commercial dealings have taken place. The proper basis for claims of commercial-in-confidence information is not that there may be a commercially confidential dealing, but that the disclosure of the matter is likely to cause damage to the commercial activity.[105]

In some instances, committees may take evidence *in camera* to reduce any damage thought likely to occur through the disclosure of commercially sensitive information.

Statutory secrecy provisions

A number of Acts contain statutory secrecy provisions that aim to prohibit the disclosure of particular information by making such a disclosure a criminal offence. These Acts include the *Casino Control Act 1992*, the *Independent Commission Against Corruption Act 1988* and the *Police Integrity Commission Act 1996*. The objective of such provisions is to protect the functions and objectives of the Act of which the provision is a part. However, they have no application to Parliament, except by express enactment.

Many such Acts also contain a specific provision expressly preserving parliamentary privilege. For example, section 122 of the *Independent Commission Against Corruption Act 1988* provides:

> Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

A corresponding provision is found at section 145 of the *Police Integrity Commission Act 1996*.

The impact of statutory secrecy provisions on the powers of the Senate and its committees is outlined in *Odgers*:

> Statutory provisions of this type do not prevent the disclosure of information covered by the provisions to a House of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry. They have no effect on the powers of the Houses and their committees to conduct inquiries, and do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees.
>
> The basis of this principle is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a House or a committee … It is also a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.[106]

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105 Lynch A, 'Commercial in Confidence Claims: The Mantra of the Nineties', Paper presented at the 28th Conference of Presiding Officers and Clerks, Nauru, July 1997.

106 *Odgers*, 11th edn, p 50.

Odgers also argues that Parliament's freedom of speech, as guaranteed under the *Bill of Rights 1689*, is important in this context.

In the early 1990s, these principles were called into question as a result of advice given to the executive government by legal advisers in relation to the operations of the Parliamentary Joint Committee on the National Crime Authority. Despite this, since 1991 the Commonwealth Government has generally adhered to the view that a generic statutory secrecy provision does not affect parliamentary inquiries, 'with only occasional episodes of confusion on the point'.[107]

In New South Wales, there have been instances where witnesses before a committee have refused to answer questions on the basis of statutory secrecy provisions.

On 16 June 1988, the Council referred the Police Regulation (Allegations of Misconduct) Amendment Bill to a select committee for consideration and report. In the course of giving evidence before the select committee, the Ombudsman informed the Committee that section 34 of the *Ombudsman Act 1974* would preclude him from divulging certain information. While the Ombudsman did not on that occasion refuse to answer any specific question, as he would be required to give further evidence at a later hearing, the committee resolved to ask the Clerk of the Parliaments to seek the advice of the Crown Solicitor.

In advice of 12 August 1988, the Crown Solicitor indicated:

> Section 34(1) binds the Ombudsman and his officers and does so, in my view, regardless of whether 'the Legislature' is bound by the Act. … there could clearly be a conflict between s 11 of the Parliamentary Evidence Act and s 34 of the Ombudsman Act as the Ombudsman in some situations may not be able to satisfy the requirements of both provisions. Faced with that prospect I consider that a court would be likely to give effect to the specific provisions enacted to apply to the Ombudsman and would regard those provisions as a partial repeal of s 11 of the Parliamentary Evidence Act to the extent of the Ombudsman's obligations under s 34 of his Act.[108]

Based on this, the Crown Solicitor argued that neither the Ombudsman nor any officer of the Office of the Ombudsman is required by section 11(1) of the *Parliamentary Evidence Act 1901* to provide information in an answer which would amount to disclosure of information obtained in the course of their office. The matter did not arise when the Ombudsman gave evidence again.

The issue arose again at a budget estimates hearing held by GPSC 4 in 2000. On that occasion, witnesses representing the Casino Surveillance Division of the Department of Gaming and Racing refused to answer questions on the grounds that answers would breach the statutory confidentiality provisions of section 148 of the *Casino Control Act 1992*. Section 148 creates an offence for divulging information acquired in the exercise of functions under the Act.

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107 *Ibid*, p 53. For detailed description of the advice given on the operations of the Parliamentary Joint Committee on the National Crime Authority, see *Ibid*, pp 50-53.

108 State Crown Solicitor's Office Correspondence, 'Question of whether the Ombudsman may be required to disclose information to a Parliamentary Committee', 12 August 1988, p 4.

Consideration as to whether the questions were compellable centred on whether parliamentary committees fall within the definition of a 'court' under section 148(8) of the Act and whether it could have been the intention of Parliament, in passing the legislation, to instill greater powers in the agencies constituted under the Act than in the House itself or its committees. The Office of Gaming and Racing sought the advice of the Crown Solicitor's Office on the matter. In the Crown Solicitor's opinion, parliamentary committees fall within the definition of a 'court' under the Act and are therefore prohibited from requiring staff to divulge information that is not in accordance with section 148(3) and (4) of the Act.[109]

GPSC 4 subsequently requested the Clerk to obtain legal advice on the matter. In advice, Mr Bret Walker SC was of the view that statutory secrecy provisions do not prevent disclosure to the Parliament or its committees and that the general words of section 148 of the *Casino Control Act 1992*:

> are not apt to deprive the Council or the committee of its pre-existing power, both at common law and under the Parliamentary Evidence Act, to enquire into public affairs as members see fit. … [I]n my opinion, it would have required express reference to the Houses including their committees, or alternatively a statutory scheme which would be rendered fatally defective unless its application to the Houses were implied, for the statutory secrecy provisions of the Casino Control Act to have this drastic effect … And it should not be doubted that the effect is drastic. It would remove important matters of administration from the scrutiny of the electors' representatives. That is no mere incidental or relatively unimportant consequence.[110]

He further stated:

> Section 148 does not create any offence constituted by public servants summoned before the Committee to answer questions about the administration of the Casino Control Act, notwithstanding that full and proper answers would divulge to the Committee … information which in every other forum or context (apart from the Legislative Assembly) would be information within the embargo imposed by sub-sec 148(1) of the Casino Control Act.[111]

Mr Walker also commented more generally on the impact of Article 9 in his advice to the Council:

> [T]he provisions of Article 9 of the Bill of Rights would arguably protect a public servant witness before the Committee from prosecution and punishment in a court, if the public servant were to answer a question in such a way as to divulge information falling within that which it is an offence to divulge.[112]

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109 Correspondence from Office of the Minister for Gaming and Racing to GPSC 4, 2 August 2000, pp 6-7.

110 Walker, above n 55, p 9.

111 *Ibid.*

112 *Ibid.*

In his subsequent advice on this matter, the Clerk of the Parliaments indicated that, as there is no explicit reference to Parliament or a parliamentary committee in section 148 of the *Casino Control Act 1992*, in his view the provision does not apply to a parliamentary committee, and no offence is created by divulging information to a committee. It is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.[113]

The Clerk further noted that under s 148(6), the New South Wales Crime Commission, the Independent Commission Against Corruption and the National Crime Authority are all exempt from the secrecy provisions, permitting information to be divulged to those agencies. Schedule 5 to the *Casino Control Regulation 1995* also exempts other persons and bodies. The Clerk continued:

> It seems incongruous that the Parliament intended, in passing the legislation, to instill greater powers in these agencies than in the House itself or its committees.[114]

In support of this position, the Clerk cited the judgment of Helman J in *Criminal Justice Commission v Dick*:[115]

> More cogent perhaps than those considerations is, however, the implausibility of the proposition that Parliament should have intended by such an indirect means to surrender by implication part of the privilege attaching to its proceedings. The proposition advanced on behalf of the applicants really comes down to an assertion that by providing for a limited immunity for act and omission of the parliamentary commissioner the Parliament intended substantially to derogate from its own privilege. I do not accept that construction of the Act.

Finally, the Clerk noted that another issue not canvassed in the advice of the Crown Solicitor is that, if the statutory secrecy provisions of the *Casino Control Act 1992* did apply to the Parliament, then those provisions would fall foul of the 'manner and form' requirements of section 7A of the *Constitution Act 1902*. Section 7A(1)(a) and (b) provide that the powers of the Council cannot be altered either expressly or impliedly except by referendum in accordance with section 7A. In short, the common law or statutory powers of the Council cannot be abrogated except by legislation passed in the required form.[116]

The circumstances under which a committee must consider and determine any objection by a witness to answering a question concerning statutory secrecy provisions are rare. In such circumstances, where a witness has difficulty answering a question, they raise their concerns with the committee. In most cases the committee

113 Clerk of the Parliaments, 'Advisory Note: Parliamentary Privilege and Statutory Secrecy Provisions', June 2001, p 4.

114 'Parliamentary Privilege and Statutory Secrecy Provisions', above n 113, p 4.

115 [2000] QSC 272 at [13].

116 'Parliamentary Privilege and Statutory Secrecy Provisions', above n 113, pp 4-5.

will not pursue the line of questioning or will seek the information from an alternative source.

Legal professional privilege

Confidential communications between a person or corporation and their legal representatives, or documents brought into existence for the sole purpose of obtaining or receiving legal advice, even if the communication sometimes involves third parties, are generally classed as being subject to legal professional privilege.

It has been said that the proper functioning of the legal system depends on a freedom of communication between legal advisers and their clients, which would not exist if either could be compelled to disclose what passed between them.[117]

The Court of Appeal in *Egan v Chadwick* found that the Council's power to call for documents did extend to documents for which legal professional privilege had been claimed, on the basis that such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the executive.[118]

Spigelman CJ observed that the applicability of the doctrine depends on the context in which the issue of access to information arises, and the relationship between the parties involved.[119] Where the context involves the right of a House of Parliament to access legal advice on which the executive has acted, the applicable principle is the common law doctrine of reasonable necessity. Applying the doctrine results in the conclusion that access to such legal advice may be necessary for the House to perform its functions. Spigelman CJ reasoned:

> In performing the accountability function, the Legislative Council may require access to the legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision.[120]

Once again, however, each claim by a witness must be considered on its merits and advice sought prior to a witness being placed in a position where they may be in conflict with the *Parliamentary Evidence Act 1901*.

Privilege against self-incrimination

The privilege against self-incrimination, sometimes referred to as the right to silence, is a fundamental right in our legal system that is jealously guarded by the courts. The right or privilege extends so as to protect a person not only from being forced to speak against their interest, but to prevent the person from being forced to produce any document or thing that may incriminate them.

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117 See *Baker v Campbell* (1983) 153 CLR 52 at 66 and 135.

118 (1999) 46 NSWLR 563 at 578.

119 *Ibid* at 577-578.

120 *Ibid* at 578.