

## LEGAL PRIVILEGE IN NEW ZEALAND

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### 1. INTRODUCTION AND DEFINITIONS

#### *Introduction*

In both civil and criminal cases, confidential communications between a client and the client's legal adviser, and certain communications between the client or legal adviser and third parties, do not have to be revealed in evidence.

The privilege, commonly referred to as legal professional privilege, can be divided into two categories: solicitor-client privilege and litigation privilege.

The law of legal professional privilege in New Zealand has been codified by the Evidence Act 2006 (also referred to here as "the Act"). The Act essentially consolidated the existing law of legal professional privilege in New Zealand, and made a number of key changes.

This presentation looks at how the Act has defined the scope of each of the two branches of legal professional privilege, and the sources of the current law. It analyses the extent to which the Act departs from previously established common law principles, including the circumstances under which the privilege can be waived and to whom the privilege applies. The presentation concludes with a brief discussion as to whether judicial application of the Act to date, has shown an increased or reduced protection of information.

#### 1. *Definitions*

Solicitor-client privilege is defined in section 54 of the Act (Privilege for communications with legal advisors) in the following way:

*"A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was –*

- (a) intended to be confidential; and*
- (b) made in the course of and for the purpose of –*
  - (i) the person obtaining professional legal services from the legal adviser; or*

(ii) *the legal adviser giving such services to the person."*

Section 56 of the Act (Privilege for preparatory material for proceedings) defines litigation privilege as applicable in the following circumstances:

*"a person (the "party") who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of –*

- (a) *a communication between the party and any other person:*
- (b) *a communication between the party's legal adviser and any other person:*
- (c) *information compiled or prepared by the party or the party's legal adviser:*
- (d) *information compiled or prepared at the request of the party, or the party's legal adviser, by any other person."*

Litigation privilege only applies to communications or information made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (s56(1) of the Act).

For the purposes of these sections, a "legal adviser" is defined as *"a lawyer, a registered patent attorney or an overseas practitioner"*. "Overseas practitioner" is separately defined (s51(1) of the Act).

For the purposes of these sections, a "lawyer" has the same meaning as given by s6 of the Lawyers and Conveyancers Act 2006 (s51(1) of the Act). This Act, which came into force on 1 August 2008, defines a lawyer as *"a person who holds a current practising certificate as a barrister or as a barrister and solicitor."*

References to communications or to any information includes reference to communications or information contained within a document. Further, references to communications made or received by a person (or acts carried out by a person) includes reference to communications made or received (or acts carried out) by an authorised representative of that person on that person's behalf (s51(4) of the Act).

## **2. SOURCES**

The law of professional legal privilege in New Zealand prior to the commencement of the Act, derived from a variety of statutory and common law rules. Some rules as to the admissibility or otherwise of legally privileged information in civil and criminal proceedings were contained in such enactments as the Evidence Act 1908, the Official Information Act 1980, and the High Court Rules. The majority of the rules originally stemmed from English common law, but the differences between English law and New Zealand law have tended to increase in recent decades.

The Evidence Act 2006 draws upon the common law and statutory provisions to create a comprehensive code of the law of evidence for court proceedings in New Zealand.

Under the Act, regard may still be had to the common law either in interpreting the Act or where no other provision regulates the admission of particular items of evidence - but only to the extent that the common law is consistent with the Act's provisions and to the promotion of its purpose and principles (*ss10(1)(c) and 12 of the Act*).

As the Court of Appeal decision in *R v Shortland* ([2007] NZCA 37, 2 March 2007, paras 41-44) illustrated, the New Zealand Law Commission report *Evidence* (NZLC R55, Vol 2, 1999) is a relevant, but not necessarily determinative, reference in interpreting the Act. In *Bain v R* [2010] 1 NZLR 1 (SC) the Supreme Court frequently referred to the NZLC report in reaching its decision.

Statutory provisions that require disclosure of otherwise privileged communications continue to apply and prevail over the privilege provisions in the Act to the extent that there is any inconsistency (*s5 of the Act*).

### **3. SCOPE/LIMITS**

#### ***Scope of the privilege***

Section 53 of the Act provides that:

- "(1) *A person who has a privilege in terms of [ss 54 or 56] of the Act in respect of a communication or any information has the right to refuse to disclose in a proceeding –*
- (a) *the communication;*
  - (b) *the information, including any information contained in the communication; and*
  - (c) *any opinion formed by a person that is based on the communication or information."*

Similarly, under s53(3) a person who has such a privilege in respect of a communication, information, opinion, or document may require that it not be disclosed in a proceeding -

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

If the communication, information, opinion or document in respect of which a person has a privilege is in the possession of a person other than a person referred to above, a Judge may, on the Judge's own initiative or on the application of the person who has the privilege, order that the communication, information, opinion, or document not be disclosed in a proceeding (s53(5) of the Act).

The Act expressly preserves the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding (s52 of the Act).

### *Limits*

A judge must disallow a claim of privilege if satisfied that there is a prima facie case that the communication was made or received, or information compiled or prepared, for a dishonest purpose or to enable or aid anyone to commit what the person claiming the privilege knew, or reasonably ought to have known, to be an offence – see s67 of the Act.

Section 67 essentially codified and extended existing common law, which excluded claims of legal professional privilege for communications intended to further the commission of a crime or fraud. It was well-established at common law that if a client applied to a lawyer for advice intended to guide the client in the commission of a crime or fraud, the communication between the two was not privileged (see *R v Cox and Railton* (1884) 14 QBD 153). It did not matter that the solicitor was unaware of the client's unlawful purpose. The doctrine was also applied in the context of civil cases, where there was prima facie evidence that it was the client's intention to obtain advice in furtherance of a criminal or fraudulent purpose (see for example *Matua Finance Ltd v Equiticorp Industries Group Ltd* [1993] 3 NZLR 650 which was endorsed in *Gemini Personnel Ltd v Morgan & Banks Ltd* [2001] 1 NZLR 672 (CA) at [26]).

Section 67 of the Act appears to have a broader application than the common law doctrine, as s67 extends to all privileges and applies to communications or information made or received for a "dishonest purpose". While the Act does not define "dishonest purpose", it has been said to include "all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances" (*Crescent Farm (SIDCUP) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553). Equitable fraud that may amount to a civil wrong, but which falls short of dishonesty, will not be sufficient to void a claim to legal privilege (see *The Baby Hammock Co Ltd v A J Park Law* HC Auckland CIV-2008-404–3581, 24 March 2010 at [29]).

The Act also introduced a new limit on privilege and now requires the Court to undertake a novel balancing exercise (refer to Liesle Theron, "*Litigation Privilege in Criminal Cases*" [2006] NZLJ 436). The rule contained in s67(2) of the Act, provides that, subject to the privilege against self incrimination, a Judge may disallow a claim of legal professional privilege conferred under the Act in respect of a communication or information if the Judge is of the opinion that evidence of the communication or information is necessary to enable the defendant in a criminal proceeding to present an effective defence. Some guidance as to when privilege will be necessarily disallowed to

enable defendant to put forward an effective defence may be found in the Canadian case of *R v McClure* [2001] 1 SCR 445.

Where a privilege is denied by exercise of the discretion in s67(2), the communication or information disclosed, and any information derived from that disclosure, cannot be used against the holder of the privilege in a proceeding in New Zealand (ie the privilege against self incrimination prevails).

### ***3.1 Between lawyers***

Communications between a client's various legal advisers, such as communications between a solicitor and his or her supervising partner, are privileged when such communications are undertaken with a view to providing the client with legal advice.

However, communications between opposing counsel are not confidential and thus are not protected by litigation privilege.

### ***3.2 Between third parties***

Generally speaking, in order for communications between the client or the client's legal adviser and third parties to be privileged, there must be a definite prospect of litigation in contemplation by the client, and not a mere vague anticipation of it, and the communication must have been made for the purpose of enabling the legal adviser to act or advise with regard to the litigation. As pointed out in *Jeffries v Privacy Commissioner* [2011] 1 NZLR 45 at [20] (SC), "the important question remains simply the 'character' in which the information is made, received, compiled or prepared".

Solicitor-client privilege extends to communications by the client's agent to an employee or other subordinate of the adviser, and vice versa. However, solicitor-client privilege does not generally extend to communications with third parties.

### ***Waiver***

A person who has a privilege may waive that privilege either expressly or impliedly (s65 of the Act).

A person who has a privilege in respect of a communication, information, opinion or document, waives that privilege if the person –

- (a) (or anyone with the authority of that person) voluntarily produces or discloses, or consents to production or disclosure of, any significant part of the privileged communication, in circumstances that are inconsistent with a claim of confidentiality; or
- (b) acts so as to put the privileged communication in issue in a proceeding; or
- (c) institutes a civil proceeding against a person who is in possession of the privileged communication, the effect of which is to put the privileged matter in issue in the proceeding.

However, privilege is not waived if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.

The privilege is the client's and not the lawyer's. Until such time as the client waives that privilege, it is the lawyer's duty, if requested to make disclosure, to claim the privilege.

#### **4. IN-HOUSE LAWYERS**

The privilege is applicable to in-house lawyers. Two limitations on the privilege are particularly relevant to in-house lawyers.

First, the privilege conferred by s54 of the Act is restricted to communications between a person and their legal advisers. The term "legal advisers" includes only those lawyers who hold a current practising certificate. In-house lawyers need to hold a practising certificate for the privilege to apply.

Second, the Law Commission (in a report published before the Act was passed) pointed out the significance of the nature of the relevant activities, with particular reference to in-house lawyers, as follows:

*"An in-house lawyer is likely to be called upon to perform duties going beyond the usual functions of a lawyer. A company executive should not be able to shield activities from scrutiny that are not lawyers' activities, simply because the executive has qualified as a lawyer. This is so even though the advice of a competent lawyer in private practice is unlikely to be totally silent on the commercial and public relations consequences of that advice."*

#### **5. PROSPECTIVE**

A primary objective of the law of evidence is that, unless otherwise provided, all relevant evidence should be admissible in proceedings (*section 7 of the Act*). Evidence is relevant if it "*has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding*". The courts have recognised that such a threshold for relevance is relatively low.

It remains to be seen whether the Act will tilt the balance in favour of greater access to and admissibility of privileged communications or information.

One important change that the Act has introduced is an overriding discretion as to confidential information (*section 69 of the Act*). A Judge may give a direction under this section preventing disclosure if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in –

*"(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded or prepared or to whom it was communicated; or*

- (b) *preventing harm to –*
- (i) *the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded or prepared; or*
  - (ii) *relationships that are of the same kind as, or of a kind similar to, the relationship referred to [above]."*

When considering whether to give a non-disclosure direction, the Judge must have regard to a number of factors, including (but not limited to) the likely extent of harm that may result from the disclosure of the communication or information, the nature of the communication and its likely importance in the proceeding, and the availability or possible availability of other means of obtaining evidence of the communication or information. The Court may exercise its discretion to protect confidential information whether or not the information would also be protected by a specific privilege conferred under the Act.

This discretion may lead to greater protection of professional secrecy within New Zealand. Since the Act came into force, parties claiming privilege in respect of certain documents are frequently relying on s69 of the Act as a back stop (ie to prevent disclosure of the document on the grounds of confidentiality in the event the document is not protected by privilege) – see for example *N-Tech Ltd v Abooth Ltd (In Rec)* HC Auckland, CIV-2006-404-3362/CIV-2007-404-990, 25 February 2011, White J. According to *R v X* [2010] 2 NZLR 181 (CA), s69 was enacted to deal with the issue of less clearly defined relationships (ie other than solicitor-client etc) and discrete confidential information, and such information may be disclosed **unless** the Judge gives a direction under s69(2) of the Act.

The overall impact of the Act is still emerging. Some provisions of the Act have lead to greater protection and other provisions still emerging have resulted in lesser protection.