical difficulties. Section 14(1)(a) confines the privilege to “criminal offences under the law of any part of the United Kingdom and penalties provided for by such law”.

- 264 Section 14(1)(a) was enacted in the wake of the Law Reform Committee’s *Report on Privilege in Civil Proceedings, 16th Report* (Cmnd 3472, London, 1967), presented by the Lord Chancellor. The Committee envisaged that the judiciary would retain a discretion to apply the privilege, and no mention is made of officials dealing with claims of privilege. The Committee said:

The problem presents difficulties since, although an English judge is qualified to decide forthwith whether a witness’s objection to answering a question on the grounds that it might incriminate him under the law of any part of the United Kingdom is bona fide and realistic or not, it may well be difficult for him to reach such a decision where questions of the criminal law of foreign states are concerned. On the whole, we think that no absolute privilege should be given against self-incrimination under foreign law. The matter is best left to the general discretion of the judge in the particular circumstances in which the claim arises. (7)

- 265 At first sight, the option of the courts having a discretion to determine whether to uphold a claim of privilege when the risk occurs overseas may seem an attractive option. It allows the degree of knowledge and risk of self-incrimination to be assessed by the judge in the particular case and also allows sovereignty issues to be taken into account. However, we suggest that such an approach would create an unacceptable tension between expediency and the privilege, because currently, if the privilege applies, it applies absolutely. In other words, the privilege is an explicit censure against compelled self-incrimination in specifically pre-determined situations of need.
- 266 These issues are not easy to resolve. We therefore express only a tentative view in favour of removing any opportunity for the privilege to apply to liability arising overseas, and we seek specific submissions on the issues canvassed in this chapter.

CONCLUSIONS

- In several jurisdictions, the question whether the privilege extends to the risk of liability occurring overseas, has been unsettled for some time.
- Recently, a majority of the New Zealand Court of Appeal has held that the privilege does not extend extraterritorially: see *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278. This decision was upheld by the Privy Council.
- Although the interests that the privilege protects apply in some cases when the risk of liability occurs overseas (eg, protection from an invasion of privacy), in most cases the risk will be less pronounced. This is because the officials compelling self-incriminating disclosures in New Zealand will not usually be representatives of the foreign State under which liability arises.
- Once a claim of privilege is held to be legitimate in a particular situation, it cannot be limited or negated by any competing privilege, such as territorial sovereignty. This means that when the privilege is upheld to protect against liability arising overseas, that definable but often fairly remote risk will prevail over what may in some cases be more pressing public interest reasons for compelling disclosure in New Zealand.
- If a claim of privilege for liability arising overseas is upheld in New Zealand, any immunity granted is not enforceable overseas, because this would deny the sovereignty of the foreign State.
- It is difficult for New Zealand courts and, in particular, New Zealand officials, to assess claims of privilege when the asserted liability arises overseas.
- The Commission expresses a tentative preference for removing the privilege for liability arising overseas, and seeks submissions on this difficult issue.

Part III

LEGISLATION
AND
THE PRIVILEGE

12

Express Preservation or Removal

In which particular circumstances should the privilege be removed by legislation, how should this be done, and what kinds of immunities should be offered in place of the privilege?

INTRODUCTION

- 267 **I**N NEW ZEALAND, many statutory provisions confer broad powers on courts, quasi-judicial tribunals, government officials, and even private individuals, to compel others to answer questions or produce documents. The statutory provisions fall into four broad categories, each of which will be discussed in this part of the paper. They are
- provisions which expressly preserve the privilege,
 - provisions which expressly remove the privilege,
 - provisions which are silent about their impact on the privilege, and
 - provisions which preserve the privilege but provide a certification procedure by which the witness may voluntarily waive the privilege.
- 268 This chapter is concerned with the first two categories – express preservation or removal of the privilege. The following chapter focuses on an example of express removal contained in the Serious Fraud Office Act 1990. Chapter 14 discusses provisions which are silent about their impact on the privilege, and Chapter 15, the Australian voluntary disclosure procedure.
- 269 As background to the following discussion, see Appendix B, which contains a list of explicit statutory references to the privilege in New Zealand. The majority of provisions in Appendix B preserve the privilege. While there is no set pattern, removal appears to occur most frequently in what may loosely be termed commercial and governmental spheres (ie, statutes concerned with the administration of government and the central economy). Preservation is more common in the regulatory welfare sphere (ie, statutes concerned with public health and particular markets).

EXPRESS PRESERVATION

- 270 In those New Zealand statutes expressly preserving the privilege, the status accorded the privilege varies markedly. In some cases, the particular context with which the legislation deals may account for this. In others, it is difficult to detect any reason for differences concerning

- the words used to preserve the privilege,
- whether reference is made to documents as well as to oral statements,
- whether there is an obligation to inform witnesses of the privilege,
- the wording of provisions making failure or refusal to answer questions or produce documents an offence, and
- the maximum penalty for failing to answer questions or produce documents.

Formulae for express preservation

- 271 The privilege has been expressly preserved in a number of ways. Examples serve to illustrate this.
- 272 Section 11 of the Social Security Act 1964 empowers the Director-General of Social Welfare (by notice in writing) to require certain information or documents from Crown employees, in order to detect welfare fraud and wrongful claims to benefits. Subsection (4) expressly preserves the privilege against self-incrimination in the following way:
- Nothing in subsection (1) of this section shall require any person to provide any information or produce any document that would be privileged in a Court of law on the ground of self-incrimination.⁵⁵
- 273 In contrast to the specific reference to the privilege against self-incrimination in the current s 11, the Bill reported back from the Social Services Select Committee contained a less specific provision:
- Except as provided in subsection (5) of this section, nothing in subsection (1) of this section requires any person to provide any information or produce any document that would be privileged in a Court of law.
- 274 A similar way of expressly preserving the privilege is for legislation to bestow broad information-gathering powers on investigative agencies, while at the same time preserving all privileges or immunities which would be available to a witness in a court of law. Examples of this can be found in the Commissions of Inquiry Act 1908, and they apply prior to and during hearings. Section 4C(4) states:
- Every person shall have the same privileges in relation to the giving of information to the Commission, the answering of questions put by the Commission, and the production of papers, documents, records, and things to the Commission as witnesses have in court.⁵⁶
- 275 As already noted in the preceding chapter, in relation to people summonsed to give evidence before a Commission of Inquiry, s 6 provides:
- Every witness giving evidence, and every counsel or agent or other person appearing before the Commission, shall have the same privileges and immunities as witnesses and counsel in Courts of law.

⁵⁵ In 1994, the Social Services Select Committee initiated an inquiry into the privilege provisions of s 11 of the Social Security Act 1964. The Social Welfare Reform Bill (No 3), together with s 11, was also the subject of a submission by the Legislation Advisory Committee in 1994. Proposed s 11(4) only protected people suspected of the offences specified in the section. The common law privilege has no such qualification. The Select Committee decided that the broader scope of the privilege should be reflected in s 11.

⁵⁶ The Commissions of Inquiry Act was amended in 1995 to bestow upon retired judges, appointed as members of Commissions of Inquiry, the same powers, privileges and immunities applicable to judges of the High Court under the Judicature Act 1908. These include the power to order that a witness who refuses to attend or disclose information is in contempt: see, in particular, s 13A.

- 276 Apart from Commissions of Inquiry established under the Commissions of Inquiry Act, certain other bodies have their powers. For example, s 153 of the Legal Services Act 1991 says:
 For the purposes of this Act, sections 4A to 9 of the Commissions of Inquiry Act 1908 shall apply to the Board and the Authority as if those bodies were Commissions of Inquiry established under that Act.
- 277 Yet another formula for preserving the privilege can be found in s 37(6) of the Ozone Layer Protection Act 1990:
 Nothing in this section shall limit or affect the privilege against self-incrimination.

Documents and oral statements

- 278 Several statutory provisions expressly preserve the privilege in relation to oral statements only. Documentary and other real evidence is excluded. An example of this is contained in the Films, Videos, and Publications Classification Act 1993. Section 106(4) gives inspectors powers, on entry to non-residential premises where films and publications are displayed or offered for sale, to require the production of documents for inspection and to demand information reasonably required for the purposes of the inspection. Subsection (5) limits the express protection from self-incrimination to oral answers:
 No person shall be required to answer any question by an Inspector if the answer would or could tend to incriminate that person, and that person shall be informed of that right before an Inspector exercises the power to demand information conferred by this section.
- 279 A slightly different wording, which also restricts the privilege's ambit to oral answers, can be found in s 86(2) of the Casino Control Act 1990. Section 86 gives inspectors powers to require casino licence holders and employees to produce certain documents, gaming equipment and, generally, to provide information. Subsection (2) states:
 No person shall be required to answer any question asked by an inspector if the answer would or could tend to incriminate that person.
- 280 Section 4C(4) of the Commissions of Inquiry Act is a provision preserving the privilege for documents (see above). Slightly different wording to the same effect is used in s 27(1)(b) of the Fishing Vessel Ownership Savings Act 1977 (an offence provision). The privilege for information, encompassing documents, forms part of the offence of failing to supply information in writing to the National Bank of New Zealand Limited. There is a proviso to the offence as follows:
 Provided that no person shall be required to supply any information tending to incriminate himself . . .

Reinforcement of the privilege

- 281 In most of the above statutory provisions there is no explicit duty imposed on officials enforcing the various Acts to warn those under investigation of the availability of the privilege. An exception is s 106(5) of the Films, Videos, and Publications Classifications Act (quoted above), which expressly obliges inspectors to inform people of their right to claim the privilege.

Wording of offence provisions

- 282 Some offences of failing or refusing to comply with requests for information are strict liability offences (eg, see the Fisheries Act 1983), while others provide that non-compliance does not amount to an offence if there were good reasons for it (eg, the Commissions of Inquiry Act offences). The words used to convey the latter vary, and include "sufficient cause" (eg, s 11(4) Social Security Act) and "insufficient excuse" (eg, s 9 Commissions of Inquiry Act). In some instances, such as s 134(b) of the Films, Videos, and Publications Classifications Act, the privilege is expressly referred to as a legitimate excuse.

Maximum penalties

- 283 The range of maximum penalties for failing or refusing to comply with statutory information-gathering powers is broad, and in most cases, there is no apparent justification for the range. As an example, a breach of s 79(3) of the Fisheries Act is punishable by a maximum penalty of \$250,000 and an additional fine of \$1,000 for every day the breach continues. In contrast, failure to comply with the requests of a health and safety in employment inspector under the Health and Safety in Employment Act 1992 is punishable by a maximum fine of \$50,000, if the failure caused any person serious harm, and by a maximum fine of \$25,000 in any other case.

EXPRESS REMOVAL

- 284 The following discussion looks at the variety of New Zealand's approaches to removing the privilege, together with statutory immunities provided in place of the privilege, namely use immunities, use fruits immunities and transactional immunities. The New Zealand legislature's approach to removal has been piecemeal, concerning the contexts in which the privilege is removed, the extent and language of removal, and the breadth of immunities provided in the privilege's stead.

Formulae for removal

- 285 An example of a provision which removes the privilege comprehensively in the particular area (ie, encompassing all information and the privileges of liability to a civil penalty and forfeiture) is contained in s 49(3) of the Gas Act 1992. Subsection (3) provides:

No person shall be excused from answering any question, or furnishing any information or particulars, when required to do so under subsection (1) of this section on the ground that compliance with that requirement could or would tend to incriminate that person or subject that person to any penalty or forfeiture.

- 286 Other provisions remove the privilege against self-incrimination, and do not refer specifically to the penalty and forfeiture privileges. Or, in removing the privilege, they refer to oral statements specifically, and do not indicate whether the privilege for documentary evidence remains. Section 267(1) of the Companies Act 1993 exhibits both of these features:

A person is not excused from answering a question in the course of being examined under section 261 or section 266 of this Act on the ground that the answer may incriminate or tend to incriminate that person.

- 287 In contrast, s 15 of the Secret Commissions Act 1910 is an example of a provision containing a very specific formula for removal (ie, in relation to the privilege in civil or criminal proceedings concerning an offence against the Act):

No person shall in any civil or criminal proceedings be excused from answering any question put either viva voce or by interrogatory, or from making any discovery of documents, on the ground that the answer or discovery may criminate or tend to criminate him in respect of an offence against this Act . . .

Use immunities

- 288 Use immunities are immunities from the admissibility of self-incriminating disclosures in proceedings and they are by far the most common kinds of immunities provided for in New Zealand legislation. They can be given in exchange for compelled self-incriminating information at an investigative stage or in proceedings, as in the following example from s 267(2) of the Companies Act:

The testimony of the person examined is not admissible as evidence in criminal proceedings against that person except on a charge of perjury in relation to that testimony.

- 289 The varieties of statutory use immunities include immunity from use in proceedings involving prosecution for specific offences (eg, s 15(2) of the Secret Commissions Act); immunity from admission in criminal proceedings alone (eg, s 267(2) of the Companies Act); immunity extending to civil proceedings (eg, s 49(4) of the Gas Act); immunity restricted to documents (eg, s 15 of the Secret Commissions Act); and immunity extending to documents (eg, s 49(4) of the Gas Act). In addition, some immunity provisions expressly exclude immunity from use of the incriminating disclosures in prosecutions for perjury (eg, s 267 of the Companies Act), while others make no explicit reference to perjury (eg, s 15 of the Secret Commissions Act).
- 290 Use immunities only apply to the subsequent admissibility of compelled self-incriminating information in *proceedings*. Therefore, they are not comprehensive protection against other agencies gaining access to the information, either prior to, or during, proceedings.

Use fruits immunities

- 291 Use fruits immunities (also known as derivative use immunities) are immunities from the admissibility of information in proceedings derived from compelled self-incriminating disclosures. The immunity prevents the admissibility of evidence of an incriminating nature discovered as a consequence of the original self-incriminating disclosure as well as the admissibility of the original compelled disclosure. As Appendix B shows, we could find no examples in New Zealand legislation of use fruits immunities. This is somewhat surprising, given that the common law privilege addresses the consequences of disclosure of information, in addition to the disclosure itself: see *R v Boyes* (1861) 121 ER 730, 738.

Transactional immunities

- 292 Transactional immunities are immunities from prosecution arising as a direct or indirect result of making compelled self-incriminating disclosures. We have located only two legislative examples of transactional immunities, in s 253 of the Legislature Act 1908 and s 248 of the Electoral Act 1993.⁵⁷ Both provisions set out a procedure whereby a person required to provide self-incriminating information is in return issued with a certificate. On production of the certificate, any resulting proceedings against the person will be stayed. Immunities from prosecution are sometimes granted on a discretionary basis by courts or prosecutors: see the discussion in chapter 14.
- 293 In Western Australia, it is possible for a certificate of immunity from prosecution to be given in civil proceedings: see *Re Application for Inquiry, Election of Officers, Transport Workers' Union of Australia, Western Australian Branch* (1989) 89 ALR 575, 579. However, Cotton notes that this is not typical and transactional immunities are usually granted only in criminal proceedings.⁵⁸

WHEN SHOULD THE PRIVILEGE BE REPLACED BY AN IMMUNITY?

- 294 As already noted, legislation which currently expressly preserves or removes the privilege does not clearly reveal in what circumstances either approach will be adopted. The Commission believes that some consistency needs to be introduced into the legislation regarding its treatment of the privilege. The starting point in deciding whether it is appropriate to remove the privilege in a particular context and replace it with an immunity is that the privilege applies unless it has been explicitly removed. The privilege's significant status has been reinforced in ss 23(4), 25(d) and 27(1) of the New Zealand Bill of Rights Act 1990. Specific factors which should be considered by policy-makers and drafters include the following:
- The nature and the degree of the risk of self-incrimination in the particular circumstances (ie, is the risk strong and is the potential penalty serious?).
 - The necessity of the self-incriminating information for the effective performance of statutory functions or determination of material issues in proceedings. For example, in order to prevent the importation and publication of illegal material, it is necessary for inspectors to have powers to require the production of documents for inspection under s 106(4) of the Films, Videos, and Publications Classification Act.
 - Whether or not an alternative legal means of obtaining the necessary information is available (eg, the issue of a search warrant to seize incriminating documents, or the availability of real evidence or, under the Commission's proposals, whether pre-existing documents are produced).
 - Whether or not, in the particular context under consideration, the privilege provides important protections at the time when the disclosure is sought. For example, in the criminal investigative context, the privilege plays a role

⁵⁷ At first sight, s 17 of the Evidence Act 1908 contains a transactional immunity, but the intent behind the provision, and how the immunity works, is difficult to grasp.

⁵⁸ "Company Directors and the Privilege Against Self-Incrimination in Civil Proceedings: Is Use Immunity the Answer? Part 3" (1994) 15 *The Company Lawyer* 163.

in preventing abusive interrogation techniques which cannot be addressed by an immunity from use of the information in an entirely different context. In comparison, questioning in open court does not carry the same risk.

- Whether or not any use and use fruits immunity provided in the privilege's stead can guarantee sufficient protection to the person in the circumstances. For example, a person giving evidence in civil proceedings in return for an immunity may be liable to the imposition of a civil penalty in a related hearing before a tribunal over which the immunity may have no jurisdiction: see further the discussion in chapter 15.

295 The Commission seeks comment on these principles, in relation to existing provisions. The desirability of a review of existing provisions is discussed in chapter 14.

HOW SHOULD THE PRIVILEGE BE PRESERVED OR REMOVED?

296 Elsewhere in this paper it has been proposed that the Evidence Code should expressly preclude claims of privilege in relation to

- bodies corporate,
- spouses incriminated by a person's disclosures,
- pre-existing documents and real evidence,
- liability to forfeiture and ecclesiastical censure, and
- extraterritorial liability.

297 We have also proposed (in chapter 14) that statutory information-gathering powers should not be interpreted as removing or limiting the privilege unless this is done clearly and explicitly. If these proposals are implemented, some current legislative provisions need to be amended.

298 Given the proposed clarification and reiteration of the privilege in the Evidence Code, we have considered whether preservation clauses in particular information-gathering provisions will be necessary. The Commission has reached the conclusion that preservation clauses are desirable as a reminder to those exercising statutory powers in information-gathering contexts of the privilege's existence and application.

299 In addition, preservation provisions should impose an express obligation on the questioner to inform the person from whom self-incriminating disclosures are sought of his or her right to claim the privilege, along the lines of s 106(5) of the Films, Videos, and Publications Classifications Act. The need to inform people who have been detained or arrested under any enactment of their rights is already reflected in s 23 of the Bill of Rights Act.

300 In making the proposal that there should be an obligation to inform, the Commission nevertheless recognises that officials exercising information-gathering powers at an investigative stage are often at a disadvantage in knowing what is the appropriate response to a claim of privilege. Brennan J acknowledged this in *Pyneboard v Trade Practices Commission and another* [1983] 45 ALR 609, 629:

How and by whom would the claim be decided? Would the obligation be defeated merely by the person from whom the information is sought claiming the privilege? Or would the claim of privilege defeat the obligation only if it was admitted by the agency which is seeking to enforce the obligation?

- 301 The courts have been gradually introducing clarity to this area of the law. For example, recent decisions have indicated that
- an assertion by a suspect or counsel that answers to certain questions tend to be self-incriminating is not enough (*Ministry of Agriculture and Fisheries v Linton* (unreported, District Court, Wellington, 5 May 1993, CRNH2085017182, Henwood DCJ); and
 - responding to an order to produce documents by attaching the condition that answers would only be given if the questions were put in writing, constitutes an offence of refusing to comply with the order (*Charlesworth v Collector of Customs* (unreported, High Court, Auckland, AP 186/91, 19 August 1991, Robertson J).
- 302 Alongside statutory obligations to inform individuals of their right to claim the privilege and judicial clarification of what that right involves, there is a need for agreed protocols or administrative guidance for the people exercising statutory powers (including tribunals) and counsel for suspects in investigative contexts (with perhaps the aid of the New Zealand Law Society), to foster awareness and uniformity of practice concerning
- when a claim of privilege by a witness is appropriate and should be upheld,
 - to what extent a claim of privilege needs to be substantiated by the witness for it to be upheld, and
 - what the appropriate responses are by officials to claims.
- 303 It may be that there are other means of assisting enforcement agencies in deciding whether claims of privilege are legitimate in particular cases. For example, it would be possible, albeit cumbersome, to design a process by which claims could be brought before a court for a ruling when they arise. The Commission invites submissions on this issue.
- 304 In relation to proceedings as distinct from investigations, we have already noted that it is customary for a court to warn witnesses of the risk of self-incrimination and of the availability of the privilege in proceedings, but there is no obligation to do so (*R v Goodyear-Smith* (unreported, High Court, Auckland, 26 July 1993, T 332/92, Anderson J)): see chapter 15 for discussion on whether there should be a statutory obligation to inform witnesses in court proceedings of the risk of self-incrimination when the risk arises.
- 305 To avoid any doubt, when the privilege against self-incrimination is preserved in legislation, provisions making it an offence to fail or refuse to supply information should be expressly subject to the preservation provision. Where possible, the language used and the maximum penalties in such offence provisions should also be consistent across the statute book.

WHAT KINDS OF IMMUNITIES SHOULD REPLACE THE PRIVILEGE?

- 306 The use immunity protects only the disclosure and is not concerned with the consequences of that disclosure. Therefore, when a use immunity is provided in place of the common law privilege, it is not as complete a protection against self-incrimination. As Lord Wilberforce observed in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, 443, disclosure of information may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating nature... The party from whom disclosure is asked is entitled, on established law, to be protected from these consequences.

- 307 In the 1980s, it became common in Australian federal legislation to provide that, where the privilege was removed, immunity from admissibility was granted, not only for resulting answers, but also for information obtained as a direct or indirect consequence of those answers (eg, s 48(6) Proceeds of Crime Act 1987). As a result of submissions made by the Australian Securities Commission, the Report of the Joint Statutory Committee on Corporations and Securities, *Use Immunity Provisions in Corporations Law and the Australian Securities Commission Law* (Canberra, 1991), concluded that the problems caused by use fruits immunities were such as to frustrate the achievement of Parliament's objective of cleaning up Australia's capital markets.⁵⁹
- 308 The Australian Securities Commission suggested that a corporate criminal might consciously use the statutory immunities to make a full confession for which he or she could not be prosecuted.⁶⁰ The argument was also made that use fruits immunities place too great an onus on the prosecution (ie, the prosecution must prove beyond reasonable doubt that evidence was not obtained from information given by the compelled witness). These reasons for discarding use fruits immunities are not convincing.
- 309 First, a company director would be wary of volunteering anything to his or her detriment, because of the possibility of civil proceedings (Cotton, 132). Second, the Australian Securities Commission's claim that the burden of proof is too onerous on the prosecution can be disputed by reference to *Kastigar v United States* 406 US 441 (1972). In that case, the court suggested that the "government will have no difficulty in meeting its burden by mere assertion if the witness produced no contrary evidence" (469). Third, the statements from the Australian High Court on the question of onus, suggest that it lies on the defendant, rather than on the prosecution (Cotton, 132). Murphy J in *Sorby v The Commonwealth* (1983) 46 ALR 237, 260 said, for example:
- Even immunity from derivative use is unsatisfactory, because of the problems of proving that other evidence was derivative, and because of the real possibilities of innocent or deliberate breach of the immunity. Hence the trend in the United States has been to "transactional immunity" that is, that once a witness has been compelled to testify about an offence he or she may never be prosecuted for that offence, no matter how much independent evidence may come to light.
- 310 In any case, we suggest that the Australian Securities Commission's view is less persuasive in the face of the recent extension of the voluntary certification procedure in s 128 of the Evidence Act 1995 (Aust) to a use fruits immunity. Subsection (7)(b) provides that "evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence" cannot be used against the person (except in criminal proceedings for perjury). This is subject to the rider, in s 128(8), that the certification procedure does not apply to the giving of evidence by criminal defendants when the self-incriminating evidence relates to a fact in issue in the immediate proceedings. When a use fruits immunity is granted at an investigative stage, it will prevent the admissibility of the protected evidence in subsequent proceedings.

⁵⁹ Para 4.2, cited in Cotton, "Company Directors and the Privilege Against Self-Incrimination in Civil Proceedings: Is Use Immunity the Answer? Part 2" (1994) 15 *The Company Lawyer* 131.

⁶⁰ For a recent report discussing the Australian Securities Commission's powers, see Senate Legal and Constitutional References Committee, *Investigatory Powers of the Australian Securities Commission* (Canberra, 1995).

- 311 In New Zealand, the case for suggesting that a use and use fruits immunity should be provided when the privilege is removed is reinforced by ss 23(4), 25(d) and 27(1) of the Bill of Rights Act.
- 312 The Commission proposes that when legislation removes or restricts the privilege in a particular context, both a use immunity and a use fruits immunity should generally be provided in its stead. A use immunity alone should only be acceptable if those sponsoring the proposed legislation can show that provision of a use fruits immunity would thwart an identifiable and specific objective of the legislation, and that that objective outweighs the need to give the person comprehensive protection from self-incrimination in the particular statutory context. What we envisage is an onus on the sponsor, analogous to that in s 5 of the Bill of Rights Act – namely, those who seek to limit rights contained in the Act must show that those limits are reasonable: see *MOT v Noort* (1992) 3 NZLR 260, 283, where Richardson J discussed the requirements of s 5. We seek submissions on this proposal.
- 313 Any use immunity or use fruits immunity provided should not prevent the admissibility of self-incriminating information disclosed in a prosecution for perjury or deliberately making false statements. A person who deliberately misleads representatives of the State carrying out statutory powers can be said to have forfeited the protection which the privilege, or statutory immunities in its place, provides. The interests which the privilege protects (discussed in chapter 2) are, in these circumstances, largely inapplicable. For example, there is no need to protect the person from interrogative suggestibility leading to unreliable admissions, because the person has calculatedly chosen to lie.
- 314 The Commission does not propose the widespread use of statutory transactional immunities because they are heavy-handed. Criminal prosecutions are not merely impeded by them, but prevented. Generally, the privilege is not a means by which to *prevent* prosecutions or civil actions for a penalty, but rather to protect witnesses in the event of such proceedings. Because of this encroachment on prosecutorial discretion, statutory transactional immunities may be open to the criticism that they are against the public interest in bringing offenders to justice.

CONCLUSIONS

- In New Zealand legislation, there is no set pattern determining when the privilege will be preserved or removed.
- There is little consistency in the language used to preserve or remove the privilege, or concerning
 - whether provisions will extend to documents or to civil penalties and forfeiture,
 - whether there is an obligation to inform witnesses of their right to claim the privilege,
 - the wording of offence provisions for failing to supply information, and
 - the maximum penalties in offence provisions.
- When statutory powers are set out in legislation and the privilege is removed, use immunities are generally provided. There are no known examples of use fruits immunities, and transactional immunities are rare, in New Zealand.

- The Commission believes that consistency needs to be introduced into the legislation affecting the privilege.
- The starting point in deciding whether the privilege should be removed or limited in a particular context is that the privilege applies unless explicitly removed or limited, and that the privilege's significance has been reinforced by ss 23(4), 25(d) and 27(1) of the New Zealand Bill of Rights Act 1990.
- In determining whether removal or limitation is appropriate in a given context, drafters and policy-makers should consider the following:
 - the nature and the degree of the risk of self-incrimination in the particular circumstances;
 - the necessity of the self-incriminating disclosures for the effective performance of statutory functions or determination of material issues in proceedings;
 - whether or not an alternative legal means of obtaining the necessary information is available (eg, the issue of a search warrant to seize incriminating documents, or the existence of real evidence);
 - whether or not the privilege provides important protections at the time when the disclosure is sought (eg, is there a prospect of abusive questioning techniques?), which an immunity cannot provide;
 - whether or not any use or use fruits immunity provided in the privilege's stead can guarantee sufficient protection to the person in the circumstances.
- When statutory powers to gather information are contained in legislation and the privilege is to continue to be available, the privilege should be explicitly preserved in the legislation (by reference to the Evidence Code provisions) to remind those exercising the powers of its existence and application.
- Preservation provisions should impose an express obligation on the questioner to inform the person from whom self-incriminating disclosures are sought of his or her right to claim the privilege: see chapter 15 for how this proposal should be implemented in the course of *proceedings*.
- Protocols and guidelines should exist alongside statutory obligations to inform individuals of their right to claim the privilege and case law clarifying how such claims should be responded to. They should be drafted by the people exercising information-gathering powers in investigative contexts, together with counsel representing suspects in investigative contexts (perhaps with the aid of the New Zealand Law Society), to foster awareness and uniformity of practice concerning
 - when a claim of privilege by a witness is appropriate and should be upheld,
 - to what extent a claim of privilege needs to be substantiated by the witness for it to be upheld, and
 - what the appropriate responses are by officials to claims.
- To avoid any doubt, when the privilege is preserved in legislation, provisions making it an offence to fail or refuse to supply information should be expressly subject to the preservation provision.
- The language used and maximum penalties in offence provisions for failing to disclose information should, where possible, be consistent across the statute book.

- When the privilege is removed in a particular context, a use and use fruits immunity should usually be provided.
 - A use immunity alone should be acceptable only if those sponsoring the proposed legislation can show that in the particular context the provision of a use fruits immunity would thwart an identifiable and specific objective and that the objective outweighs the need to give the person comprehensive protection from self-incrimination.
 - Statutory immunities should not prevent the use of self-incriminating disclosures in prosecutions for perjury.
 - The Commission does not propose the widespread use of transactional immunities because they are heavy-handed. Criminal prosecutions are not merely impeded by them, but prevented.
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13

Removal of the Privilege: Serious Fraud

Is the removal of the privilege, and its replacement with a partial use immunity for oral disclosures, justified in the detection of serious fraud? Should the Serious Fraud Office Act 1990 be amended and to what effect?

INTRODUCTION

- 315 **T**HIS CHAPTER LOOKS IN DETAIL at an example of legislation which removes the privilege in a particular context – namely, the investigation of serious fraud. The aims of this chapter are two-fold. The first aim is to demonstrate the effect on existing legislation of implementing the Commission's proposals in chapter 12. The second is to consider the implications for the privilege if ss 27 and 28 of the Serious Fraud Office Act 1990 continue in their current form.
- 316 In preparation for this chapter, the Commission has consulted with the Director and staff of the Serious Fraud Office. The views of the Office are referred to throughout the following discussion.
- 317 The Serious Fraud Office Act 1990 gave statutory recognition to a specialist office to investigate fraud and was passed in the wake of the economic crash of 1987. The Act was generally well received by the public and by politicians on both sides of the House. The Act was based on the Criminal Justice Act 1987 (UK), although the English Serious Fraud Office has no investigative powers in relation to people who are not themselves suspects: see s 2(1) of the Criminal Justice Act and compare with s 5 of the Serious Fraud Office Act which empowers the Director to require any person to answer questions or produce information when the Director suspects the person has information relevant to an investigation under the Act.
- 318 The Justice and Law Reform Select Committee received only seven submissions on the Serious Fraud Office Bill, and only one of these (the submission from the National Council of Women) opposed the establishment of a separate agency to deal with one type of crime.⁶¹
- 319 In relation to cls 31 and 32 (now ss 27 and 28, set out below), which remove the privilege and provide a use immunity in its stead, the National Council of Women said that the clauses infringed a basic human right – the right of silence.

⁶¹ Department of Justice, *Report to the Justice and Law Reform Select Committee: Serious Fraud Office Bill* (Wellington, 6 April 1990).

The New Zealand Law Society's submission suggested that clses 31 and 32 should be deferred until a comprehensive study of the right of silence could be conducted across the range of investigative and criminal legislation. The Legislation Advisory Committee did not comment on the issue of self-incrimination, other than to note that there were wider policy issues which the Law Commission would be considering in the course of its review of the law relating to criminal procedure.

- 320 In the Second Reading Speeches on the bill, Mr Paul East, MP called for a total review of the right of silence. He said:

The right to silence should be considered in its entirety. My major criticism of the Bill is that the House is dealing with the right to silence in isolation. (508 Hansard 2352)

- 321 The Commission will soon be publishing its final report on the right of silence. We now undertake the consideration of wider policy issues concerning the privilege against self-incrimination. The Commission's review is impaired by the fact that it is a review after the event and the privilege has already been removed by s 27. Nevertheless, the existence of ss 27 and 28 continues to raise questions about the privilege's application in other contexts.

SECTIONS 27 AND 28

- 322 Section 27 removes the privilege:

No person shall be excused from answering any question, supplying any information, producing any document, or providing any explanation pursuant to section 5 or section 9 of this Act on the ground that to do so would or might incriminate or tend to incriminate that person.

- 323 Section 28(1) provides:

A self-incriminating statement made orally by a person (whether or not the statement is recorded in writing) in the course of answering any question, or supplying any information, or producing any document, or providing any explanation, as required pursuant to section 5 or section 9 of this Act, may be used in evidence against that person only in a prosecution for an offence where the person gives evidence inconsistent with the statement.

- 324 The Director has both investigating and prosecuting powers and responsibilities under the Act.

- 325 The Director has powers under Part I of the Act when he or she has reason to suspect that an investigation into the affairs of any person may disclose serious or complex fraud (s 4). Section 5 of Part I authorises the Director to require (by written notice) that *any* person must produce information or documents or answer questions about documents that may be relevant to the investigation. In s 6, the Director is authorised to apply to a judge for a search warrant if a response to the written notice has been unsatisfactory, or because it is impractical to serve a notice.

- 326 The Director's investigative powers under Part II of the Act apply once he or she has reasonable grounds to believe that an offence involving serious or complex fraud may have been committed. Section 9 gives the Director power, by written notice, to require a person whose affairs are being investigated, or any other person whom the Director has reason to believe may have information or documents relevant to the investigation,

- to attend before the Director, with or without counsel,
 - to answer questions and supply information which the Director has reason to believe are relevant to the investigation, and
 - to produce documents for inspection which the Director has reason to believe are relevant to the investigation etc.
- 327 Section 10 contains search warrant powers equivalent to those in s 6. Section 34 authorises any person appointed by the Director to investigate to exercise the powers in ss 5 and 9, provided he or she is accompanied by a designated member of the Serious Fraud Office. According to s 33, the Director has power to delegate any of his or her functions or powers in Parts I and II, provided the delegation is in writing to a designated member of the Serious Fraud Office, including people seconded to the Office. Section 50 authorises the Director to exercise the powers conferred under ss 5 and 9, regardless of whether proceedings have commenced in respect of any matter under investigation.
- 328 Section 28(1) is modelled on s 2(8) of the Criminal Justice Act. Its wording is unclear. Unlike other immunities in New Zealand legislation (see chapter 12), the provision does not say when evidence cannot be used in evidence, but rather when it can. In addition, the words “only in a prosecution for an offence where” could be interpreted in two conflicting ways:
- the use immunity could be limited to criminal prosecutions so that the self-incriminating disclosures would be usable in other contexts; or
 - the use immunity could prevent the self-incriminating disclosures from being usable in contexts other than in a criminal prosecution.
- According to the Department of Justice’s report to the Justice and Law Reform Select Committee on the Serious Fraud Office Bill, dated 6 April 1990, the latter approach appears to have been the intention:
- Before a self-incriminating statement may be admitted, the following prerequisites must be met:
- (a) the statement must have been made pursuant to sections 9 or 13 [now ss 5 and 9];
 - (b) there must be a prosecution for a criminal offence; and
 - (c) evidence given subsequently by the maker of the statement must be inconsistent with the original statement. (20)
- 329 The use immunity in s 28 does not guarantee protection from use of *all* oral disclosures made prior to trial but is limited to consistent oral statements, excluding both inadvertently and deliberately false oral statements.
- 330 Therefore, if a defendant elects to give evidence in a prosecution for fraud by the Office, any oral information he or she has been compelled to disclose at the investigative stage will be admissible if the defendant’s testimony is inconsistent with it. The use immunity in s 28 does not extend to documents or non-verbal assertions, nor is a use fruits immunity provided for information derived from disclosures made at the investigative stage. Therefore, these types of evidence can be admitted in evidence, whether or not the defendant elects to testify.
- 331 The secrecy obligations imposed on the Director and members of the Office under s 36 give some limited protection to witnesses. Section 36 requires the members of the Office to observe the “strictest secrecy” in relation to information supplied to the Director under ss 5 and 9 or in the exercise of powers under Part II, or information derived from either of these sources.

- 332 The Serious Fraud Office Act was passed in the same parliamentary session as, but before, the New Zealand Bill of Rights Act 1990. Section 27 is in conflict with ss 23(4) of the Bill of Rights Act (ie, right of person arrested or detained for an offence or suspected offence to refrain from making a statement etc) because it removes the privilege and the right of silence for people investigated by the Director under s 5 or s 9, when the person questioned is detained.

REMOVAL OF THE PRIVILEGE FOR ORAL STATEMENTS AND NEWLY CREATED DOCUMENTS

- 333 In chapter 8, we proposed that the privilege or a statutory immunity should remain for oral statements and newly created documents (ie, documents created in response to a specific demand by the investigator that they be created). Section 27 currently removes the privilege for oral statements and newly created documents compelled under ss 5 and 9. As already noted, although s 28 contains a use immunity for oral statements, this is limited to consistent oral statements, and there is no use immunity for newly created documents in the nature of a written account or admission.
- 334 In chapter 12, it was suggested that the privilege should apply unless explicitly removed and that the privilege should be included in the Commission's Evidence Code. The other option, discussed and rejected in chapter 3, would be to remove the privilege across the board and replace it with immunities. In determining whether the latter course is justified in a particular context (as distinct from across the board), drafters and policy makers should consider
- the nature and the degree of the risk of self-incrimination in the particular circumstances,
 - the necessity of the self-incriminating disclosures for the effective performance of the statutory functions or determination of material issues in proceedings,
 - whether or not an alternative legal means of obtaining the necessary information is available,
 - whether or not the privilege provides important protections which an immunity cannot provide at the time when the disclosure is sought, and
 - whether or not any use or use fruits immunity provided in the privilege's stead can guarantee comprehensive protection to the person in the circumstances.

We now discuss each of these in the context of investigations under the Serious Fraud Office Act.

Nature and degree of the risk

- 335 Apart from further criminal liability for fraud offences, a risk of liability to a civil penalty might arise when a person is compelled to give self-incriminating information to the Director under the Act. However, the Commission has been advised that the risk of a civil penalty is not a matter that arises with any frequency; moreover,

[t]he secrecy provisions prohibit the members of the SFO from disclosing any such information in any way to any person who is not a member of the SFO. The Director, alone, is given a statutory discretion by the Act to disclose such protected information in any of the circumstances provided for by section 36(2)(a)–(e). It is unlikely that I would exercise my discretion to release protected information, comprising information given to this Office by a suspect, in circumstances where

that release would expose the person to the risk of a civil penalty. In fact, I have recently refused a request to disclose information that would fall into this category.⁶²

- 336 The secrecy obligations imposed on the Director and members of the Serious Fraud Office by s 36 provide limited protection from derivative use of information obtained in the exercise of the information-gathering powers in ss 5 and 9. Section 36(1) states that every member of the Office shall observe the strictest secrecy in relation to information obtained under those provisions. However, subs (2) contains a number of broad exceptions, including the disclosure of the information for the purposes of any prosecution anywhere or disclosure to any person who the Director is satisfied has a proper interest in receiving such information.

Effective performance of statutory functions

- 337 The complex nature of fraud has been suggested as a reason why special powers are needed. The Hon WP Jeffries (then Minister of Justice) said in the introductory speech on the Bill:

fraud can lurk behind apparently normal complex commercial transactions. It is committed and carefully hidden with stealth and deceit. Traditional investigatory powers are insufficient. Investigators need special powers to be able to unravel the complex transactions and documentation that accompany such offences. (503 Hansard 14022)

- 338 Throughout this paper we have advanced several general proposals which, if implemented, would enhance the investigative powers of the Director and members of the Serious Fraud Office considerably. These are
- the proposal in chapter 8 that neither the privilege nor immunities should extend to pre-existing documents or to real evidence,
 - the proposal in chapter 9 that bodies corporate, or individuals on their behalf, should not be able to claim the privilege or the protection of an immunity,
 - the proposal in chapter 10, that witnesses should not be able to claim the privilege or the protection of an immunity on the basis that a spouse is vulnerable to incrimination by the evidence of the other spouse, and
 - the proposal in chapter 11, that people should not be able to claim the privilege or the protection of an immunity for extraterritorial liability.

- 339 In the Department of Justice's report, the specific case for removing the privilege for all statements, oral or documentary, is summarised at page 19:

[T]he Director strongly supports clauses 31 and 32 and considers their inclusion to be absolutely necessary for the SFO to achieve its objectives. He questions the relevance of a suspect's right to remain silent in modern society and states that such a right originated for the protection of the simple and illiterate at a time when they could not give evidence in their own defence. He indicates that such considerations have no relevance to serious and complex fraud offences given the sophistication of the persons involved with such offences and the legal and financial advice available to those persons.

- 340 The Director's view is that the protection afforded by silence is no longer necessary because the threat of torture has receded and because of the use of video recording to protect the interests of both sides.⁶³ Furthermore, the reason

⁶² In a letter dated 14 August 1995 from the Director of the Serious Fraud Office.

⁶³ Meeting with the Serious Fraud Office on 17 June 1996.

why the power in s 9 to compel suspects to answer questions is said to be useful is:

The use of powers under section 9 of the SFO Act to compel any person to answer questions relevant to an investigation has the advantage of committing the person questioned to a particular "story".⁶⁴

- 341 An ability to compel suspects to answer questions about complicated documentation and paper trails, particularly when the suspected offence is one of non-disclosure (eg, under-reporting, disappearing documents, documents created), or creating documents to avoid detection, is no doubt useful. Access to pre-existing documents will not always give the investigator a clear picture of what has occurred. In addition, the investigation of fraud can be carried out more expeditiously if those being investigated are required to answer questions. However, the Commission questions some of the justification for the removal of the privilege for oral statements and the production of newly created documents in the serious fraud context.⁶⁵
- 342 The Commission does not consider the right of silence and the privilege to be outdated or irrelevant in the serious fraud context. Innocent people who are fearful and unsure of why they are being questioned, or of the precise nature of the questioner's suspicions, as well as those who are vulnerable and those who manufacture stories, benefit from claiming the privilege. In response to such a claim, the questioner may need to provide more information, reassess his or her interrogative approach, and ultimately seek evidence from independent sources, rather than rely on the person being questioned as the source of evidence.
- 343 We have also acknowledged that the privilege does not by itself prevent inhumane treatment and abuses, unreliable admissions etc. The privilege is one of several means of providing protection to people being questioned. The practice of videotaping interviews is to be encouraged, but is not a replacement for the right of silence or the privilege against self-incrimination. Incriminating information may be compelled from a person away from video-tape equipment or before the video-tape is turned on. Although people investigated under s 9 of the Serious Fraud Office Act have recourse to counsel, that right will not always be sufficient (eg, when a solicitor is unavailable or inexperienced). The right to counsel only applies when the person is required to *attend* before the Director (s 9(5)). There is no such right when a person supplies information to other members of the Office, unless the person is arrested or detained within the meaning of s 23 of the Bill of Rights Act. Furthermore, people asked for information under s 5 have no right to counsel, because they are not immediately the focus of suspicion. However, they could conceivably become the focus during an interview.
- 344 There is no evidence that large numbers of guilty people are escaping detection by claiming the privilege in the serious fraud context. In chapter 2, we said that the results of the surveys conducted by the Commission on the right of silence do not substantiate the argument that the privilege should be removed because it is the refuge of sophisticated or hardened criminals. It appears from those surveys (described further in Appendix C) that most suspects do not

⁶⁴ Department of Justice Report, 19.

⁶⁵ For discussion of spousal privilege in the context of serious fraud, see *Hawkins v Sturt* [1992] 3 NZLR 602. As already noted in chapter 10, spousal privilege should not be confused with the privilege against self-incrimination's possible application to protect a witness's spouse.

remain silent in the face of questioning by the police, and the majority of those who do are found guilty. Suspects with criminal records appear more likely to speak than remain silent.

- 345 In the United Kingdom, there is a minimum monetary limit on the cases which can be investigated by the Serious Fraud Office (of one million pounds). A protocol developed between the New Zealand Serious Fraud Office and the police, referred to in the Office's 1994/95 annual report at page 6, provides for the police to notify the Office of cases in the following situations:
- The complaint involves an actual or potential fraud in excess of \$500,000.
 - The facts, law or evidence are of great complexity; for example, the complaint could include international financial transactions or computer manipulation or other complex methods indicative of the commission of an offence.
 - The complaint is of great public interest or concern and/or involves a public figure.
- 346 The Office's annual reports for the years 1990–95 (inclusive) reveal that the Office sometimes investigates fraud involving quite small amounts.⁶⁶ In the annual report for the 1994/95 year, for example, out of 34 prosecutions completed, at least 10 of these were for amounts of less than \$300,000; the lowest being for \$2,000. It is questionable whether offences at this lower end of the range necessarily involve the sophisticated criminals alluded to by the proponents of wide powers for the Office.⁶⁷
- 347 Finally, it should also be noted that the reasons given for removing the privilege for the compelled production of documents focus on documents already in existence at the time when the Director requires a person to supply self-incriminating information. For example, in its report to the Select Committee, the Department of Justice said:
- It is essential then in New Zealand for the Director to have the power to require production of documents. Until the documents have been obtained it will often not be possible to ascertain whether an offence has been committed. (6)
- 348 It has already been suggested in chapter 8 that the privilege should be removed for pre-existing documents, but that documents newly created in an interrogation situation are equivalent to oral statements, and should be treated in the same way as oral statements.

Alternative means of obtaining information

- 349 While acknowledging the usefulness of the power to compel people to answer questions and explain complex documents, we note that the Office appears to rely far more heavily on its powers to compel individuals to supply pre-existing documents than it does on its powers to require answers to questions. The following tables illustrate this and have been compiled from the Office's reports for the years 1990–95 (inclusive). The tables should be interpreted bearing in mind that one witness may be asked to supply a number of documents on different occasions and that there are many more witnesses than suspects.

⁶⁶ This is often because the Office uncovers more minor offending in the course of a much longer investigation.

⁶⁷ In referring to the minimum monetary limit required before the United Kingdom Serious Fraud Office will investigate, we are not advocating that monetary amounts alone should determine whether fraud is serious or complex in New Zealand.

Part I Detection of Serious or Complex Fraud		1994/95	1993/94	1992/93	1991/92	1990/91
s 5(a)	Requiring documents	71	28	51	24	26
s 5(b)	Requiring answers to questions	–	–	3	–	3
s 6	Search warrant obtained	–	–	–	–	–

Part II Investigation of Suspected Offences Involving Serious or Complex Fraud		1994/95	1993/94	1992/93	1991/92	1990/91
s 9(d)	Requiring answers to questions	42	37	44	58	40
s 9(e)	Requiring information	11	1	13	108	8
s 9(f)	Requiring documents	538	343	460	2482	383
s 10	Search warrant obtained	16	30	–	8	7

350 Another means of obtaining information from people about suspected fraud is information voluntarily supplied by people. As the discussion of the right of silence surveys in chapter 2 reveals, more people speak to the police than exercise their right to remain silent. There is no evidence to suggest that the position would be any different, in relation to offences investigated by the Serious Fraud Office, if the Director no longer had the power to compel self-incriminating information from people.

The privilege's role in providing important protections

351 As the summary in chapter 12 on legislative provisions expressly removing the privilege for oral statements and documents reveals, there are precedents for the approach adopted in s 27. For example, s 49(3) of the Gas Act 1992 and s 15 of the Secret Commissions Act 1910 are examples of provisions removing the privilege for oral statements and documents. However, the information-gathering powers contained in those sections are not for the purpose of criminal investigations.⁶⁸ Section 27 of the Serious Fraud Act is unprecedented in removing the privilege for oral and documentary statements in the investigation of Crimes Act offences.

352 It has been suggested that the powers to compel people to answer questions (etc) amount to “an *investigative* tool, not a stratagem to acquire confessions for direct use in court as evidence”.⁶⁹ However, this distinction does not take account of the crucial fact that investigation leads to evidence, and without evidence there will be no prosecution.

⁶⁸ Section 49(1) authorises gas inspectors to request information to ensure gas fittings are in a safe condition, and s 15 deals with questioning in civil or criminal proceedings as distinct from investigations.

⁶⁹ Letter from the Director of the Serious Fraud Office, 19 June 1996.

353 In chapter 2, the Commission said that the privilege is most valuable in protecting the interests lying behind it in criminal investigation contexts: see, in particular, the discussion on the privilege's role in maintaining a fair State-individual balance and in preventing the conviction of the innocent, inhumane treatment and abuses, and unreliable coerced admissions of guilt. Herman summarises the specially strong case for the privilege's application in the criminal investigative, as distinct from other, contexts:

[T]he risk of criminal prosecution, conviction, punishment, and abusive interrogation is much greater in the police interrogation setting than in any other interrogational setting. It has long been held that the privilege may be claimed in civil proceedings and legislative inquiries, even though neither is itself a "criminal case" within the meaning of the Fifth Amendment and even though the risk of prosecution may be remote. That those proceedings are open to the public (indeed, that they may be televised), that the witness may be represented by counsel, and that the interrogator is therefore not likely to be abusive do not defeat the privilege. By contrast, police interrogation is "criminal" and its very purpose is to obtain evidence for use in a criminal prosecution; the fruits of police interrogation lead to criminal charges far more frequently than do the fruits of civil or legislative questioning; and, as noted earlier, abusive practices are more likely to occur in the interrogation room than in any other governmental setting. To apply the privilege in these former settings while denying application to police interrogation stands the privilege on its head.⁷⁰

354 Certain features of the Serious Fraud Office Act suggest that the privilege could be useful as a protection against over-zealous investigation techniques. The Office's investigation powers under s 5, in relation to non-suspects, have already been referred to. In addition, despite the protocol between the police and the Office, the Director has considerable leeway in deciding whether and which cases to investigate. The term "serious or complex fraud" is inclusively defined in s 2 as follows:

"Serious or complex fraud" includes a series of connected incidents of fraud which, if taken together, amount to serious or complex fraud.

355 Under s 8, the Director has a *discretion* whether to take account of the following guidelines in determining whether any suspected offence involves serious or complex fraud:

- the suspected nature and consequences of the fraud;
- the suspected scale of the fraud;
- the legal, factual and evidential complexity of the matter; and
- any relevant public interest considerations.

356 Section 50 authorises the Director to exercise powers conferred under the Act, even when the police or another agency are also investigating the suspected offence, or proceedings have already commenced, or the suspected offence occurred before the Office was established.

357 Neither the Director's decisions and exercise of his or her powers, nor employees of the Serious Fraud Office, come within the Police Complaints Authority's jurisdiction. The Director's decisions regarding investigations or mounting proceedings in cases of suspected fraud cannot be challenged, reviewed, quashed or called into question in any court (s 20); although the Ombudsmen can review the Office under the Ombudsmen Act 1975.

⁷⁰ "The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)", 550.

- 358 Section 30 states that:
 [I]n any matter relating to any decision to investigate any suspected case of serious or complex fraud, or to take proceedings relating to any such case or any offence against this Act, the Director shall not be responsible to the Attorney-General, but shall act independently.
- 359 The approach adopted in s 27 of the Serious Fraud Office Act not only undermines the interests the privilege protects in the investigation of serious fraud, but also undermines the privilege in other contexts. As Herman's comments above in para 353 imply, if the privilege is inapplicable in the criminal context where it can be most useful, why should it be retained in non-criminal contexts? Similarly, if the privilege is disposable in the investigation of fraud offences, why does it still apply to the investigation of serious drug, violent and sexual offending?
- 360 In relation to the second question, although in some instances there will be body sample and real evidence on the scene (unlike in most fraud investigations), this will not invariably be the case. Furthermore, although information about fraudulent offending may reside with the suspected fraudster alone, this is similar to some sexual offending, where there is no independent evidence corroborating the complainant's report of offending, and where the privilege and right of silence still apply. So, a power to compel individuals to make disclosures and produce documents would be useful in the investigation of *all* criminal offences, but at a cost.
- 361 There is also an issue about equality of treatment, between people investigated by the Serious Fraud Office and those investigated by the police. When the police investigate fraud, unless they come within the secondment and delegation authority in s 33 of the Serious Fraud Office Act, they are not governed by provisions such as ss 27 and 28. The police must comply with the rights of suspects recognised in the Judges' Rules and with the right of silence and privilege against self-incrimination embodied in ss 23(4), 25(d) and 27(1) of the Bill of Rights Act: see chapter 5 for a discussion of what those provisions entail.⁷¹ In other words, the privilege is available if the police investigate serious or complex fraud offences, but is not available if the investigation is under the auspices of the Director of the Serious Fraud Office. In *Ernest Saunders v United Kingdom* (Report of the Commission No 19187/91, discussed in chapter 2), the European Commission said:
 It cannot be compatible with the spirit of the Convention that varying degrees of fairness apply to different categories of accused in criminal trials. The right to silence, to the extent that it may be contained in the guarantees of Article 6, must apply as equally to alleged company fraudsters as to those accused of other types of fraud, rape, murder or terrorist offences. Further there can be no legitimate aim in depriving someone of the guarantees necessary in securing a fair trial.

⁷¹ The Judges' Rules are rules originally formulated by English judges in 1912 (and supplemented and clarified in 1918 and 1930, although now no longer in operation in England) to provide guidance to police officers conducting investigations. Rule 2 of the Judges' Rules says that whenever a police officer has made up his or her mind to charge a person with a crime, a caution should first be given before the person is asked any questions or further questions. Rule 3 provides that "persons in custody should not be questioned without the usual caution being first administered". An explanatory note to rule 3 indicates that the rule was never intended to encourage or authorise the questioning or cross-examination of a person in custody after cautioning.

- 362 The same considerations apply to s 27 of the Serious Fraud Office Act, and the Commission concludes that although a power to ask questions without the obstacles of the privilege and the right of silence is no doubt a useful investigative tool, it pushes the balance of power too far in favour of the investigator. As a result, there is potential for questioning abuses to go undetected; the right of innocent people to be free from unwarranted intrusions by the State may be compromised; and prosecutions may be brought on the basis of unreliable admissions of guilt made by suggestible but innocent people.
- 363 Accordingly, the Commission proposes that s 27 should be repealed and that the right of silence and privilege against self-incrimination should be restored for people investigated by the Serious Fraud Office. This would not extend to documents already in existence at the time when specific demands for them are made. Section 28 would no longer be necessary and we propose that it should likewise be repealed. As a result, it is unnecessary to consider whether the immunity contained in s 28 should be extended. However, we now turn to the scope of immunities which should be provided if our proposal that the privilege be restored for oral disclosures and newly created documents is not implemented.

SCOPE OF IMMUNITIES PROVIDED

The use immunity

- 364 As already noted, s 28 contains a use immunity which does not include inadvertently inconsistent oral statements, newly created documents, nor any non-verbal assertion intended. The Department of Justice report to the Justice and Law Reform Select Committee on the Bill explains the thinking behind the first two limitations.
- 365 In relation to the exclusion of documents from the immunity, the Department said:
On reflection we consider that the inadmissibility provision should apply to oral statements only in New Zealand as well. Otherwise the intention of clauses 9 and 13 in requiring documents to be produced could be defeated. These documents should be available as evidential exhibits as well as to ascertain whether an offence may have been committed. (20)
- 366 The concern to use the documents produced as exhibit evidence focuses on pre-existing documents which reveal that a serious fraud offence has been committed, rather than on newly created documents, in the nature of oral admissions recorded in writing. The reason given by the Department for excluding documents from the use immunity in s 28 does not apply to newly created documents. We therefore propose that, if the privilege is not restored for this category of documents, s 28 should be amended to extend the use immunity to them.
- 367 In relation to the exclusion of inconsistent oral statements from the immunity, the Department said:
The extent of the limitation of the admissibility of incriminating statements does not appear to have been fully understood. The reason for allowing the admission of incriminating statements is to preclude a defendant from recanting with impunity from the statements made earlier to the Director under clauses 9 or 13. (20)

- 368 If the Director's power in s 27 to compel people to make self-incriminating oral statements is retained, the Commission proposes that the use immunity in s 28 should extend to all oral statements. This is subject to the rider that the statements may be used in a prosecution for perjury, when there is evidence of deliberate lying: see chapters 12 and 15, for other examples of this approach.
- 369 In relation to deliberate lying on the part of a person being investigated by the Serious Fraud Office, s 45(e) of the Act already contemplates that a person who supplies misleading information commits an offence. Section 45(e) says:
 [Every person commits an offence . . . who . . .]
 In the course of complying with any requirement imposed pursuant to section 5 or section 9 of this Act, gives an answer to any question, or supplies any information, or produces any document, or provides any explanation, knowing that it is false or misleading in a material particular or being reckless as to whether it is false or misleading.

A use fruits immunity

- 370 In chapter 12, we noted that there are no examples of use fruits immunities in New Zealand legislation and proposed that when the privilege is removed by legislation in a particular context, a use and use fruits immunity should usually be provided in its place. In the serious fraud context, this means that evidence discovered as a result of compelled disclosures made at an investigative stage (ie, derivative evidence) would not be admitted at trial. Such evidence could be derived from either an oral statement, a newly created document, or a non-verbal intentional assertion: information which would otherwise be subject to a claim to the privilege.

CONCLUSIONS

- Sections 27 and 28 should be repealed, and the right of a person being questioned to claim the privilege in response to demands for oral disclosures and newly created documents, as well as to exercise the right of silence, should be restored.
- If the above proposal is not implemented, the Commission proposes that s 28 should be amended to extend the use immunity to newly created documents and inconsistent oral disclosures, excluding pre-existing documents and disclosures which may be used as evidence in a prosecution for perjury. In addition, s 28 should provide a use and use fruits immunity for information derived from compelled self-incriminating oral statements or newly created documents or non-verbal intentional assertions. The Commission seeks submissions on these alternative proposals.
- Several of our general proposals will, if implemented, enhance the Director's investigative powers under the Serious Fraud Office Act 1990 in relation to serious or complex fraud. These are –
 - the proposal in chapter 8 that neither the privilege nor immunities should extend to pre-existing documents or real evidence;
 - the proposal in chapter 9 that bodies corporate, or individuals on their behalf, should not be able to claim the privilege or the protection of an immunity;

- the proposal in chapter 10 that people should not be able to claim the privilege or the protection of an immunity on the basis that a spouse is vulnerable to incrimination by the evidence of the other spouse;
 - the proposal in chapter 11 that the privilege should not be able to be claimed for extraterritorial liability.
- Sections 27 and 28 of the Serious Fraud Office Act are unprecedented in the investigation of criminal offences, because they remove the privilege for oral statements and documents and provide a use immunity limited to consistent oral statements in its place.
 - Sections 27 and 28 raise issues about the application of the privilege to criminal offences and about the privilege's continuation generally.
 - The Director of the Serious Fraud Office has wide investigative powers under the Act, both in relation to suspects and in relation to non-suspects who may nevertheless provide information relevant to the Office's investigations.
 - The Director has a great deal of autonomy from external scrutiny and is not limited to any degree by statute in the cases he or she can investigate.
 - The Director's ability under ss 5 and 9 to compel people to answer questions about complicated documentation and paper trails, particularly when the suspected offence is one of non-disclosure, is useful. Access to pre-existing documents will not always provide a clear picture of what has occurred.
 - Balanced against this, the privilege is most valuable in protecting the interests lying behind it (eg, maintenance of a fair State-individual balance, prevention of abuses, protection of the innocent, securing reliable evidence etc) in criminal investigation contexts. This is because abuses of power often arise away from the public eye and are inherently coercive.
 - The removal in s 27 of the privilege for oral and newly created documentary statements creates an inconsistency between the rights of people investigated by the police and people investigated by members of the Serious Fraud Office. The former can claim the privilege and the right of silence in response to demands for information, but the latter cannot.
 - The removal in s 27 of the privilege for oral and newly created documentary statements undermines the privilege in other contexts, because the case for the privilege's application is strongest in the criminal investigation situation, with which the section is concerned.
 - The reasons why s 27 removes the privilege for documents (ie, the need for evidence of complex transactions and the ability to use the documents as exhibits) do not apply to documents created in response to a demand for them in the context of an investigation, as distinct from pre-existing documents.
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14 Legislative Silence

When should a legislative provision be interpreted as removing the privilege?

INTRODUCTION

- 371 **T**HIS CHAPTER EXAMINES the reform issues arising from legislative powers which compel the supply of information and which do not expressly indicate whether the privilege against self-incrimination has been removed or preserved. We assess the various tests posed by courts in deciding whether the privilege has been indirectly removed. When legislation containing information-gathering powers does not expressly remove or limit the privilege, then no legislative protection in the form of an immunity is provided in place of the privilege. On occasion, the courts and prosecutors have offered to grant immunities to witnesses, in the absence of express authority to do so. We consider issues arising from this approach.

LEGISLATIVE EXAMPLES

- 372 There are many statutory provisions which authorise designated people to compel information from others and which do not refer specifically to the privilege against self-incrimination. For example, they include the surrender of fraudulent conveyancing documents under ss 81–83 of the Land Transfer Act 1952 and the Securities Commission's powers to summons individuals to produce information to it under s 18 of the Securities Act 1978. In order to illustrate how these provisions are framed and the issues they raise concerning the privilege, we briefly examine s 18 of the Securities Act.
- 373 Under Parts I and II of the Securities Act, the Securities Commission carries out investigations into insider trading and substantial security holder disclosure. The Act does not directly authorise the Securities Commission to ask for incriminating information, nor does it explicitly preclude this.
- 374 In Part I of the Act, one of the principal functions of the Securities Commission is to "keep under review practices relating to securities, and to comment thereon to any appropriate body" (s 10). As already noted, s 18 provides the Securities Commission with, among other things, power to summons witnesses to appear before it and produce books or papers within their possession. In addition, s 17 states that the Commission shall have all powers which are reasonably necessary or expedient to enable it to carry out its functions and duties. According to s 32, it is an offence to refuse or wilfully neglect to appear before the Commission, answer questions, or produce documents (etc) when summonsed to do so.

- 375 Part II of the Act contains limitations on the offer of securities to the public and, under s 67, the Registrar of Companies has powers to require people to produce documents for inspection. Under s 60(1)(a), a person commits an offence who "refuses or fails to produce for inspection any document when required to do so pursuant to section 67 . . .".
- 376 In discussion with the Law Commission, the Securities Commission has suggested that the privilege has no application to its investigative powers.⁷² This is essentially because it views proceedings under both parts of the Act as civil processes which may have penal consequences but no criminal liability (eg, the automatic disqualification of a Director if found liable for insider trading where the court can award penal compensation of up to three times the loss or gain traded). The Securities Commission does not have a prosecuting role, but is a public body receiving complaints concerning market-place irregularities. When a complaint involves criminal market-place activity, it will be sent to the police or the Commerce Commission.
- 377 On the other hand, we have seen that the privilege can apply in a broad range of contexts, civil and criminal. Conceivably, information disclosed to the Securities Commission could be passed on to other agencies for further investigation or proceedings. In addition, the Securities Commission can initiate proceedings in limited circumstances, and it is both investigator and judge in relation to the information it compels individuals to produce. There may well be good reasons why the privilege should be expressly limited or removed in the context of the Securities Commission's investigations of complaints concerning securities. However, the Law Commission considers there are dangers in importing an essentially inquisitorial regime into the Securities Act, particularly when it is currently silent about limits on the use of any compelled disclosures made.
- 378 From time to time an individual called to give evidence before the Securities Commission claims the privilege against self-incrimination. The Commission has advised us that, generally, the matter is resolved to the satisfaction of the interested parties, by the Commission making confidentiality orders to protect the witness from liability in other contexts, under s 19(5) of the Securities Act. Such orders can include the hearing of the proceedings or any class of proceedings in private, prohibiting the publication or communication of information given to the Commission in connection with the inquiry, or prohibiting the giving of evidence involving the information.
- 379 There are limits on the extent to which confidentiality orders can effectively replace the privilege against self-incrimination. Section 19(6) expressly applies the Official Information Act 1982 to information which has been the subject of a subs (5) order. The rider contained in subs (6), that the inquiry or proceedings of the Commission must have concluded, does not prevent derivative use being made of the information disclosed, by some other Crown agency. In addition, it is within the Securities Commission's discretion whether it makes one of the confidentiality orders in s 19(5).

⁷² Letter from the Chairman, Mr P McKenzie, dated 21 December 1994, and discussion with members of the Securities Commission on 15 March 1995.

THE TEST FOR IMPLICIT ABROGATION

- 380 In New Zealand, the leading case on how to determine whether a particular statutory power implicitly removes or preserves the privilege is *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394. Cooke J said:

[I]f a Court is not satisfied that a statutory power of questioning was meant to exclude the privilege, it is in accordance with the spirit of the common law to allow the privilege. (402)

- 381 However, Cooke J envisaged that the privilege could be removed by statutory language which did not expressly refer to the privilege. In considering the Poultry Board Regulations 1980, he drew a distinction between “the realm of actual invasion of physical liberty” and the realm of economic regulation. He also commented:

[I]t may well be that one of the prime purposes of a power given by or under statute to question about business or fiscal matters will be frustrated if privilege can be invoked against it. In the end the true intent of the particular authorising statute must prevail. Only where it is not reasonably discoverable can there be a presumption in favour of the right to silence. Marketing schemes, introduced largely to protect and at the wish of primary producers, have long been a feature of the New Zealand economy. As Jeffries J said, policing is needed to make them work. Considerable bureaucratic powers are a necessary consequence – however distasteful to those who in principle would prefer free enterprise. (402)

- 382 The court in *Taylor* sought to strike a balance between those instances when the privilege should prevail and those when its application would unduly frustrate the objectives of the particular statute being considered. In the particular case, the majority held that the function of the Poultry Board included promoting and organising the poultry industry, for which purposes extensive powers were necessarily given under s 12 of the Poultry Board Act 1980:

The policy of the Act is thus to allow the industry something approaching plenary powers of self-government. It would be a mistake to see this case as an issue between the central Government and an individual citizen. And it would be quite wrong for this Court to approach the interpretation of the Poultry Board Act with any sense of hostility to the power to ask reasonable questions. (402)

- 383 McMullin J (dissenting) considered various examples of legislation which expressly removes the privilege, before focusing on the Poultry Board Act and Regulations. In finding that the privilege had not been removed impliedly, he said:

Nowhere in the Act itself is there any indication of a legislative intention to require, under pain of prosecution for default, the supply of information by any person with reference to the ownership, source or destination of eggs or poultry.

...

While recognising that there are two sides to the argument, I have no confidence that in enacting s 24(1)(n) and (o) Parliament intended to provide the bureaucracy with the power to make punishable with a fine of \$2000 the mere failure of a producer or retailer of eggs to supply information as to the source of eggs in his possession.

...

I would conclude by observing that in the Seventh Report of the Public Administrative Law Reform Committee, “Statutory Powers of Entry”, 1983, the Committee stressed that the relationship between the privilege of self-incrimination and an official’s power to ask questions should be clarified in respect of each statutory power, and emphasised the need to retain it. (408–409)

- 384 The Commission has reservations about whether the approach adopted by the majority in *Taylor* (ie, of removing the privilege when it is said to frustrate the objectives of the provision) gives sufficient weight to the privilege.
- 385 It is unclear what constitutes clear language removing the privilege, given that something less than an express removal or even a reference to the privilege is required. Furthermore, the reference to the privilege subverting the intent behind a statute is arguably open to almost universal application. On this basis, whenever there is a statutory power to request information, the privilege should be taken as removed because its invocation may undermine the underlying objective of the power – namely, to discover the truth.⁷³
- 386 In addition, the distinction between physical compulsion and economic regulation can be taken too far. When the person being questioned is likely to be under suspicion, the investigation of all offences, whether under the Crimes Act or some other Act, is inherently coercive, in the sense that the very purpose of the questioning is to obtain incriminating admissions. Prosecution and punishment are potential outcomes for both Crimes Act and other offences. These contentions find some support in the comments of Lord Browne-Wilkinson:
- We all know the rules of statutory construction which require penal and taxation provisions to be strictly construed so as to protect the physical liberty and property of the individual ... but although the presumption is well established in those cases, we seem on occasion to have lost sight of the fact that the rules applicable to penal, taxing and confiscatory legislation are only instances of a more general rule. Maxwell on Statutes states the following proposition: "Statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Acts".⁷⁴
- 387 Murphy J adopted a different approach from Cooke J in his minority judgment in *Pyneboard Pty Ltd v Trade Practices Commission and Another* (1982) 45 ALJ 609, 622. Unlike Cooke J in *Taylor*, Murphy J said that there should be a presumption against removing fundamental common law human rights, such as the privilege, unless that intent is conveyed in "unmistakable language". The reasoning behind Murphy J's approach is that the privilege against self-incrimination is not simply *any* common law rule which the legislature can remove whenever and to whatever extent it chooses, without first balancing competing interests.
- 388 Murphy J's position can be supported in New Zealand by reference to the requirements in ss 5 and 6 of the New Zealand Bill of Rights Act 1990. As already discussed in chapter 5, s 6 says that wherever a provision can be given a meaning consistent with the Act, that meaning should be preferred, and s 5 provides that limits on the rights and freedoms in the Act must be prescribed by law. This legislation was enacted some time after the judgment in *Taylor* was delivered.

⁷³ As we have seen in chapter 2, claims of privilege may also enhance the discovery of the truth because of the privilege's role in screening out unreliable compelled disclosures.

⁷⁴ Lord Browne-Wilkinson quoted by Frommel "The Right to Silence and the Powers of the Serious Fraud Office" (1992) 15 *The Company Lawyer* 227.

- 389 There is also support, in the American case law, for the idea that encroachments on the privilege should be as small as possible. In *Central Hudson Gas & Electric Corp v New York Public Service Commission* 447 US 557, 566 (1980), the court held that the infringement must be closely tailored to serve an important interest ie, a substantial interest is advanced and must not be more extensive than is required to serve that interest.
- 390 The relationship between the privilege against self-incrimination and an official's power to ask questions requires clarification in respect of each statutory power: see the discussion in chapter 12 concerning what factors should be taken into account to determine whether the privilege should be removed in a particular context. The Commission welcomes submissions from those with experience in the area. In relation to existing provisions, it prefers the interpretation that a provision should only be taken as removing or restricting the privilege when the provision does so by explicit reference to the privilege in clear and unmistakable language.

IMMUNITIES GRANTED BY COURTS AND PROSECUTORS WHEN THE PRIVILEGE HAS BEEN REMOVED BY IMPLICATION

- 391 A further difficulty in interpreting information-gathering provisions which do not refer to the privilege as nevertheless removing the privilege is the absence of any statutory protection in the privilege's place. Because the privilege is not referred to in the information-gathering power, when the courts interpret the power as implicitly removing the privilege, there is no legislative protection in the privilege's stead. In practice, immunities from prosecution are sometimes granted by the courts and prosecutors in these circumstances, in return for self-incriminating disclosures. However, as the following discussion illustrates, such immunities are unlikely to be commensurate with the protection the privilege provides.

Immunities granted by courts

- 392 In *Busby v Thorn EMI Video Programmes Ltd* [1984] 1 NZLR 461, the Court of Appeal held that if a defendant is required under an Anton Piller order to provide information which might include evidence of criminal offences, it should be on the condition that it will not be used to prosecute that defendant. As a consequence, the court said that the plaintiffs should be required to give an undertaking that the information would not be made available to the police for any purpose. The court sought to remove the real risk of prosecution arising from disclosure as a condition for negating the witness's privilege.
- 393 In *A T & T Istel Ltd v Tully* [1993] AC 45, the House of Lords ordered compliance with a Mareva injunction requiring disclosure of documents relating to the defendant's dealings with the plaintiff's money, despite the defendant's claim of privilege. It found that there was unlikely to be a real risk of self-incrimination to the defendants in criminal proceedings as a result of disclosure, because para 33 of the disclosure order provided:
- No disclosure made in compliance with [the order] shall be used as evidence in the prosecution of the offence alleged to have been committed by the person required to make that disclosure or by any spouse of that person. (55)

- 394 Additionally, a letter provided by the Crown Prosecution Service indicated that no use would be made of any disclosure in any subsequent criminal proceedings. This included a use fruits immunity. Their Lordships said that it was for Parliament to remove the privilege and provide protection to witnesses in its place.
- 395 When the courts order the giving of evidence and provide an immunity in the absence of legislative authority to do so, there is no clear statement of the scope of the remaining privilege, if any, and of the immunity provided in the privilege's place. A process is lacking to ensure that adequate and consistent protection, in the form of an immunity, is provided.

Prosecutors' immunities

- 396 Paragraph 9 of the Solicitor-General's Prosecution Guidelines (as at 9 March 1992) contains limitations on prosecutors offering witnesses written undertakings to stay proceedings if the person is prosecuted for nominated offences. Under the Guidelines, the only person authorised to give an immunity is the Solicitor-General. The Prosecution Guidelines contain a number of pre-requisites for granting an immunity (eg, that all avenues of gaining sufficient evidence to prosecute, other than relying upon the evidence to be given under immunity, have been exhausted). Paragraph 9.6 says that immunities are given reluctantly and only as a last resort in cases where it would not otherwise be possible to prosecute a defendant for a serious offence.
- 397 The Crown Law Office has advised the Commission that witness immunities from prosecution are infrequently granted and never when a witness has already declined to answer questions on the basis of the privilege.⁷⁵ Instead, the witness will through counsel outline the evidence he or she can give, and then a decision is made about whether that witness will be granted an immunity.
- 398 There is no consistent pattern in the giving of prosecutorial immunities by other prosecution agencies. The status of the privilege varies, as do attitudes towards immunities (ie, to whether and when they should be granted, and whether a particular process should be followed). Immunities are most likely to be given when the witness is a comparatively minor offender or is an offender on the fringe of criminal activity.⁷⁶ Sometimes immunity from prosecution is given when there is little possibility of a conviction against the person being obtained. However, on a number of occasions, the seriousness of the offending has meant that the immunity could not be given and the evidence could not be obtained.
- 399 The Inland Revenue Department has indicated that "it is most unlikely that a guarantee would ever be given, but if the question did arise, the form of the guarantee would be decided at the time".⁷⁷ Similarly, New Zealand Customs does not issue immunities from prosecution.⁷⁸

⁷⁵ Letter to the Commission from L Goddard, Deputy Solicitor-General, dated 3 August 1995.

⁷⁶ See also *MAF v Imlach* (unreported, District Court, Wellington, 8 October 1993, CRN 03 5469327): Jaime DCJ's notes on sentencing.

⁷⁷ Letter to the Commission from L Doubleday, National Taxpayer Audit, dated 10 August 1995.

⁷⁸ Letter to the Commission from J Singh, dated 2 May 1995.

- 400 Reliance on prosecutorial goodwill alone, when legislation does not expressly provide an immunity for self-incriminating disclosures, is problematic. In high profile cases, or if there is a great deal of money at stake, the prosecution is unlikely to agree to issuing a guarantee of immunity from prosecution. In less serious cases, the prosecution might conceivably refuse to issue a guarantee if it is convinced of the person's guilt but needs the additional evidence disclosed in the civil proceedings to mount a successful prosecution. The prosecution is also less likely to issue guarantees when criminal proceedings are actually running concurrently with civil proceedings, or are at least in contemplation (Cotton, 135).
- 401 Australian courts have the power to stay criminal proceedings on the ground that prosecution constitutes an abuse of process. Corns suggests that this may be an effective way of enforcing prosecution indemnities.⁷⁹ In the New Zealand context, in *R v McDonald* [1983] NZLR 252, 253, the Privy Council recognised that the giving of an undertaking to stay proceedings is within the proper scope of the Solicitor-General's powers. The right to a fair trial in s 25(a) of the Bill of Rights Act might also be an avenue through which to prevent prosecutions being brought in breach of a prosecutorial immunity; although we are not aware of any such cases. Conceivably, a defendant could argue that there has been an abuse of process when a prior undertaking to stay the proceedings has not been honoured.
- 402 If a witness gives false information in exchange for an immunity, Corns suggests that he or she will be in breach of an implied condition of the immunity – that the person will provide truthful evidence. Therefore, the Crown might be entitled to prosecute the person and use the previously indemnified evidence against him or her. However, the position is not entirely clear.
- 403 There are also limits on the extent to which prosecutorial immunities, short of transactional immunities constituting guarantees not to prosecute or to stay, can be effective in protecting suppliers of information from prosecution, for as Freckleton observes:
- [I]t would be extraordinary if prosecutors or police, once put on notice of criminality by information compulsorily extracted, could not contrive to come by the same or equally damning material by their own investigations. Given that the value of such protection for witnesses is so low, the utility of the Act's self-incrimination provisions must be doubted in the real world of criminal complicity.⁸⁰
- 404 In a recent appeal from the Supreme Court of New South Wales, the High Court of Australia in *Reid v Howard* (1995) 184 CLR 1, held that the privilege is not to be modified or abrogated in favour of some different protection by judicial decision. Any such modification or substitution can effectively be achieved only by legislation. Justice cannot be served by the ad hoc modification of a right of general application, particularly one as fundamental as the privilege against self-incrimination.
- 405 The Commission concludes that immunities granted by the courts or prosecutors on an ad hoc, discretionary basis, when information-gathering provisions do not refer specifically to the privilege, are unsatisfactory substitutes for the privilege or for legislatively mandated immunities.

⁷⁹ Corns has recently looked at the types of indemnities given by prosecution agencies in "The 'Big Four': Privileges and Immunities" (1994) 27 *The Australian and New Zealand Journal of Criminology* 133, 148.

⁸⁰ Quoted by Corns, 148.

CONCLUSIONS

- A provision requiring the disclosure of information should not be interpreted as removing or restricting the privilege unless it expressly refers to the privilege and removes or restricts it in clear and unmistakable language.
 - The privilege is an important common law rule, reinforced by the New Zealand Bill of Rights Act 1990, and should not be able to be derogated from unless legislation explicitly says so.
 - Currently, it appears that something far less than an explicit reference to the privilege can be interpreted as impliedly removing or restricting it.
 - There should be a review of information-gathering powers in the various contexts in which they arise, in order to determine whether current provisions which are silent about the privilege should be amended to explicitly remove or restrict it: see the relevant factors in aiding that determination in chapter 12.
 - The current approach of impliedly removing or restricting the privilege means that there is no guarantee that a comprehensive or effective immunity will be offered in return for the compelled self-incriminating disclosures.
 - Immunities granted by the courts or prosecutors on an ad hoc, discretionary basis, when information-gathering provisions do not refer specifically to the privilege, are no substitute for legislatively mandated immunities.
 - Immunities granted on a discretionary basis, in the absence of legislation, may be inconsistently offered, or provide only partial protection from liability. It is unclear how the immunities could be effectively enforced, and what action could be taken if untrue self-incriminating disclosures were made in return for the immunity.
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15

The Australian Approach

Should the Australian approach – of requiring the courts to give a person who makes self-incriminating disclosures in proceedings a certificate containing a use and use fruits immunity – be adopted in New Zealand? If so, what modifications, if any, should be made?

INTRODUCTION

- 406 FROM THE DISCUSSION in the preceding chapters, it is apparent that the privilege is applied haphazardly in various pieces of legislation. This chapter looks at a partial alternative to New Zealand's piecemeal approach and to the total abrogation of the privilege, namely, legislatively regulated disclosure in court proceedings in return for a use and use fruits immunity certificate. Several of the observations made in this chapter have previously been made elsewhere in this paper. However, for completeness, the main features of the Australian approach, and its relationship to proposals made throughout the paper, are discussed.
- 407 Section 128 of the Evidence Act 1995 (Aust) preserves the common law privilege while providing a process by which witnesses who make self-incriminating disclosures in federal court proceedings are, in return, given certificates of immunity from use and derivative use of the disclosures in other court proceedings.⁸¹ The certificate of immunity extends to the use of the evidence as a prior inconsistent statement, but does not provide protection from prosecution for perjury.
- 408 Section 187 of the Australian Act removes the common law privilege for bodies corporate. The provision extends beyond the context of court proceedings. This is in line with the Commission's proposal in chapter 9 that the privilege for bodies corporate should be removed by legislation.

⁸¹ The courts exercising federal jurisdiction include the High Court, federal court, industrial relations court and family court. The Evidence Regulations 1995 prescribe a form of certificate under s 128: see Appendix D.

SECTIONS 128 AND 187

409 Sections 128 and 187 of the Evidence Act are set out below:

128 Privilege in respect of self-incrimination in other proceedings

- (1) This section applies if a witness objects to giving particular evidence on the ground that the evidence may prove that the witness:
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (b) is liable to a civil penalty.
- (2) Subject to subsection (5), if the court finds that there are reasonable grounds for the objection, the court is not to require the witness to give that particular evidence, and is to inform the witness:
 - (a) that he or she need not give the evidence; and
 - (b) that, if he or she gives the evidence, the court will give a certificate under this section; and
 - (c) of the effect of such a certificate.
- (3) If the witness gives the evidence, the court is to cause the witness to be given a certificate under this section in respect of the evidence.
- (4) The court is also to cause a witness to be given a certificate under this section if:
 - (a) the objection has been overruled; and
 - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
- (5) If the court is satisfied that:
 - (a) the evidence concerned may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law; and
 - (b) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (c) the interests of justice require that the witness give the evidence;the court may require the witness to give the evidence.
- (6) If the court so requires, it is to cause the witness to be given a certificate under this section in respect of the evidence.
- (7) In any proceeding in an Australian court:
 - (a) evidence given by a person in respect of which a certificate under this section has been given; and
 - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence;cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.
- (8) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:
 - (a) did an act the doing of which is a fact in issue; or
 - (b) had a state of mind the existence of which is a fact in issue.

(9) A reference in this section to doing an act includes a reference to failing to act.

187 Abolition of the privilege against self-incrimination for bodies corporate

(1) This section applies if, under a law of the Commonwealth or the Australian Capital Territory or in a proceeding in a federal court or an ACT court, a body corporate is required to:

- (a) answer a question or give information; or
- (b) produce a document or any other thing; or
- (c) do any other act whatever.

(2) The body corporate is not entitled to refuse or fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing that other act, as the case may be, might tend to incriminate the body or make the body liable to a penalty.

STATUTORY CERTIFICATION AND THE COMMON LAW PRIVILEGE

410 Because the Commission's proposed Evidence Code will codify the law of evidence, it is not contemplated that the common law privilege against self-incrimination would co-exist with the provisions on the privilege contained in the Code. Rather, the Code provisions would replace the common law privilege.

411 The Evidence Act (Aust) is not a codification of the law of evidence, although the Act displaces a great deal of the law of evidence applying in federal and ACT courts before its enactment. As already noted, s 128 does not replace the common law privilege but co-exists with it. Several consequences flow from this, including the following:

- Claims of privilege arising outside of federal court proceedings are not referred to in the provision, and would continue to be governed by the case law on the common law privilege: see the Commission's proposals in chapters 12 and 14 concerning statutory powers to compel disclosure of self-incriminating information in contexts other than judicial proceedings and the Commission's proposals in chapter 12, namely, that the privilege should apply unless explicitly removed or limited.
- The provision does not remove the privileges against liability to forfeiture and ecclesiastical censure, although the certification procedure does not extend to them: see the Commission's proposals in chapter 7 concerning the need for the express removal of those privileges.
- Although the certification process only applies to claims to the penalty privilege in relation to specific evidence, there is nothing to prevent claims based on the common law penalty privilege for all evidence sought in proceedings aimed at imposing a civil penalty: see the Commission's proposals in chapter 7 concerning the prevention of opportunities to claim a blanket penalty privilege for all the evidence sought.
- No distinction is made between oral statements, documents, real evidence, and any non-verbal intentional assertion. Section 128(1) simply says that the section applies if the witness gives particular evidence: see the Commission's proposals in chapter 8 concerning the preclusion of claims of privilege for pre-existing documents and real evidence.

- Although s 128(1) limits the certification process to witnesses who object to giving evidence on the ground that they will personally be incriminated, there is nothing to prevent claims based on the common law penalty privilege for incrimination of a witness's spouse: see the Commission's proposals in chapter 10 concerning the preclusion of claims of privilege based on incrimination of the claimant's spouse.

VOLUNTARY DISCLOSURE IN RETURN FOR IMMUNITY

- 412 The courts' powers under s 128 apply when the witness objects on reasonable grounds to the giving of particular evidence because it may tend to prove he or she committed an offence under any jurisdiction or is liable to a civil penalty. Under s 132, if it appears to the court that a witness has grounds for making an objection, the court must satisfy itself that the witness is aware of the relevant provision.
- 413 The Commission proposes that a similar provision relating to the privilege should be included in the Evidence Code.
- 414 Under s 128, the court can overrule the witness's claim in any of three situations:
- the claim is not based on reasonable grounds – in which case, the witness must give the evidence required (subs (2));
 - the claim has been overruled, but after the evidence has been given the court finds that there were reasonable grounds for the objection – in which case, under subs (4), the court is required to give the witness a certificate of immunity; and
 - the claim is legitimate, and although the witness chooses the voluntary disclosure option, the court requires the witness to give evidence and issues a certificate of immunity, on the basis that requiring him or her to give the evidence is in the interests of justice (subs (5)).
- 415 A claim of privilege by a defendant in criminal proceedings, which relates to evidence about his or her conduct or state of mind relevant to a fact in issue in those proceedings, will not be upheld (subs (8)).⁸² In New Zealand, such claims of privilege are in any case precluded by s 5(4)(a) Evidence Act 1908; although a defendant in criminal proceedings is not prevented from claiming the privilege for matters which are not the subject of those immediate proceedings. Section 5(4)(a) should be carried over into the Evidence Code: see s 2(4)(c) of the draft provisions following this chapter.
- 416 In the last of the three situations outlined above, the court's discretion to overrule a legitimate claim of privilege does not apply to claims based on extraterritorial liability. This is because an Australian court cannot guarantee that any certificate of immunity issued by it will be respected in foreign jurisdictions. In chapter 11, the Commission proposed that legislation should preclude privilege claims based on extraterritorial jurisdiction.

⁸² In the situation where a defendant gives evidence against a co-defendant in return for a certificate of immunity, the immunity prevents the evidence from being used against the defendant who gives the evidence.

- 417 The phrase “interests of justice” in subs (5) is not defined. The absence of legislative guidance for the courts in exercising their discretion to overrule the privilege in the interests of justice was criticised in the Senate debates on the Bill.⁸³ Mr Justice Smith said:
- So, if this path is to be gone down, then the issue has to be faced, I say, of what criteria are to be applied in exercising this discretion. We are at pains when we use discretions as a solution to set out the matters the judge should consider. Unless you do that – to use an unkind expression – this approach is, with respect, a cop-out. It sounds good; it sounds terrific; it is being done in the interests of justice; who can complain about that? But you will get an enormous disparity of application and you will get injustices done. One way to reduce that is to try to set out the criteria. (98)
- 418 The commentary accompanying s 128 gives an indication of the factors the courts will take into account in assessing what is in the interests of justice, but they are not binding on courts in exercising their discretion.⁸⁴ These are:
- the importance of the evidence in the proceeding;
 - in a criminal proceeding, whether it is the prosecutor or a defendant who seeks to adduce the evidence;
 - the nature and gravity of the offence or cause of action alleged in the proceeding;
 - the nature of the offence or liability to penalty in respect of which the witness may incriminate himself or herself and the likelihood of any proceeding being brought in respect of that offence or to recover a penalty; and
 - the means available to prevent publication of the evidence.
- 419 The factors referred to in the preceding paragraph give the courts flexibility. However, they are not as helpful as they could be. There is, for example, no indication of whether a prosecution for a serious offence will mean that a claim to the privilege is more or less likely to be upheld. Some of the factors are potentially in conflict. In many cases where, for example, the likely action against the witness is serious, the evidence might also be very important in the immediate proceedings. It is unclear how each factor should be weighted and which of the conflicting interests (disclosure or the privilege) should be given priority.
- 420 A more fundamental objection to the court’s discretion to overrule legitimate claims of privilege in the interests of justice is that the privilege is so fundamental a right that, once it applies in a given situation, it should not be able to be overridden by a court. The privilege is referred to in the New Zealand Bill of Rights Act 1990, and any derogations from it should satisfy the “reasonable limits” test in s 5 and be “prescribed by law”.
- 421 The Australian approach is a compromise between overruling the privilege as a result of balancing competing interests and upholding the privilege, by requiring the courts to give a certificate when a legitimate claim is overruled. Nevertheless, as has been observed throughout this paper (ie, in chapters 2, 12 and 14), even a use *and* use fruits immunity is not as complete a guarantee of protection from liability as non-disclosure.

⁸³ *Commonwealth of Australia Parliamentary Debates*, Standing Committee on Legal and Constitutional Affairs Hansard, Evidence Bill 1993, 4 March 1994.

⁸⁴ Attorney-General’s Department, “Commonwealth Evidence Law: Evidence Act 1995” (AGPS, Canberra, 1995), para 128.8.

- 422 The Commission acknowledges the benefits of disclosure in return for a certificate of immunity, in that a certificate may encourage some witnesses to give evidence who would otherwise remain silent. However, the legislature should determine in which circumstances competing public interests should preclude or restrict the application of the privilege: see chapters 12 and 13 for a discussion of what those interests are and how they should be measured against the interests the privilege protects.
- 423 Therefore, the Commission proposes that there should be a provision in the Evidence Code giving the courts a discretion to offer a witness who legitimately claims the privilege a certificate of immunity from use and derivative use in return for the disclosures sought, along the lines of that envisaged by subs (7) of the Australian Act. If the witness refuses, the courts should uphold the witness's claim and should not require him or her to make disclosures. This proposal is of course subject to any applicable legislation which removes or restricts the privilege in a particular context. In addition, the proposal does not amount to a suggestion that the privilege should be removed or limited in contexts outside of proceedings. The Evidence Code provision embodying the privilege in a variety of contexts would co-exist with the court-based certification procedure: see ss 2 and 4(1) in the draft provisions following this chapter, which reflect this intention.
- 424 It would be important to ensure in each case that the witness is made fully aware of the implications of making disclosure. This should be provided for in the certification process, and may go beyond the requirements of s 128(2) of the Australian provisions.

CONCLUSIONS

- Because the Commission's proposed Evidence Code will codify the law of evidence, the common law privilege should not co-exist with provisions on the privilege in the Code. Rather, the Code provisions would replace the common law privilege.
- Section 128 of the Evidence Act 1995 (Aust) co-exists with the common law privilege and, as a result, the provision does not preclude claims of privilege in some areas which the Commission has proposed closing off (eg, claims of privilege for liability to forfeiture or ecclesiastical censure, real evidence etc).
- The primary advantage of voluntary disclosure in return for a certificate of immunity is that of encouraging witnesses to testify. The Commission therefore proposes that the Evidence Code should contain a provision requiring the courts to give witnesses the opportunity to make voluntary self-incriminating disclosures in return for a certificate of immunity.
- There should be an obligation in the Code imposed on the courts to inform witnesses of the privilege, the certification process, and the implications of disclosure when self-incrimination issues arise.
- The certificate of immunity should be in a prescribed form and should include a use and use fruits immunity, similar to that envisaged by s 128(7) of the Australian Act.

- New Zealand should not follow the Australian approach in relation to authorising the courts to overrule legitimate claims of privilege in the interests of justice.
 - The Australian Act does not provide criteria for determining when it will be in the interests of justice to overrule the privilege in a particular case.
 - The guidelines contained in the commentary to the Australian Act, regarding the interests of justice discretion, are open to subjective and inconsistent application.
 - Once a right as fundamental as the privilege applies in any given situation, it should not be weakened or restricted by the courts in taking into account competing interests.
 - It is for the legislature to determine in what circumstances competing public interests should preclude or restrict the privilege's application in particular contexts: see chapters 12 and 13 for a discussion of what those interests are and how they should be measured against the interests the privilege protects.
 - When a witness legitimately claims the privilege in court proceedings, and refuses to make self-incriminating disclosures in return for a certificate of immunity, the court should respect the claim of privilege.
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DRAFT PROVISIONS
AND COMMENTARY

Draft Privilege Against Self-incrimination Sections for the Evidence Code

PRIVILEGE AGAINST SELF-INCRIMINATION

1 Definitions

In this Division

civil penalty means a penalty imposed in a proceeding, other than a criminal proceeding, the primary purpose of which is to punish the person on whom it is imposed, but does not include compensatory or punitive damages;

incriminate means to provide information that is reasonably likely to lead to the criminal prosecution of a person, or the imposition of a civil penalty on a person, under New Zealand law, but does not include the provision of information that may lead only to liability to ecclesiastical censure or forfeiture of an interest in property;

information means a statement of fact or opinion which is given, or is to be given, orally, or by non-verbal conduct intended as an assertion, or in a document that is prepared or created after and in response to a requirement from the person requiring the information, but not for the principal purpose of avoiding criminal prosecution or a civil penalty under New Zealand law;

self-incrimination means the provision by a person of information that is reasonably likely to lead to the criminal prosecution of the person, or the imposition of a civil penalty on the person, under New Zealand law, but does not include the provision of information that may lead only to liability to ecclesiastical censure or forfeiture of an interest in property.

Section 1 – Definitions

- C1 The exclusion of compensatory and punitive damages from the definition of “civil penalty” reflects existing case law to the effect that damages awarded against a defendant in civil proceedings do not comprise a civil penalty (*E L Bell Packaging Pty Ltd v Allied Seafoods Ltd* (1990) 8 ACLC 1135, 1144). Punitive damages of any kind, be they aggravated, nominal, treble etc, are not included within the term “civil penalty”. The words “a penalty imposed in a proceeding” are intended to encompass penalties imposed by tribunals, as well as those imposed by courts. Examples of civil penalties imposed in disciplinary or civil court proceedings could include striking off, fines, revoking of a licence etc.
- C2 According to the definition of “information”, the privilege will apply only to oral statements, and to newly created documents, including video and audio-tapes, admitted as testimonial statements, rather than as exhibits. The definition of “information” is intended to exclude the following from the privilege’s ambit:
- real evidence, admitted in evidence as an article rather than a statement;
 - documents already in existence at the time of the demand that the information be given; and
 - documents created in response to a requirement from a person that the information be given, but created to avoid detection of offending or culpability.
- The privilege may be claimed for
- oral statements,
 - newly created documentary statements (including audio and video-taped statements), and
 - non-verbal conduct which is intended as an assertion (eg, producing an article when the act of production is itself incriminating).
- C3 The definitions of “incriminate” and “self-incrimination” expressly exclude liability to ecclesiastical censure and forfeiture of an interest in property. Neither has ever, to the Commission’s knowledge, been claimed in New Zealand. However, the definition precludes any future, if unlikely, claims based upon them.

2 Privilege in respect of self-incrimination

- (1) A person who is required to provide specific information
 - (a) in the course of a court proceeding, or
 - (b) by the exercise of a statutory power or duty, or
 - (c) by a police officer or other person holding a public office in the course of an investigation into a criminal offence or a possible criminal offence,has a privilege in respect of that information and cannot be required to provide that information if to do so would incriminate that person.
- (2) A person who has a privilege against self-incrimination in respect of specific information may not be prosecuted or penalised for refusing or failing to provide that information whether or not the person claimed the privilege when he or she refused or failed to provide the information.
- (3) Subsections (1) and (2) apply
 - (a) unless an enactment explicitly removes the privilege against self-incrimination; and
 - (b) to the extent that an enactment does not explicitly remove the privilege against self-incrimination.

Section 2 – Privilege in respect of self-incrimination

- C4 Subsection (1) indicates the contexts in which the privilege will be claimable, in the absence of legislation to the contrary. These reflect the fact that the common law privilege has always been a privilege against compelled, rather than voluntary, self-incrimination. The requisite element of compulsion is present in the following situations:
- a person is required by law to make self-incriminating disclosures (eg, via a subpoena, judicial order, an official's exercise of statutory powers etc); or
 - a person is under pressure to make self-incriminating disclosures in response to questioning by the police or other officials exercising criminal investigation powers, where the very purpose of the questioning is to establish whether an offence has been committed or who the offender is.
- C5 Section 2 goes wider perhaps than orthodox notions envisage of what an Evidence Code should contain, in that it refers to information-gathering at an investigative stage, as well as to testimony in court proceedings. This broader approach is consistent with the importance of the privilege – as a fundamental right reflected in the New Zealand Bill of Rights Act 1990: see ss 23(4), 25(d) and 27(1). It would also be somewhat artificial to separate the treatment of the privilege in investigative contexts from its application in proceedings (because investigation leads to admissibility issues). In *Evidence Law: Privilege* (NZLC PP23, 1994), the issue has been dealt with differently, excluding consideration in the code of privilege issues at an investigative stage. The Commission has previously discussed the scope of its proposed Evidence Code, in *Evidence Law: Principles for Reform* (NZLC PP13, 1991), and will be coming back to these issues as it completes the evidence reference.
- C6 The references to “specific information” in subss (1) and (2) preclude blanket claims of privilege, rather than a claim in response to a particular question or request for a newly created document or testimonial act. For example, a person is prevented from claiming the penalty privilege to avoid discovery of *all* the documents in civil proceedings.

- C7 Subsection (2) reinforces the right contained in subs (1), by providing that when a person legitimately claims the privilege, he or she cannot be prosecuted for failing to provide information. Subsections (1) and (2) are subject to subs (3), which envisages that when a statute bestows information-gathering powers on a person and explicitly removes the privilege in a particular context, the person will be required to provide the information and may be prosecuted for refusing or failing to do so. Removing or limiting provisions in other statutes should be cross-referenced to these provisions in the Evidence Code, avoiding unnecessary duplication or inconsistencies with the Evidence Code provisions. The requirement that limitations on the privilege should be explicit reflects the idea that the privilege is a fundamental right, reinforced in the Bill of Rights Act, and as such should not be removed or limited unless legislation explicitly says so.
- C8 Subsection (2) reflects case law which has held that a person facing a charge of refusing to answer an inquiry need not at the time of the refusal have alluded to or contemplated the privilege as a justification for the refusal (*Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 402).

- (4) Subsections (1) and (2) do not enable a claim of privilege to be made
 - (a) on behalf of a body corporate; or
 - (b) on behalf of any person other than the person required to provide the information (except by an adviser on behalf of a client who is so required); or
 - (c) by a defendant in a criminal proceeding in relation to information about a matter in issue in that proceeding.
- (5) A claim of privilege against self-incrimination can be made only by a person who is liable to be prosecuted or subjected to a civil penalty in New Zealand in respect of the information concerned.

- C9 Subsection (4) reflects the following of the Commission's proposals:
- Bodies corporate, or individuals on their behalf, should not be able to claim the privilege against self-incrimination. However, corporate employees or officers may claim the privilege on their own behalf when they are personally liable to self-incrimination.
 - A person required to give incriminating information cannot claim the privilege unless he or she is the person who will be incriminated. This means that the privilege against self-incrimination cannot be invoked by a person on behalf of his or her spouse, or friend, or any other person. There is an exception within para (b) – allowing a claim of privilege to be made by legal counsel, or other similar advisers, on behalf of the person represented.
 - Criminal defendants should not be able to claim the privilege in proceedings for matters in issue in those proceedings. Subsection (4)(c) does not prevent a criminal suspect from claiming the privilege at an investigative stage, nor a criminal defendant from claiming the privilege in proceedings when the information sought poses a risk other than of conviction in the immediate proceedings for the particular offence. For example, the risk could be one of prosecution for a completely separate offence or of disciplinary proceedings for matters other than those which are the subject of the trial.
- C10 Subsection (5) prevents claims of privilege from being made in New Zealand when the risk of prosecution or civil penalty arises overseas. However, if there is also a risk of prosecution or civil penalty arising in New Zealand, the person will not be required to provide the self-incriminating information.

3 Application of privilege to civil penalties

An enactment which confers or preserves the privilege against self-incrimination (however described) in circumstances specified in that enactment is to be taken, in the absence of express provision to the contrary, to confer or preserve the same privilege in respect of liability to a civil penalty.

Section 3 – Application of privilege to civil penalties

- C11 Section 3 provides that references in legislation (existing or proposed) to the privilege or to self-incrimination (etc) should be interpreted as encompassing the privilege against liability to a civil penalty, unless the legislation expressly provides otherwise. The legislation in question may bestow or remove or limit the privilege against self-incrimination. The Commission has also proposed that provisions expressly distinguishing between the two privileges should be re-examined, with a view to combining the two, if practicable.

4 Privilege against self-incrimination in court proceedings

- (1) This section does not
 - (a) limit the application of section 2; or
 - (b) apply in respect of the evidence of a defendant in a criminal proceeding in relation to information about a matter in issue in that proceeding.
- (2) If in a court proceeding it appears to the court that a party or witness may have grounds to claim a privilege against self-incrimination in respect of specific information required to be provided by that person, the court must satisfy itself (if there is a jury, in the absence of the jury) that the person is aware of the privilege and its effect.
- (3) A person who claims a privilege against self-incrimination in a court proceeding must offer sufficient evidence to enable the court to assess whether self-incrimination is reasonably likely if the person provides the required information.

Section 4 – Privilege in court proceedings

- C12 This section provides a certification procedure in court proceedings, whereby a witness or party to the proceedings voluntarily gives self-incriminating evidence in return for a certificate guaranteeing immunity from the admissibility of the information (or of derivative information) in other proceedings. A use and use fruits immunity is provided (ie, immunity from the use of the information, and any information derived from it, in proceedings). Subsection (1) indicates that although the certification process in s 4 is limited to court proceedings, this does not restrict the wider application of s 2 (ie, to tribunals, in investigations etc). There is also nothing in s 4 to prevent legislation which bestows information-gathering powers and removes the privilege in a particular context from providing a use and use fruits immunity in the privilege's stead at that investigative stage.
- C13 Subsection (1)(b) is consistent with s 2(4)(c), and together the provisions indicate that criminal defendants who elect to testify in proceedings against them cannot claim the privilege under s 2, nor be given a certificate under s 4. This is distinct from criminal suspects, who can claim the privilege at the investigative stage and may, provided this is authorised, be given a use and use fruits immunity at that stage for any subsequent proceedings against them.
- C14 Subsection (2) requires a court to inform a party or witness in court proceedings that he or she may have grounds to claim the privilege against self-incrimination for specific information, if there appears to be a risk of self-incrimination. It is within the court's inherent jurisdiction to regulate its own procedure in determining how it goes about assessing whether the risk is present. The judge might, for example, adjourn proceedings until the witness has consulted a lawyer, or simply inform the witness of the privilege's existence and effect. In some instances, where the court is satisfied from the outset that the risk is "reasonably likely" to occur (see subs (3)), it may combine the information contemplated in subs (2), with that specified in subs (3), and proceed to explain the effect of a certificate issued under the section. Subsection (2) is modelled on s 132 of the Evidence Act 1995 (Aust).
- C15 According to subs (3), a witness or party must claim the privilege before he or she is entitled to it, or to a certificate in its stead. He or she must also present sufficient evidence to the court to enable it to assess whether the risk of self-incrimination is reasonably likely if the specific information is required to be given. This is consistent with case law which says that, in order for the court to make an assessment of the degree of risk, some degree of damning material may have to be disclosed to the court (*Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395, 403–4). In other words, it is not sufficient for a witness or party to baldly assert his or her right to the privilege or a certificate, without elaborating on the nature of the risk.

- (4) If the court is satisfied that self-incrimination is reasonably likely if the person provides the required information, the court must inform the person
- (a) that the person need not provide the information; and
 - (b) that, if the witness does provide the information, the court will give a certificate under this section; and
 - (c) of the effect of a certificate under this section.

C16 Under subs (4), once the court is satisfied that self-incrimination is “reasonably likely” if the party or witness gives the required information, it must inform him or her that the information need not be given. In other words, if the person insists on his or her legitimate privilege, this will be respected by the court. The court must also inform the person that if he or she gives the information, the court will provide a certificate under the section, and the court will explain the effect of the certificate. In order to comply with the subsection, and to ensure the person is given all the relevant material to make a decision (with or without the assistance of counsel), the courts should give the following standard form direction proposed by the Law Commission:

You have what is called a privilege against self-incrimination in respect of the specific information that you have been required to provide, and the effect of that privilege is that you cannot be required to provide the information in this court. You cannot be prosecuted or subjected to a civil penalty (eg, a fine in disciplinary proceedings) if you refuse to provide it.

If you do provide the information, the court will give you a certificate which is issued under section xx of the Evidence Code 199x. The effect of the certificate is that the information you provide cannot be used against you in any other civil or criminal proceeding in the High Court or a District Court in New Zealand. It could be used though if you were to be prosecuted because the information is false.

In deciding whether to provide the information in return for a certificate of the kind I have described, you should take into account that its effect is limited to other proceedings in the High Court or a District Court in New Zealand. It does not extend to the use of the information by officials exercising statutory investigative powers or to tribunals.

If you do provide the information, it could possibly be used by people who become aware of it as a basis for making further inquiries and investigations. Perhaps some people might be able to use the information against you in some way not involving the High Court or a District Court. You should consider those possibilities.

If you do not understand what I have said, you should say so now and I will explain further.

- (5) If a person does provide information after being informed in accordance with subsection (4), the court must give the person a certificate in the prescribed form.
- (6) Information given by a person for which a certificate was given under this section and evidence of any information, document, or thing obtained directly or indirectly as a result of the person having given that information, cannot be used against the person in any other court proceeding in New Zealand except in a criminal proceeding concerning the falsity of the information given.
- (7) In this section, **court proceeding** means a civil or criminal proceeding in the High Court or a District Court (including a Family Court or a Youth Court).

- C17 If after being informed by the court of the effect of a certificate given under s 4 the person chooses to “waive” the privilege and accept the certificate, the court is required to issue the certificate. There is no discretion about whether to do so according to subs (5).
- C18 Subsection (6) requires that the certificate issued under s 4 should comprise a binding use and use fruits immunity in return for the specific incriminating information provided by the person in the proceedings. Subsection (6) is modelled on s 128(7) of the Evidence Act 1995 (Aust). The immunities do not extend beyond court proceedings (eg, they have no application in tribunal hearings). Nor will the immunities extend to criminal proceedings for the falsity of the evidence. A person who gives deliberately false self-incriminating information cannot rely on any certificate issued in good faith under the section.
- C19 Subsection (7) limits the application of s 4 to court proceedings, meaning civil or criminal proceedings in the High Court or a District Court, including Family and Youth Court proceedings. Tribunals, investigating officials or organisations, and courts martial etc are not included within s 4's scope. Whether or not the privilege, or a statutorily prescribed immunity, applies in those contexts will depend on the particular legislation governing those contexts. Under the Commission's proposals, when the particular legislation is silent about whether the privilege is claimable, it will be available, if the person satisfies the requirements of s 2.

CERTIFICATE UNDER SECTION XX
OF THE EVIDENCE ACT 199X

This court certifies under section x(y) of the Evidence Act 199x that information given in a proceeding of the court by [*state name of witness*] on [*state date or dates*], a record of which is attached to this certificate*, is information to which section xx of that Act applies.

* a transcript, or other record, of the evidence is to be attached to this certificate, and is duly authenticated by the court or its proper officer.

Dated

(*affix seal*)

Judge, JP or Registrar of the Court

[NOTE: Section x(y) of the Evidence Act 199x states:

- (6) Information given by a person for which a certificate was given under this section and evidence of any information, document, or thing obtained directly or indirectly as a result of the person having given that information cannot be used against the person in any court proceeding in New Zealand except in a criminal proceeding concerning the falsity of the information given.]

APPENDIX A

List of Crown Agencies and
Other Organisations Consulted
by the Law Commission

Accident Rehabilitation and Compensation Insurance Corporation
Civil Aviation Authority of New Zealand
Commerce Commission
Commercial Affairs Division, of the (then) Department of Justice
Crown Law Office
Department of Conservation
Department of Inland Revenue
Department of Internal Affairs
Department of Labour
Department of Social Welfare
Land Transport Safety Authority
Ministry for the Environment
Ministry of Agriculture
Ministry of Commerce
Ministry of Education
Ministry of Fisheries
Ministry of Health
New Zealand Customs
New Zealand Income Support Service
New Zealand Local Government Association
New Zealand Police
Securities Commission
Serious Fraud Office

APPENDIX B

Statutory References to the Privilege Against Self-Incrimination

<i>Enactment</i>	<i>Removes or preserves the privilege?</i>	<i>Expressly applies to documents?</i>	<i>Expressly extends to spouse?</i>	<i>Use immunity or transactional immunity provided?</i>	<i>Other comment?</i>
Boilers, Lifts, and Cranes Act 1950 s 6	Preserves	No	No		
Casino Control Act 1990 s 86	Preserves	No	No		Shall be informed of the right to refuse if answers would incriminate.
Children, Young Persons, and Their Families Act 1989 s 62	Removes	Yes	No	Use immunity	Section 62 relates solely to the production of documents.
Commerce Act 1986 s 106	Removes	Yes	Yes	Use immunity	Evidence may be used in proceedings for perjury or supplying false information.
Companies Act 1955 s 241	Removes	No	No	Use immunity	
Companies Act 1993 s 267	Removes	No	No	Use immunity	
Customs Act 1966 s 297	Removes	Yes	No	Use immunity	Evidence may be used in proceedings for perjury or supplying false information.
Dangerous Goods Act 1974 s 23	Preserves	No	No		
s 33	Preserves	No	No		
Driftnet Prohibition Act 1991 s 13	Preserves	No	No		
Electoral Act 1993 s 248	Removes	No	No	Use and transactional immunity	Certificate of indemnity available which gives a stay of proceedings.

<i>Enactment</i>	<i>Removes or preserves the privilege?</i>	<i>Expressly applies to documents?</i>	<i>Expressly extends to spouse?</i>	<i>Use immunity or transactional immunity provided?</i>	<i>Other comment?</i>
Electricity Act 1992					
s 21	Preserves	No	No		Preservation limited to questions put under Part II of the Electricity Act.
s 116	Removes	Yes	No	Use immunity	Evidence may be used in proceedings under s 116(2)(b) (supplying false information).
Employment Contracts Act 1991					
s 144	Preserves	No	No		
Evidence Act 1908					
s 4	Preserves	No	No		
s 5	Removes	No	No		Recognises that an accused is not compellable, hence not compelled to incriminate him/herself when questioned in court.
s 48D	Preserves	No	No		
Explosives Act 1957					
s 10	Preserves	No	No		
s 51	Preserves	No	No		
Films, Videos, and Publications Classification Act 1993					
s 106	Preserves	No	No		Shall be informed of right to refuse if answers would incriminate.
Fisheries Act 1983					
s 79	Preserves	No	No		Note, very wide questioning powers.
Fishing Vessel Ownership Savings Act 1977					
s 27	Preserves	Yes	No		
Gaming and Lotteries Act 1977					
s 135	Preserves	No	No		
Gas Act 1992					
s 22	Preserves	No	No		Preservation limited to questions put under Part II of the Gas Act.
s 49	Removes	Yes	No	Use immunity	Evidence may be used in proceedings under s 49(2)(b) (supplying false information).

<i>Enactment</i>	<i>Removes or preserves the privilege?</i>	<i>Expressly applies to documents?</i>	<i>Expressly extends to spouse?</i>	<i>Use immunity or transactional immunity provided?</i>	<i>Other comment?</i>
Health and Safety in Employment Act 1992 s 31	Preserves	Yes	No		
Home Ownership Savings Act 1974 s 16	Preserves	Yes	No		
Hovercraft Act 1971 s 5	Preserves	Yes	No		
Inland Revenue Department Act 1974 s 18	Removes	No	No	Use immunity	Evidence may be used in proceedings for perjury.
Insolvency Act 1967 s 70	Removes	No	No	Use immunity	Evidence may be used in proceedings for perjury or supplying false information.
Legislature Act 1908 s 253	Removes	No	No	Use and transactional immunity	Transactional immunity available if Select Committee provides a certificate. Evidence may be used in proceedings for perjury.
Machinery Act 1950 s 6	Preserves	No	No		
Niue Act 1966 s 294	Preserves	No	No		
Ozone Layer Protection Act 1990 s 37	Preserves	No	No		
Petroleum Demand Restraint Act 1981 s 18	Preserves	No	Yes		
Proceeds of Crime Act 1991 s 47	Removes	No	No	Limited use immunity	Evidence may be used in proceedings for supplying false information, or in applications for restraining, forfeiture or pecuniary penalty orders.
s 72	Removes	Yes	No	Limited use immunity	Evidence may be used in proceedings for supplying false information, or in

<i>Enactment</i>	<i>Removes or preserves the privilege?</i>	<i>Expressly applies to documents?</i>	<i>Expressly extends to spouse?</i>	<i>Use immunity or transactional immunity provided?</i>	<i>Other comment?</i>
					applications for restraining, forfeiture or pecuniary penalty orders.
Road User Charge Act 1977 s 18B	Removes	No	No	Use immunity	Evidence may be used in proceedings for perjury. Use immunity expressly applies to documents.
Secret Commissions Act 1910 s 15	Removes	Yes	No	Use immunity only in relation to Secret Commissions Act	Immunity is limited to prohibition against use of the answers or discovery in proceedings for an offence under the Secret Commissions Act.
Serious Fraud Office Act 1990 s 27	Removes	Yes	No	Limited use immunity	Answers or information may be used if inconsistent evidence is later provided by the person, or in a proceeding for supplying false information. A refusal to answer questions or supply information may be used as evidence. No immunity in relation to documents produced.
Social Security Act 1964 s 11	Preserves	Yes	No		
Takeovers Act 1995 s 11	Removes	Yes	Yes	Use immunity	Immunity limited to use in criminal proceedings.
Tax Administration Act 1994 s 18	Removes	No	No	Use immunity	Evidence may be used in proceedings for perjury.
s 19	Removes	Yes	No	Use immunity	Evidence may be used in proceedings for perjury.
Unit Trusts Act 1960 s 21	Removes	No	No	Use immunity	Evidence may be used in proceedings for perjury.

<i>Enactment</i>	<i>Removes or preserves the privilege?</i>	<i>Expressly applies to documents?</i>	<i>Expressly extends to spouse?</i>	<i>Use immunity or transactional immunity provided?</i>	<i>Other comment?</i>
Weights and Measures Act 1987 s 29	Preserves	Yes	No		Shall be informed of the right to refuse if production would incriminate.
Wheat Industries Research Levies Act 1989 s 22	Preserves	Yes	No		Shall be informed of the right to refuse if production would incriminate.

APPENDIX C

Law Commission Right of Silence Surveys

IN THE COURSE of preparing *Criminal Evidence: Police Questioning* (NZLC PP21, 1992), the Commission decided that empirical data on the exercise of the right of silence before and during trial was needed before it could with any confidence advance reform proposals. The Commission wished to test some of the assumptions commonly made about the exercise and effect of the right of silence, before it publishes its final report on the right of silence and confessions.

The three surveys were designed to test the following assumptions commonly made about the right of silence:

- The exercise of the right of silence prior to or during trial increases the likelihood of an acquittal.
- The right of silence is invoked by guilty people to evade conviction.
- The right of silence leads to an undue number of wrongful acquittals.
- The right of silence prevents the detection of crime.

Jury trial survey

The Commission conducted a survey of all judges involved in jury trials in New Zealand for a three-month period in 1992. Survey forms were sent to every High Court Registry and District Court in the country for completion. There was a 92.4% response rate, and there were 398 defendants in the survey. The aim of the research was to consider how often defendants exercise the right of silence both before and during the trial, and the impact on conviction or acquittal of exercising the right. The research was designed to consider the impact of judicial comment on the exercise of the right of silence. The research also considered the relationship between the nature of the offence and the exercise of the right of silence, as well as the relationship between the nature of the offence and judicial comment. The survey responses were coded and inputted on a Topic search and retrieval full text database. In order to evaluate the significance of relationships in the survey, chi-square tests were undertaken. Chi-square is a statistical test which examines the relationship between two variables. A significant result is one where the two variables are found to be related.

Crown solicitor survey

With the assistance of the Crown Law Office, a survey was conducted in March and April 1992 for all trials in 11 District Courts and 7 High Courts. Crown solicitors recorded the information, the main aim of which was for

the Commission to be in a position to compare the overall conviction rate with the conviction rate in those cases where the defendant:

- responded or did not respond to police questioning, or
- testified or did not testify, or
- responded to police questioning and testified, or
- did not respond and did not testify.

The Commission received a total of 376 responses. A total of 91 responses (24.2%) were invalid. Again, the survey responses were coded and inputted on a Topic search and retrieval full text database, and chi-square tests were conducted.

Police station survey

The third survey comprised interviews with suspects at the Christchurch and Henderson, Auckland police stations from June to December 1992. The survey was designed to discover how often the right of silence was exercised by police suspects in response to police questioning. Questions elicited the impact of demographic and other factors on statements made by suspects during interviews with police, the length of interviews and breaks, the timing of cautions by police, the requests for and provision of legal advice amongst different ethnic groups and the link between the age, gender and previous criminal record of the suspect. There were 312 usable questionnaires from the total of 322. The questionnaires were coded and then entered into an MS Access database. Validation checks were included in the data entry forms to ensure the accuracy of the transfer from the questionnaires to the database. Most of the data analysis was carried out using the Pivot Table tool in MS Excel 5. This enables rapid calculation of frequencies and cross-tabulations of nominal variables. The database sorting function in the spreadsheet was used to determine the relative time when specific events took place. Chi-square tests were conducted.

APPENDIX D

Certificate under Section 128
of the Evidence Act 1995 (Aust)

SCHEDULE
FORMS

FORM 1

[Set out heading to action or matter]

CERTIFICATE UNDER SECTION 128
OF THE EVIDENCE ACT 1995

This Court certifies under section 128 of the *Evidence Act 1995* of the Commonwealth that evidence given in these proceedings by *[state name of witness]* on *[state date or dates]*, a record of which is attached to this certificate*, is evidence to which subsection 128 (7) of that Act applies.

**a transcript, or other record, of the evidence is to be attached to this certificate, and duly authenticated by the court or its proper office*

Dated:

L.S.

(affix seal)

_Judge or magistrate of the Court

[NOTE: Subsection 128 (7) of the *Evidence Act 1995* provides as follows:

- “(7) In any proceeding in an Australian court:
- (a) evidence given by a person in respect of which a certificate under this section has been given; and
 - (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence; cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.”].

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