



New South Wales

Evidence Amendment (Confidential Communications) Act 1997 No 122

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Evidence Amendment (Confidential Communications) Act 1997 No 122

Act No 122, 1997

An Act to amend the *Evidence Act 1995* to expand the categories of privilege that may prevent evidence being adduced to include professional confidential relationship privilege and sexual assault communications privilege. [Assented to 10 December 1997]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Evidence Amendment (Confidential Communications) Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Evidence Act 1995 No 25

The *Evidence Act 1995* is amended as set out in Schedule 1.

Schedule 1 Amendment

(Section 3)

Part 3.10 Privileges, Divisions 1A and 1B

Insert after section 126:

Division 1A Professional confidential relationship privilege

126A Definitions

- (1) In this Division:

harm includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

protected confidence means a communication made by a person in confidence to another person (in this Division called the ***confidant***):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

protected confider means a person who made a protected confidence.

protected identity information means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

- (2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

126B Exclusion of evidence of protected confidences

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
 - (a) a protected confidence, or
 - (b) the contents of a document recording a protected confidence, or
 - (c) protected identity information.
- (2) The court may give such a direction:
 - (a) on its own initiative, or
 - (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
 - (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
 - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
 - (a) the probative value of the evidence in the proceeding,
 - (b) the importance of the evidence in the proceeding,
 - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
 - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,

- (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
 - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,
 - (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
 - (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.
- (5) The court must state its reasons for giving or refusing to give a direction under this section.

126C Loss of professional confidential relationship privilege: consent

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

126D Loss of professional confidential relationship privilege: misconduct

- (1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act was committed, and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.

126E Ancillary orders

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

- (a) order that all or part of the evidence be heard in camera, and
- (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.

126F Application of Division

- (1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.
- (2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.
- (3) This Division does not apply in relation to a protected confidence within the meaning of Division 1B.

- (4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

Division 1B Sexual assault communications privilege

126G Definitions

- (1) In this Division:

address includes a private, business or official address.

harm includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

protected confidence means a protected counselling communication made by a person against whom a sexual assault offence has been, or is alleged to have been, committed, whether before or after the acts constituting the offence occurred or are alleged to have occurred.

protected confider means a person who made a protected confidence.

protected counselling communication means a communication made by a person in confidence to another person (in this Division called the ***counsellor***) in the course of a relationship in which the counsellor is treating the person for any emotional or psychological condition suffered by the person.

protected identity information means information about, or enabling a person to ascertain, the address or telephone number of a protected confider or a counsellor of a protected confider.

sexual assault offence means:

- (a) an offence referred to in section 578 of the *Crimes Act 1900*, or
- (b) an offence prescribed by the regulations for the purposes of this definition.

telephone number includes a private, business or official telephone number.

- (2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication or further the counselling process.

126H Exclusion of evidence of protected sexual assault communications

- (1) Evidence is not to be adduced in a proceeding if it would disclose:
 - (a) a protected confidence, or
 - (b) the contents of a document recording a protected confidence,unless the court gives leave to adduce the evidence.
- (2) Evidence of a protected confidence or the contents of a document recording a protected confidence is not to be adduced if the party adducing the evidence has not given reasonable notice in writing of the party's intention to adduce the evidence to:
 - (a) each other party, and
 - (b) if the protected confider is not a party, the protected confider, and
 - (c) if the counsellor is not a party, the counsellor.
- (3) The court must not give leave to adduce evidence of a protected confidence or a document recording a protected confidence unless the court is satisfied that:

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- (a) the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have substantial probative value, and
 - (b) other evidence of the protected confidence or the document recording the protected confidence is not available, and
 - (c) the public interest in preserving the confidentiality of protected confidences and protecting the protected confider from harm is substantially outweighed by the public interest in admitting into evidence information or a document of substantial probative value.
- (4) Without limiting the matters that the court may take into account for the purposes of subsection (3) (c), the court must take into account the likelihood, and the nature or extent, of harm that would be caused to the protected confider if evidence of the protected confidence or document is adduced.
 - (5) The court must state its reasons for giving or refusing to give leave under this section.
 - (6) A protected confider or counsellor who is not a party to proceedings may, with the leave of the court, appear in the proceedings.

126I Loss of sexual assault communication privilege: consent

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

126J Loss of sexual assault communication privilege: misconduct

- (1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act was committed, and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.

126K Ancillary orders

- (1) Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence, the court may:
- (a) order that all or part of the evidence be heard in camera, and
 - (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider and counsellor, and
 - (c) make such orders relating to disclosure of protected identity information as, in the opinion of the court, are necessary to protect the safety and welfare of the protected confider and counsellor.
- (2) Nothing in this section limits the power of a court to make an order under section 577A, 578 or 578B of the *Crimes Act 1900*.

126L Application of Division

- (1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.

- (2) This Division applies in respect of a protected confidence whether made before or after the commencement of this Division.
- (3) The court may give leave under this Division in respect of a protected confidence whether or not the confidence is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

[Minister's second reading speech made in—
Legislative Council on 22 October 1997
Legislative Assembly on 12 November 1997]

