Office of the Inspector-General of Intelligence and Security

A review of the New Zealand Security and Intelligence Service's handling of New Zealanders' privileged communications and privileged information

PUBLIC REPORT

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December 2018

WHY PROTECTING PRIVILEGED COMMUNICATIONS AND PRIVILEGED INFORMATION IS IMPORTANT

1. Intelligence collection activities give rise to the risk of obtaining privileged communications and privileged information. The intelligence and security agencies when carrying out collections must be alert to this risk, despite it sometimes being difficult to identify in advance or difficult to mitigate. Privileges protect specific communications and information where there is a recognised need for confidentiality to enable certain relationships to function effectively and appropriately. The overarching principle which has informed this Review is that statutory privileges,[1] and certain other confidences and privileges such as those for journalists' confidential sources and the communications of Members of Parliament, reflect fundamental and important values in New Zealand society today.

2. There are recognised social and legal values in having certain confidential relationships protected to an especially high degree from third party interference, including interference or exploitation by the State. Those values should be recognised in the intelligence and security agencies' functions. Legal professional privilege in particular holds an elevated status in the law. It is a "fundamental human right"[2] which the courts have said can be abrogated only by express statutory language.[3]

THE SCOPE OF THIS REVIEW

Legal requirements

3. The Review, carried out under s 158 of the Intelligence and Security Act 2017 (ISA), considered the extent to which the New Zealand Security Intelligence Service's (NZSIS or the Service) handling of privileged material complied with legal requirements, initially under the New Zealand Security Intelligence Service Act 1969 (NZSIS Act) and subsequently under ISA which replaced the NZSIS Act. Section 70 of ISA imported into the intelligence warranting regime the main privileges which have been codified in the Evidence Act 2006. I also considered applicable common law where it goes beyond the terms of s 70 ISA.

4. This comprehensive approach to relevant law was necessary, given intelligence agencies are not directly dealing with privilege in terms of "evidence" or "proceedings" (ie, the language employed in the Evidence Act) and what the law seeks to protect New Zealanders "from" in the intelligence and security context is different from the law enforcement context. The Review has taken into account the policy intent of both executive Government and Parliament in this area, namely, the policy that underpinned ISA, and as expressed in the Ministerial Policy Statement (MPS) on *The management of information by GCSB and NZSIS, including retention and disposal of that information*.[4]

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1 As set out in the Evidence Act 2006.

2 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [7] per Lord Hoffman.

3 *Rosenberg v Jaine* [1983] NZLR 1 at 12; See further discussion in Appendix One to this Report.

4 See ISA, ss 158(2)(a) and 206 to 210; MPSs are available at www.nzic.govt.nz/legislation/.

5. ISA applies to both intelligence and security agencies, the Service and the Government Communications Security Bureau (GCSB or the Bureau). My comments on the law therefore apply to both, but my Review of existing policies and practices primarily concerned the Service. I appreciated the Service's fulsome engagement and willingness to discuss the legal issues with me and my office over the duration of this Review, which served to clarify where we agreed on points of law as well as where our views differed.[5] More recently, under ISA, I also note with appreciation the input I received from the Bureau.

Guidance from policies and procedures: practical examples

6. I reviewed in detail some 19 Service policies, procedures, templates, associated documents and training modules.[6] The most significant document is a "joint policy statement on privilege" issued in September 2017 by both the Service and the Bureau under ISA. The Service has advised over past months, and up to the time publication of this Report, that this joint policy statement is under review.

7. To best consider how the guidance materials directed practice, I examined a sample of the Service's approach to and handling of privileged material across:
   - selected warrant applications and subsequent warrant execution;
   - activities conducted without warrant; and
   - inadvertent collection or unsolicited receipt of information.

A PUBLIC REPORT ON THE REVIEW: TRANSPARENCY

8. In June 2018 the Directors-General of the NZSIS and the GCSB, and the Minister responsible for the NZSIS and the GCSB, received the classified version of this Report.

9. Publishing an unclassified version of my Report is an important part of effective oversight and public accountability.[7] While I am barred by law from disclosing information that would be likely to prejudice national security interests, I am committed to providing as much public information about the agencies' activities as I responsibly can. In other jurisdictions, such as the United Kingdom, while operational details of what the intelligence and security agencies do cannot be publicly disclosed, the guiding frameworks under which they operate can. In my view, such transparency marks best practice.

10. While it is not possible to include in this Report the details of specific Service warrant applications and activities that I considered, I can address matters of legal interpretation and the Service's institutional position on the scope of its responsibilities with respect to privilege. I am also able to describe generally where internal policies, procedures and practices were not adequate.

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5 As noted in the Summary Framework in this Report.

6 The number of relevant Service policies and procedures is partially due to the change of governing legislation during my Review from the NZSIS Act to ISA. The Service's policies, procedures and training modules under ISA were reviewed as at 31 May 2018; under the NZSIS Act as at 30 June 2017. The Service has indicated that there may be amendments to policies and practices which relate to the topic of privilege.

7 I am not obliged to publish reports of my "reviews", however, I generally do so consistent with the obligation governing Inquiry reports under s 188 ISA.

LEGAL ISSUES CONSIDERED: KEY FINDINGS SUMMARISED

11. My Review looked in-depth at the legal obligations regarding privilege and at how they were reflected in the Service's policies and practice. This report focuses on quite specific, even arcane, legal issues but I wish to note at the outset my general finding that the Service was and is very conscious of the need not to obtain the privileged communications and privileged information of New Zealanders, in activities carried out under a warrant. It is those Service activities, in the process of executing a warrant, where the risk of obtaining such privileged material is most likely to arise.

12. I also found that there were areas where the Service's policies needed more information and/or more clarity, particularly with respect to its obligations when carrying out activities where a warrant is not required and in areas where there is no express statutory provision governing the activity. My overall observation is that a more rigorously preventative approach should be taken to ensuring that, by whatever processes communications and information might be obtained, the Service minimises the risk of obtaining, retaining and using the privileged material of New Zealanders.

13. My key findings follow.

What must be included in warrant applications?

14. What needs to be clear in a warrant application is a statement of the risk, in that particular case, of encountering specific relationships[8] which have communications and information likely to be protected by a privilege. The application should then set out the steps that will be taken to minimise or avoid that risk. Without the full picture of the situational risk of encountering privilege, potential conditions or safeguards necessary for a warrant may not be flagged for and considered by the warrant issuer.

15. I found that warrant applications require more information, and more robust analysis, to be set out for the warrant issuer, addressing the full picture of the likelihood of obtaining privileged material of New Zealanders; any inquiries made; steps taken to avoid such collection; and how the material is to be handled if obtained. The templates for warrant applications have improved in this regard under ISA, compared to those under the NZSIS Act, but there is scope for further improvement, and more consistent practice, in order to ensure the full extent of the duty of candour for such *ex parte* applications is met.

When must privilege be considered?

16. I found that more accurate and more consistent guidance for NZSIS staff is needed on how privilege must be considered in relation to *all* lawful agency activities – both activities carried out under warrant and activities done lawfully without the need for a warrant. Privilege issues can apply to any information held by the Service, including information received in an unsolicited manner, and agency guidance should comprehensively reflect that. The key joint policy statement, current at the time of publishing this Report, makes no reference to

[8] For example, between a lawyer and client, or a member of a religious community and the minister of religion.

privileged information that the agencies might receive in an unsolicited manner. The adequacy and content of guidance relating to privileged material arising in activities done without warrant has been an ongoing point of difference with the Service throughout this Review. I consider it raises questions of lawfulness as well as propriety.

17. At the time of writing this Public Report, inconsistencies remain across the Service's guidance materials which may cause difficulties for staff. For example, most agency guidance material focuses on considering protections for privilege when applying for and executing warranted activities. Other guidance material advises staff not to seek to obtain privileged material as part of lawful activies undertaken without the need for a warrant, but states that privileged information obtained in this way may in some circumstances be retained and used. Other guidance rules out the need to consider privilege if information is received unsolicited with the result that privileged material received in this way is considered usable for "intelligence purposes".

Considering privilege when information is received unsolicited

18. Determining the extent of information the Service receives in an unsolicited manner has not formed part of this Review although it seems likely, in the context of any reciprocal intelligence relationships, such unsolicited receipt may be commonplace. The extent to which such unsolicited information might comprise New Zealanders' privileged communications and privileged information is uncertain but in my view the likelihood must be considered by the Service.

19. In law, privilege is not lost as soon as a third party interferes with the confidential communication by passing it to another party, including to the State.[9] Unless the "waiver" of the privilege is made voluntarily by the New Zealander who holds the privilege, the protection remains intact (although the protection of confidentiality offered by the privilege has undoubtedly been weakened).[10] The Service's position in the non-warranted context treats privileged material it obtains unsolicited as if the privilege had been destroyed or waived, and as if the information were no different to any other non-privileged information. I do not agree that is an available or proper approach and we will keep it under review.

Considering protections for privilege in statute and in common law

20. Examining when privilege must be considered also raises the question of what responsibility the Service has, as part of the public sector, to act consistently with the law on privilege as set out in both statute *and* the common law. The Law Commission in its recent review[11] of the Search and Surveillance Act 2012[12] recommended "the principle that powers under the

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9 See, for example, the discretionary protection able to be provided for privileged material when it comes into the hands of someone other than by consent, in s 53(4) of the Evidence Act; Hon Justice Mathew Downs (ed) *Cross on Evidence* (10th ed, LexisNexis NZ Ltd, Wellington, 2017) at [EVA 53.3].

10 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence Act and Analysis* (Thomson Reuters, Wellington, 2018) at 505 to 506.

11 New Zealand Law Commission *Review of the Search and Surveillance Act 2012* (NZLC, R141, 2017) at [4.89] to [4.100].

12 While the Search and Surveillance Act does not apply to the intelligence and security agencies, the Report of Sir Michael Cullen and Dame Patsy Reddy in 2016, *Intelligence and Security in a Free Society*, proposed a greater alignment between that Act and the statute governing the intelligence and security services.

Search and Surveillance Act should be exercised in a manner that protects any privilege held by, or available to, any individual".

What guidance do staff need about the nature of each of the privileges?

21. More comprehensive and consistent guidance about the nature of each of the privileges would be of assistance to operational staff, including examples of what material would and would not be covered under each of the privileges.[13]

22. The range of policies, procedures and direct advice provided to staff to date varied in its interpretation of the privileges, although this has gradually been consolidating under ISA, including through a joint NZSIS and GCSB policy statement issued on privilege. In particular, the Service and Bureau's joint guidance to date does not adequately reflect the absolute protection for legal professional privilege established at common law which has the effect that legal professional privilege can only be abrogated by express statutory language. There is no such express language in ISA, and as a result that Act is not a complete code for the agencies in terms of how they must approach legal professional privilege. The Service has also applied a narrower practical interpretation of religious privilege, both in advice provided and operational application, than the definition in the Evidence Act 2006 requires.

23. Fuller guidance about when privilege may have been waived by the holder of the privilege, or could be disallowed, will be necessary to assist staff to identify when these potential issues arise and legal advice should be sought. A sound understanding of waiver, for instance, is important to understanding the potential limitations on use of unsolicited material.

24. At the operational level, as far as possible, the processes should be clearly focused on best practices for not capturing privileged communciations and privileged information in the first place. Policies should reflect the presumption that in all aspects of operations the agencies will act consistently with the protections for privileged material, when encountered. If the agencies consider that there is a compelling operational need that justifies rebutting the presumption, such an exception should be explicit, narrowly framed, and require documented internal approval. Agency policies are unlikely to be as comprehensive as, for example, the United Kingdom's 2018 Code of Practice *Interception of Communications*[14] and the approach it takes to legal professional privilege, given the different statutory scheme in operation there. Nevertheless, parts of the Code provide an exacting approach to privilege which both New Zealand agencies could usefully consider.

What guidance do staff need about the nature of other relationships where confidential communications are essential?

25. The MPS on *The management of information by GCSB and NZSIS, including retention and disposal of that information*, under the heading of 'Additional matters to be reflected in internal policies and procedures', requires the GCSB and the NZSIS to "be aware of when

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13 I note that after the close of this Review the Service made improvements to guidance material (a standard operating procedure) by the insertion of useful examples.

14 United Kingdom Home Office *Interception of Communications Code of Practice; Pursuant to Schedule 7 of the Investigatory Powers Act 2016* (March 2018).

Parliamentary privilege and the protection for journalists' sources may apply". Given this requirement, in my view the Service's existing policy and procedures for staff do not sufficiently reflect the protections established at common law for a journalist's confidential sources, given the role of a free media in a democracy. Nor do existing policies and procedures require that any collection carried out directly against a journalist should have the same seniority of sign-off as for collection involving other kinds of confidential relationships, such as the communications of Members of Parliament (protected under Parliamentary privilege).

26. Given the significance of the social values at stake I consider that Service guidance and processes ought to be more strongly and clearly worded to avoid the possibility of Service staff inadvertently breaching their legal obligations with regard to these "sensitive category" individuals.[15]

27. While journalists, their confidential sources, and MPs' communications are not covered by s 70 ISA, the agencies' policies should reflect a high bar for interfering with such communications. As the Departmental Report on the New Zealand Intelligence and Security Bill 2016 noted:

> "In terms of protection for communications with Members of Parliament and journalists and their sources, the Bill does not confer a clear prohibition in relation to such communications. However, clause 3 [now ISA, s 3] makes clear that the primary purpose of the Bill is the protection of New Zealand as a free and democratic society. All of the provisions of the Bill will need to be given effect in light of this … It would be an exceptionally high bar to target a Member of Parliament or a journalist."[16]

When must privileged material be destroyed: can it ever be retained?

28. I have reasoned, as reflected in the summary framework for dealing with privilege (at paragraph 33 below), that if the agencies have a presumptive duty to act consistently with privilege, then it is appropriate that their policy and procedural guidance reflect a strong presumption that any privileged material obtained (whether incidentally intercepted; obtained without warrant, or received unsolicited) will be destroyed, without reporting.

29. In particular, I consider that privileged material which meets the very limited and exceptional test under s 104 ISA for disclosure to other public authorities, in New Zealand or overseas, should be destroyed by the agencies once disclosed. Section 104 applies only where the information is first deemed "irrelevant" to the agencies' own functions. In that context I see no basis for the Service to retain the information once it has disclosed it to the other authority, given the information will be both irrelevant and privileged. The agencies, by contrast, consider it may be retained, although they do not suggest it would be used for

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[15] See *Hager v Attorney-General* [2016] 2 NZLR 523, which subsequently resulted in an apology and settlement provided by the NZ Police to journalist Nicky Hager in June 2018, for a search that breached Mr Hager's rights under ss 14 and 21 of the New Zealand Bill of Rights Act 1990 (BoRA) and *inter alia* for the NZ Police failure to mention when seeking the warrant that "Mr Hager was a journalist who could claim journalistic privilege". See also ISA, s 19.

[16] DPMC *Departmental Report New Zealand Intelligence and Security Bill* (December 2016) at [593].

intelligence purposes.[17] I consider that retention of "irrelevant" privileged information, once disclosed under s 104, does not accord with the general approach to irrelevant material in ISA, or the policy approach taken in the MPS on *The management of information by GCSB and NZSIS including retention and disposal of that information*.

30. I intend to keep this complex area under review and so have requested that the Service provide me with relevant material and circumstances around any disclosure of the privileged material of New Zealanders under s 104, as soon as practicable after it has occurred. The Service has agreed to this process. I expect this will be a rare occurrence and, as yet, none has been received for review.

What record-keeping is required about privileged material?

31. Service policies contain no express reference to keeping records of the approach taken to privilege in the operational environment, for example in the context of activities carried out under a specific warrant, including the advice provided on specific privileges. I consider it possible to retain information about the nature of legal advice provided in certain circumstances, without retaining the actual identifying privileged material at issue.

32. This approach would satisfy a number of policy objectives: the presumption I contend for of destruction of privileged material; and the ISA requirement to act to facilitate effective oversight. To the extent that any privileged material contains personal information (and much would) the approach is consistent with Information Privacy Principle 9 of the Privacy Act 1993. This approach can also be undertaken consistently with the Public Records Act 2005, through the Service establishing an authorised disposal schedule. I note the MPS on *The management of information by GCSB and NZSIS including retention and disposal of that information* appears to expect this course of action be considered.[18]

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[17] The agencies consider the retention is necessary "for limited record-keeping and oversight purposes", and would be in a "locked down internal system" to prevent use for any other purpose.

[18] MPS at [38].

SUMMARISED RECOMMENDATIONS FROM THIS REVIEW

R1: Warrant applications: ensure that reasonable inquiries are made as to the likelihood of obtaining New Zealanders' privileged communications and privileged information in the course of execution of any proposed warrant and are fully represented in the warrant application.

R2: Guidance material for Service staff: ensure that existing guidance material is consolidated and amended so as to consistently and properly reflect:

a. The nature of the privileges and the common law and statutory protections of those privileges across all Service functions;

b. The general obligation, including as set out in the relevant Ministerial Policy Statement, to destroy privileged communications and privileged information of New Zealanders, without reporting; and

c. The very limited circumstances in which it will be lawful and proper for the Service to disclose to third parties the privileged communications and privileged information of New Zealanders which it has obtained or received.

R3: Amend and finalise the policy and procedures on privilege, having regard to the need for:

a. Fuller information on the elements of each privilege, for example, reflecting the breadth of 'minister of religion' in religious privilege, as required by s 58 of the Evidence Act;

b. Fuller information on the protection required for legal professional privilege;

c. Fuller information on the protection required for 'sensitive categories', for example, for journalists' confidential sources and reflecting factors such as the right to freedom of expression that must be considered if proposing a journalist as a target for collection;

d. Practical examples of communications and information that would and would not be privileged;

e. Guidance on a case by case basis when privilege may be waived or could be disallowed in accordance with ss 65 and 67 of the Evidence Act; and

f. Consultation by staff with the Service's Legal Team on all 'matters relating to privilege'.

R4: Record-keeping: Establish clear record-keeping requirements for the Service's handling of privileged material.

IGIS SUMMARY FRAMEWORK ON PRIVILEGE: HOW THE LEGAL OBLIGATIONS RELATING TO PRIVILEGE APPLY TO THE INTELLIGENCE AND SECURITY AGENCIES

33. This summary framework sets out my view of how the legal obligations relating to privilege apply in practice across the work of both intelligence and security agencies under the current law. The framework notes where my interpretation of the applicable legal obligations differs from that of the Service. The variances mainly arise in areas that are not directly governed by ISA. I have considered case law, indications of general legal policy in comparable New Zealand legislation (eg, the Search and Surveillance Act 2012, along with the recent Law Commission review of that Act), the relevant Ministerial Policy Statement, and my view on what the principle of legality requires. I note again that the Service has the current 'joint policy statement' relating to privilege under review and some of the Service's policy positions identified below may change.

The agencies should act consistently with the obligation that they must not seek to obtain privileged communications or privileged information, or knowingly risk doing so.

Prohibition on seeking to obtain privileged communications or privileged information

A. The agencies are prohibited from using activity under a warrant to seek or target any privileged communications or privileged information of New Zealanders.[19]

B. The agencies must not use any other activities — whether lawful, or authorised or unauthorised — to seek to obtain privileged material. To do so would circumvent the purpose behind the prohibition in s 70 ISA, and be inconsistent with the protections for privilege at common law (for legal professional privilege in particular).
The NZSIS position in the current joint policy statement is that it should not seek to obtain privileged material by lawful activities undertaken without warrant, unless it is necessary and proportionate, the Legal Team is consulted, and there is sign-off at appropriate manager level.

Where reasonable inquiries or proper prior consideration show that there is a real risk of obtaining privileged communications or privileged information that risk must be avoided

C. There is a constant duty, spanning the activities of both agencies, to make reasonable inquiries to understand the risk of obtaining privileged material when seeking to obtain other communications or information.

D. Warrant (or other authorisation) context:

a. If the risk arises in the context of an activity which requires a warrant, the risk must be specifically addressed in the application for the warrant. An assessment of the likelihood of the risk occurring should be included.

[19] The term 'New Zealanders' refers to a New Zealand citizen or a permanent resident of New Zealand.

b. The risk of obtaining such communications or information must be avoided or minimised as much as possible. A description of how that will be achieved should be included in the warrant application, along with an explanation of how any privileged material of New Zealanders is to be handled if obtained, with suitable conditions to reflect this put in the warrant as necessary.

E. Non-warrant context (ie, other activities):

a. Outside the warrant and authorisation context, including in the HUMINT[20] context, the agencies must ensure that staff are alert to the risk of obtaining privileged communications or privileged information, including through passive or unsolicited receipt, and have in place training and processes to guard against that.
The NZSIS current joint policy statement does not recognise a responsibility to guard against a risk of obtaining privileged communications or information in the non-warrant context, and does not address privilege in relation to material received via passive or unsolicited processes.

b. The same basic approach applies as above in the warrant context: the circumstances giving rise to the risk should be specifically identified, and an assessment made of how likely it is to arise.

c. With legal advice if necessary, activities should then be undertaken in a way that avoids or minimises the risk of privileged relationships and confidences being interfered with.

d. In the HUMINT area this will involve ensuring that individual relationships with Service staff do not implicitly encourage such disclosures of privileged communications and information.

If the agencies do obtain, hold or receive privileged communications or privileged information (by whatever means) they must act consistently with upholding the privilege.

F. Warrant (or other authorisation) context:

a. If privileged material of New Zealanders is obtained, it is unauthorised information (under s 102 ISA), obtained outside the scope of the warrant.

b. A warrant cannot be issued to retain that information, because it is privileged (s 70 ISA).

c. The information must be destroyed immediately (s 102(2)).

d. The only exception to the duty to destroy is if s 104 applies. Information will rarely fall within this exception. It must first be irrelevant to the agencies' own functions under

[20] Human intelligence.

ss 10 and 11 ISA. Second, there must be objective and concrete (ie "reasonable") grounds to believe that the information nonetheless may assist another agency in one of the circumstances set out in s 104(3). Third, the other agency must be the New Zealand Police, the New Zealand Defence Force, or a New Zealand or overseas public authority that the Director-General of the NZSIS "considers should receive the information".

e. If the agencies consider that s 104 applies to privileged material:
   i. The Director-General has a discretion to disclose the information — there is no presumption in favour of disclosure;
   ii. Legal advice should be obtained, ideally from a Service legal advisor with no prior involvement in the operation in which the information was obtained;
   iii. Once the decision to disclose the information is made all relevant material should be forwarded to the Inspector-General of Intelligence and Security (IGIS) so that she can form her own view of the legality and propriety of what has occurred;
   iv. At the conclusion of the IGIS review, the agencies should destroy the privileged information. There are ways of recording what has taken place in relation to that information without indefinitely retaining the privileged information itself. **The NZSIS policy position is that it is not required to destroy the privileged material following the disclosure of the material to another agency or authority, and will retain it for limited record-keeping and oversight purposes.**

f. If privileged communications or privileged information have been obtained, and identified as privileged, but cannot be destroyed (one example, perhaps, is as part of a large scale intercept):
   i. The information must not then be read, listened to, shared, reported on or used in any way, for any purpose;
   ii. Legal advice must be obtained as to how the privileged material can be marked, or otherwise managed, to best ensure its confidential nature is protected;
   iii. The agency should notify the IGIS as soon as practicable once the issue has come to the attention of the agency staff.

G. Non-warrant (or other authorisation) context:

a. If privileged communications or privileged information of New Zealanders is obtained by lawful activities conducted without a warrant it will be unsought or unsolicited (as the agencies accept that should not actively or directly seek to obtain it). It is not unlawful to receive information in such circumstances, but the agencies have a duty to then deal with it in a manner consistent with protecting the privilege.

b. After receipt and identification of the unsolicited information as privileged, and prior to destruction, the privileged information should be dealt with in a way that respects the confidence (eg, it should not be further listened to or read, or put to any use). **The agencies' current joint policy statement regarding privilege does not specifically address the use and retention of privileged material received in a passive or**

unsolicited manner in the non-warrant context. Instead, the joint policy statement provides that the privileged material "must be retained and handled in accordance with information management policies".

c. In practice, this requires the agencies to have policies and training in place that clearly treat such information in a manner akin to unauthorised information under s 102, ISA. It should be identified as privileged, and there is a very strong presumption that it will be destroyed.
The NZSIS policy position is that there is no presumption that the agencies will destroy unsolicited privileged material.

d. Following the scheme of s 102, a warrant cannot be issued to retain or re-obtain the information, because it is privileged.

e. The only statutory exception to the duty or presumption to destroy is if s 104 applies. Information will rarely fall within this exception. It must first be irrelevant to the agencies' own functions under ss 10 and 11 ISA. Second, there must be objective and concrete (ie, "reasonable") grounds to believe that the information nonetheless may assist another agency in one of the circumstances set out in s 104(3). Third, the other agency must be: the New Zealand Police, the New Zealand Defence Force, or a New Zealand or overseas public authority that the Director-General "considers should receive the information".

f. If the agencies consider that s 104 applies to privileged material:
   i. The Director-General has a discretion to disclose the information — there is no presumption in favour of disclosure;
   ii. Legal advice should be obtained, ideally from a Service legal adviser with no prior involvement in the operation in which the information was obtained;
   iii. Once the decision to disclose the information is made, all relevant material should be forwarded to the IGIS so that she can form her own view of the legality and propriety of what has occurred;
   iv. At the conclusion of the IGIS review, the agencies should destroy the privileged material.
   The NZSIS policy position is that it is not required to destroy the privileged material following the disclosure of that material to another agency or authority, and will retain it for limited record-keeping and oversight purposes.

g. If the agencies decide that in the non-warrant context there is some basis other than s 104 for retaining, accessing, sharing or in any other way using privileged communications or privileged information:
   i. Legal advice should be obtained, ideally from a Service legal advisor with no prior involvement in the operation;
   ii. Once the decision is made all relevant material should be forwarded to the IGIS so that she can form her own view of the legality and propriety of what has occurred.

APPENDIX ONE: SUPPORTING LAW ON PRIVILEGE

Intelligence and Security Act 2017 (ISA)

1. Under ISA, "an intelligence warrant may not authorise the carrying out of any activity or the exercise of any power for the purpose of obtaining privileged communications or privileged information of a New Zealand citizen or a permanent resident of New Zealand".[21]

2. Privileged communications or privileged information are defined as communications or information "protected by legal professional privilege or privileged in proceedings under section 54 or any of sections 56 to 59[22] of the Evidence Act 2006".[23]

The impact of broader common law principles protecting privilege

3. Any consideration of privilege also requires acknowledgement that the protection of privilege arises from substantive, common law principles, which in most common law jurisdictions such as New Zealand run alongside, and underpin, specific statutory regimes, such as ISA.

4. Legal professional privilege has the benefit of especially strong protection at common law. It is more than a "mere rule of evidence",[24] holding a higher status referred to as "a fundamental condition on which the administration of justice as a whole rests".[25] It encompasses the right to legal representation, with the accompanying need to ensure candour in that legal relationship. Legal professional privilege provides wider benefit than for any one particular client,[26] being recognised by the courts as "a fundamental human right long established in the common law".[27]

5. It has been held by the European Court of Human Rights to be part of the right to privacy guaranteed under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[28]

6. While Parliament can explicitly remove the application of legal privilege, through clear words in legislation, New Zealand law is unequivocal that:

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21 ISA, s 70(1).

22 Note that these sections identify to whom the privilege belongs, ie, the person who is entitled to assert or to waive the privilege.

23 ISA, s 70(2). Section 70 must be purposively interpreted, consistent with Parliament's intention to preserve the substantive protection of such communications and information in relation to agency activities and powers, rather than only with regard to court proceedings. This accords with ss 10 and 12 of the Evidence Act and with the approach taken in the Search and Surveillance Act 2012 (ss 136 to 148). This purposive approach is also supported by the New Zealand Law Commission *Review of the Search and Surveillance Act 2012* (NZLC, R141, 2017) at [17.24] to [17.30].

24 *Solosky v R* [1980] 1 SCR 821 at 836.

25 *B v Auckland District Law Society* [2004] 1 NZLR 326 at [37] per Lord Millett citing *R v Derby Magistrates Court ex p B* [1996] 1 AC 487 at 507 per Lord Taylor.

26 *R v Derby Magistrates Court ex p B* [1996] 1 AC 487 at 508 per Lord Taylor.

27 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [7] per Lord Hoffman. See also Bankim Thanki *The Law of Privilege* (2nd ed, Oxford, 2011) at [1.72] citing I Dennis *The Law of Evidence* (4th ed, 2010) at 408.

28 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [7] per Lord Hoffman citing *Campbell v United Kingdom* (1992) 15 EHRR 137 and *Foxely v United Kingdom* (2003) 31 EHRR 637.

> "[a] statute cannot abrogate the privilege in an indirect way. The legislature must use plain or unequivocal language."[29]

7. In the United Kingdom express statutory provisions[30] can, and do, overrule legal privilege, and other privileges based on the law of confidence, on a case by case basis in specific circumstances. Nevertheless, in respect of legal professional privilege, UK courts have affirmed that:

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."[31]

8. Consequently, legal professional privilege cannot be set aside by inference or simply overlooked. The House of Lords has stated:

> "It is evident that clear words are needed to override legal professional privilege. There is a strong presumption against Parliament intending a statute to operate so as to impair an existing substantive right."[32]

9. Similarly, the Supreme Court of Canada has held:

> "The privilege cannot be abrogated by inference. Open-textured language governing production of documents will be read *not* to include solicitor-client documents."[33]

10. The ISA does not expressly remove the protection for legal professional privilege in respect of any agency function or action and that privilege cannot be removed by indirect language.[34] The effect of this is that s 70 of ISA (which is limited to information collected in the context of a warrant) cannot be read as stating the full extent of the intelligence and security agencies' responsibilities to avoid obtaining and to protect privileged material in any operational context. Rather, s 70 is a statutory reaffirmation of fundamental legal principles and social values in the particular context of intelligence and security. The common law requires privileged communications and privileged information also be protected in activities undertaken without warrant.

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29 *Rosenberg v Jaine* [1983] NZLR 1 at 12.

30 Investigatory Powers Act 2017 (UK), ss 26 to 29, 53, 55 and 150.

31 *R v Secretary of State for the Home Department, ex parte Simms* [2002] 2 AC 115 at 131. See also *General Mediterranean Holdings SA v Patel* [1999] 3 All ER 673 and *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563.

32 Bankim Thanki *The Law of Privilege* (2nd ed, Oxford, 2011) at [4.79] citing *R v Secretary of State for the Home Department, ex p Simms* [2002] 2 AC 115, 131 (HL) and Bennion *Statutory Interpretation* (4th ed, 2002) at [271] and [705] to [707].

33 *Canada (Privacy Commissioner) v Blood Tribe Department of Health* [2008] 2 SCR 574 at [11]; *Jaballah (Re)* (2012) FC 1084 at [32] and [42] to [45].

34 For example, it cannot be removed by operation of ss 102 to 104 ISA.

11. Whenever information that may be subject to any one of the specified privileges is at issue, the agencies have a presumptive duty to act consistently with protecting the privilege.[35] The summary framework (at pages 10 to 14 above) outlines how that can be achieved. There may be specific circumstances that allow interference with a privilege, but that will not often be the case.

Legal professional privilege

12. Legal professional privilege has two limbs, referred to as legal advice privilege (also known as solicitor–client privilege) and litigation privilege, established in common law and subsequently codified in the Evidence Act.[36]

Legal advice privilege

13. Legal advice privilege is defined as:[37]
    (1) 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.

14. A "legal adviser" is defined as:[38]
    - a lawyer in New Zealand who holds a current practising certificate;
    - a registered patent attorney (providing advice on intellectual property); or
    - an overseas practitioner (entitled to practise in a country other than New Zealand).[39]

15. The privilege applies when legal services are requested, whether or not the person actually obtained the advice.[40] The privilege can extend to communications by the client or legal adviser to their agent or employee, provided the communication is intended to be confidential.[41] A summary of the legal advice received, created for the client by their agent

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35 The principles established by the Supreme Court of Canada in *Descoteaux v Mierzwinski* [1982] 1 SCR 860 are to similar effect: unless the law provides otherwise, when, and to the extent that, the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the conflict should be resolved in favour of protecting the confidentiality. Second, when the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with the confidence. Third, Acts providing otherwise must be interpreted restrictively.

36 Evidence Act, ss 54 and 56.

37 Evidence Act, s 54.

38 Evidence Act, s 51; Lawyers and Conveyancers Act 2006, s 6.

39 Evidence (Recognition of Overseas Practitioners) Order 2008; *Re Duncan* [1968] P 306, 311; *Kennedy v Wallace* (2004) 213 ALR 208.

40 Evidence Amendment Act 2016 (which came into force 8 January 2017), adding s 54(1A) to the Evidence Act.

41 *Cross on Evidence* at [EVA54.5], citing *Bannock v Monaco Management Ltd* [2015] NZHC 640.

or employee, will remain privileged provided it is kept confidential.[42] In some circumstances, the client's identity can be privileged.[43]

16. To identify whether this privilege applies to a communication or document, the essential question is "was the communication made or document brought into existence for the purpose of getting or giving confidential legal advice or assistance?"[44]

Litigation privilege

17. Litigation privilege is defined in the following terms:[45]
A person who is, or who on reasonable grounds contemplates becoming, a party to proceedings has a privilege for:
    - a communication between the person, or the person's legal adviser, and any other person (for example, an expert third party);
    - information compiled or prepared by the person or by the person's legal adviser;
    - information compiled or prepared at the request of the person, or the person's legal adviser, by any other person.[46]

18. Litigation privilege is sufficiently broad to encompass communications between the lawyer and their client. However, it only applies to a communication or information if it is made, prepared, compiled or received for the dominant purpose of preparing for litigation[47] and the litigation is current or within reasonable contemplation.[48] A longer communication cannot be split into component parts, with litigation privilege applying to some parts and not others — the test is the dominant purpose of the communication as a whole.[49]

19. Under ISA, the holder of the privilege must be a New Zealand citizen or permanent resident. As a result, litigation privilege applies to foreign litigation only if a New Zealander is involved and that New Zealander is the holder of the privilege.

Privilege for communications with ministers of religion

20. Religious privilege, and medical privilege which is outlined below, also recognise the value society accords certain relationships that require confidentiality to operate.[50]

21. A communication between a person and a minister of religion is privileged if the communication is made:[51]

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42 *Cross on Evidence* at [EVA54.5].
43 For example, provided the client's identity was disclosed in confidence; the client's solicitor is acting as legal adviser not as an agent; the client is not a party in litigation; the client is acting in the public interest or their identity is incriminating information; *Cross on Evidence* at [EVA54.11].
44 *Re Merit Finance and Investment Group* [1993] 1 NZLR 152(HC) at 158.
45 Evidence Act, s 56, with the heading 'Privilege for preparatory materials for proceedings'.
46 *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45.
47 *Guardian Royal Exchange Co v Stuart* [1985] 1 NZLR 596.
48 Evidence Act, s 56(1).
49 *Beckham v R* [2016] 1 NZLR 505.
50 New Zealand law has reflected some form of statutory protection for communications with ministers of religion since 1885; *Cross on Evidence* at [EVA58.2].
51 Evidence Act, s 58.

- in confidence,[52]
- to or by the minister in the minister's capacity as a 'minister of religion', and
- for the purpose of the person obtaining from the minister religious or spiritual advice, benefit or comfort.

22. A 'minister of religion' is defined[53] as a person who has "a status within a church, or other religious or spiritual community", that requires or calls for them to receive these confidential communications and respond with advice (as noted above).[54]

23. The rationale for the privilege is that "a person should not suffer temporal prejudice from what is uttered under the dictates of spiritual belief".[55] The purpose for which the communication is made is key.[56] The privilege does not protect communications when there is nothing in their nature to suggest a person is seeking religious or spiritual advice or solace, and where the communication is more in the nature of "a spontaneous utterance to express and, perhaps, relieve [a person's] own distress".[57] A communication seeking budgeting advice from a City Missioner, for example, will not be privileged.[58]

24. The Evidence Act 2006 broadened religious privilege from "confessions" to "plainly religious or spiritual communications in a general sense, whether or not they involve atonement for sin, and regardless of whether they are made within a religious structured community'".[59] The privilege is now "suitably broad and absolute to deal with modern society's more diverse religious and spiritual communities while at the same time, drawing a line so as not to extend protection to 'rationalist systems of ethical conduct' that do not have a religious or spiritual basis".[60]

Privilege for information obtained by medical practitioners and clinical psychologists

25. This privilege has a narrow application, protecting information from a person's consultation with a medical practitioner or registered clinical psychologist for "drug dependency" or any other condition or behaviour that may manifest itself in criminal behaviour.[61] It covers related information, such as communications the person makes to the health professional to enable the professional to examine, treat or care for the person; treatment notes; and prescriptions generated in the course of the treatment.[62]

26. The rationale is that compliance with the law is more likely achieved through medical treatment than prosecution, especially for drug addiction "where legal sanctions have little

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52 *R v L* [1998] 2 NZLR 141. In *R v L* (decided under s 31 of the Evidence Amendment Act (No 2) 1980, which related to "confessions") the Court held that discussions at a group prayer meeting were akin to group therapy sessions and did not meet the required level of confidentiality for a 'confession'.
53 Evidence Act, s 58(2).
54 *Preston v R* [2017] 2 NZLR 358.
55 *R v Howse* [1983] NZLR 246 at 251.
56 *Preston v R* at [90].
57 *Preston v R* at [93].
58 New Zealand Law Commission *Evidence — Reform of the Law* (NZLC R55, 1999).
59 *Preston v R* at [89], citing New Zealand Law Commission *Evidence Law: Privilege* (NZLC PP23, 1994) at [284].
60 New Zealand Law Commission *Evidence — Reform of the Law* (NZLC R55, 1999) at [266].
61 Evidence Act, s 59.
62 Evidence Act, s 59.

effect and the most important thing is to rehabilitate the addict".[63] However, the privilege does not apply if a judge required the person to submit to the consultation or examination.[64]

27. A person can consent to the disclosure of this medical information (ie, waive the privilege) expressly or by conduct through which such consent can be inferred. Merely bringing a complaint about, for example, the conduct of a medical practitioner, does not amount to a waiver.[65]

Privilege for settlement negotiations or mediation

28. This privilege protects communications in settlement negotiations in civil disputes, plea discussions conducted in criminal proceedings, and mediation.[66] A communication between a person and another party to a dispute is protected if the communication was intended to be confidential and made in connection with an attempt to settle or mediate the dispute. The privilege covers confidential documents prepared by the parties for the same purpose, but does not apply to the terms of a settlement agreement or evidence of such an agreement in a proceeding.[67]

Parliamentary privilege

29. Protections for proceedings in Parliament, and for journalists' sources outlined below, are sometimes referred to as 'limited privileges' for confidential communications. Proceedings in Parliament are protected to ensure that Parliament can function effectively. Collectively referred to as Parliamentary privilege, it takes the form of privileges, immunities and powers exercisable by the House of Representatives, its committees and members.[68]

30. The Privileges Committee of Parliament considered the use of intrusive powers within the Parliamentary precinct and, as a result, created the 'Protocol for release of information from Parliamentary information, communications and security systems'.[69] The Committee also created a Protocol on Police use of search powers in the Parliamentary precinct.

Journalists' sources

31. The need to protect the confidentiality of journalistic sources is often described as critical to safeguard the free press in a democratic society. The protection is closely related to the right to freedom of expression[70] and the media function to act as a public watchdog on matters of public interest, and to help ensure maintenance of a democratic culture. ISA includes specific

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63 New Zealand Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [10.100]; *R v Campbell* HC Wellington CRI-2005-085-3703, 9 February 2007 per Mallon J.

64 Evidence Act, s 59(1)(b).

65 *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2006] 3 NZLR 577 at [38], [39] and [129].

66 Evidence Act, s 57.

67 Evidence Act, s 57(2) and (3).

68 See also the Parliamentary Privilege Act 2014 which also ensures protection from civil and criminal liability for communications and documents. However, it is a qualified immunity which can be set aside for bad faith or a motive of ill-will.

69 Privileges Committee Report *Question of privilege regarding the use of intrusive powers within the Parliamentary precinct* I.17C, July 2014, Appendix C.

70 BoRA, s 14; Article 10 Convention on the Protection of Human Rights and Fundamental Freedoms.

protection for persons exercising their right to freedom of expression, advocacy, protest or dissent.[71] In Europe, measures which create a 'chilling effect' on the right of the media to freedom of expression have been held to breach the right in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[72]

32. The Evidence Act provides a limited protection for a journalist or their employer from being compelled, in court proceedings, to disclose the identity of an informant or to produce any document that would enable the informant's identity to be discovered.[73] A judge may, however, order disclosure of the informant's identity if satisfied that the public interest in disclosure outweighs any likely adverse effect of disclosure on the informant or another person; the public interest in the communication of facts and opinion to the public by news media; and the ability of journalists to access sources of facts.[74] The Court has said:[75]

> "While the statute does not give any particular guidance as to the relative weight to be attached to the elements which must be assessed under s 68(2), the trend of authority both in New Zealand and in the United Kingdom is to attach substantial weight to freedom of expression in a broad sense as well as in the narrow sense of encouraging the free flow of information and the protection of journalist's sources. … The presumptive right to the protection should not be departed from lightly and only after a careful weighing of each of the statutory considerations."

33. This view was reinforced in *Hager v Attorney-General*:[76]

> "Pursuant to s 68, it is no longer for the media to establish the public interest in the confidentiality of their sources. Rather it is for the applicant for a media warrant to persuade the court that other relevant public interests in disclosure outweigh the presumptive public interest in the preservation of that confidentiality."

34. The Courts have identified factors to be considered when weighing the public interest in disclosure of such confidential sources, for example, whether the information is important to the case at hand and not merely desirable or nice to have.[77] Further guidance is provided by the Courts in the context of search warrants.[78] An assessment of whether a search of a media organisation is reasonable requires a balancing between the need to investigate a public offence, and rights of freedom of expression, freedom from unreasonable search and seizure, privacy[79] and the protection of promised confidentiality.

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71 ISA, s 19.

72 *Goodwin v United Kingdom* (1996) 22 EHRR 123. The Canada Evidence Act s 39.1(7) was amended in October 2017 to increase the statutory protection for journalists' confidential sources. A court can authorise disclosure of information likely to identify a journalistic source only if it considers that the information cannot be produced in evidence by any other means and the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source (including having regard to the importance of the information to a central issue in the proceeding; freedom of the press; and the impact of disclosure on the journalist and source).

73 Evidence Act, s 68.

74 Evidence Act, s 68(2).

75 *Police v Campbell* [2010] 1 NZLR 483 at [92] and [93].

76 *Hager v Attorney-General* [2016] 2 NZLR 523 at [78].

77 *Police v Campbell* at [96] to [101].

78 *Television New Zealand v Attorney-General* [1995] 1 NZLR 641 (CA) at 647, 648 and 649.

79 BoRA, ss 14 and 21.

35. This guidance from the Courts relates to search warrants, which are open to legal challenge. For intelligence warrants, any impacts on privacy, freedom of expression and other human rights do not receive open scrutiny. Nevertheless, agency actions under intelligence warrants are subject in the same way to obligations under BoRA. The guidance noted above is therefore useful in assessing the necessity and proportionality of relevant Service warrants and activity consequent on warrants.[80] The need for such 'intrusion' must be more than mere expediency, and justified by an overriding requirement in the public interest.[81]

Relevance of procedures under the Search and Surveillance Act 2012

36. The Search and Surveillance Act 2012 provides a general statutory procedure for Police and others subject to that Act. Parliament's intent with the ISA was to align GCSB and NZSIS powers with those in the Search and Surveillance Act, with appropriate modifications.[82]

37. The New Zealand Law Commission's *Review of the Search and Surveillance Act 2012,*[83] publicly released in 2018, is instructive and provides a useful benchmark for considering the broad legal policy questions underpinning ISA. The Law Commission recommends strengthening the Search and Surveillance Act, and proposes seven principles be included in the Act, primarily based on existing case law,[84] to inform when and how search powers are exercised. One principle is that "powers under the Act must be exercised in a manner that protects any privilege held by, or available to, any individual".[85]

38. This principle is intended to provide tangible protection to privilege:[86]
    - by adequately signalling in warrant applications when issues of privilege may arise, allowing the issuing officer to consider whether existing procedures for managing privilege in the Act are sufficient or further conditions need to be imposed, and
    - throughout the investigation phase, not solely at the warrant application phase, including during the actual execution of the search.

Required advice on privilege to warrant issuers: Duty of candour

39. General obligations of candour and 'utmost good faith' apply to *ex parte* applications, such as applications for intelligence warrants.[87] The duty of candour is not weakened or otherwise adapted in the intelligence context.[88] The duty relates directly to the ISA requirement[89] for

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80 ISA, s 61.

81 Interception of Communications Commissioner's Office *IOCCO inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources,* 4 February 2015 at [6.47].

82 Cabinet Paper Two 'Warranting and Authorisation Framework' at [9], [52] and [57].

83 New Zealand Law Commission *Review of the Search and Surveillance Act 2012* (NZLC, R141, 2017).

84 Under BoRA, s 21.

85 New Zealand Law Commission *Review of the Search and Surveillance Act 2012* at [4.89] to [4.100]. A broader range of privileges is covered under the Search and Surveillance Act, s 136, than under the ISA and the Law Commission proposal covers the "rights conferred on journalists under section 68 of the Evidence Act 2006 to protect their sources" (at [4.98]).

86 New Zealand Law Commission *Review of the Search and Surveillance Act 2012* at [4.99].

87 *Canada (Citizenship and Immigration) v Harkat* [2014] 2 RCS 33 at [101]; See also *Mahjoub (Re)* 2012 FC 669, (SCC) at [101] and [102].

88 DPMC *Departmental Report New Zealand Intelligence and Security Bill* (8 December 2016) at [526] and [527]; *In the matter of an application by [XXX] for warrants pursuant to sections 12 and 21 of the Canadian Security Intelligence Act*, 2016 FC 1105.

89 ISA, ss 55 and 61.

the Minister (and Commissioner of Intelligence Warrants) to receive sufficient information to enable them to be "satisfied" [90] that the specified conditions for authorising intelligence warrants have been met.

40. The Departmental Report on the New Zealand Intelligence and Security Bill 2016 noted that "to the extent there is a risk in a particular warrant of intercepting privileged communications, the agencies will need to address this concern and how it will be avoided or mitigated in their application for the warrant".[91] This complements the requirement for a warrant application to "describe with due particularity the proposed activity".[92]

41. Where it is likely that privileged material will be obtained, regardless of the stated purpose of the warrant, courts have held that the warrant application must raise the issue to enable due consideration by the warrant issuer.[93] It is not sufficient for the recipient of the warrant to take procedural steps to exclude privileged material, absent advice on the matter to the warrant issuer.[94]

42. The courts have articulated general principles on the duty of candour, particularly in the search warrant context. These include that the warrant application: must give the warrant issuer "the full picture";[95] not present only selected facts or omit things the applicant thinks may mean the warrant issuer is less likely to issue the warrant;[96] be "as specific as circumstances allow";[97] sufficiently define the places, people and things to be found and be more than a fishing expedition with nothing in particular in mind.[98] Observance of these requirements also ensures it is "the judicial officer who decides what is relevant at the margins, rather than the appellant".[99]

43. A material failure to discharge the applicant's duty of candour has been held to be a "defect of a fundamental nature as the common law duty of candour is extensive and demanding".[100] Under ISA a lack of candour may risk the agency failing to satisfy statutory necessity and proportionality conditions and, should the matter ever come before a court, the warrant will likely be found to be unlawful, along with the activity undertaken in reliance on that warrant.[101] The IGIS, on reviewing the warrant, would likely conclude the warrant or activity was "irregular".[102]

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90 ISA, ss 58, 59 and 60.
91 *Departmental Report* at [590].
92 *Departmental Report* at [528]; now reflected in ISA, s 55(1)(b).
93 *Hager v Attorney-General* [2016] 2 NZLR 523 (HC) at [117].
94 *Beckham v R* [2016] 1 NZLR 505 at [18] and [127].
95 *R v Williams* [2007] 3 NZLR 207 at [209] to [214].
96 *R v Butler* (Court of Appeal, CA, 439/00, 10 April 2001) at [31].
97 *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at [41].
98 *R v Sanders* [1994] 3 NZLR 450 (CA) at 461.
99 *Tranz Rail Ltd v Wellington District Court* at [64].
100 *Hager v Attorney-General* at [62], [66], [68], [88], [103], [115], [116], [121] to [123].
101 *Hager v Attorney-General* at [67] and [68].
102 Under ISA, s 163.

Disallowance and waiver of privilege

Disallowance

44. A judge can disallow a claim of privilege if satisfied that the communication or information was made or prepared for a dishonest purpose (such as fraud), or to enable anyone to plan or commit a crime.[103] Courts have traditionally been reluctant to exercise this power, other than in exceptional cases:[104]

> "For the power to be exercised, a high threshold applied. Section 67(1) required a dishonest purpose that more completely diffused or animated the communication."

45. It will not be sufficient, for example, to simply allege fraud. A statement must have been made "in clear and definite terms" with "a foundation in fact".[105] A person seeking legal advice, or religious or spiritual comfort, in relation to a criminal charge they are facing would not lose their claim to privilege under this statutory exception.

Waiver

46. Only the person who "owns" the privilege can waive it – either expressly or impliedly.[106] A person waives privilege if they voluntarily produce or disclose, or consent to the production or disclosure of, any significant part of the privileged communication, information, opinion or document, in circumstances that are inconsistent with confidentiality.[107]

47. Whether a disclosure is significant depends on substance rather than the quantity of material involved.[108] A passing reference to taking legal advice will not be sufficient to amount to waiver. Disclosure by the privilege holder of the nature of legal advice received, with an assertion that it supported the holder's position, will amount to waiver.[109] Once privilege is waived for a particular communication, then it is also waived for other records of the same communication.[110]

48. Privilege will not have been waived if the disclosure to the other person occurred involuntarily or mistakenly, or without the consent of the person who owns the privilege. Sharing of a communication in confidence will also not amount to waiver, for example, providing privileged material to another professional adviser or within another form of confidential relationship or on condition of non-disclosure. Section 53(4) of the Evidence Act confirms that the law's ability to protect privilege is not thwarted simply because the communication comes into the hands of someone other than by consent of the privilege holder.

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103 Evidence Act, s 67.
104 *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at 265.
105 *Matua Finance Ltd v Equiticorp Industries Group Ltd* [1993] 3 NZLR 650 (CA) at 653.
106 Evidence Act, s 65.
107 Evidence Act, s 65(2).
108 *Messenger v Stanaway Real Estate Ltd* [2014] NZHC 2103 at [22].
109 *Robertson v Auckland Council* [2014] NZHC 422; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 70 ALJR 603.
110 *Capital & Merchant Finance Ltd v Perpetual Trust Ltd* [2015] NZHC 1233 at [27] to [29].