

First print



New South Wales

Evidence Amendment (Confidential Communications) Bill 1997

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

Part 3.10 of the *Evidence Act 1995* protects certain evidence against disclosure on the ground that it is privileged or is evidence that should not be disclosed for public policy considerations. Client legal privilege provides for protection from disclosure of confidential communications made and documents prepared in the context of the relationship between a lawyer and client (sections 117–126). Clerical religious confessional privilege entitles members of the clergy to refuse to disclose the contents of religious confessions made to them in their professional capacity (section 127). Privilege in respect of self-incrimination protects a witness from disclosure of self-incriminatory evidence (section 128). Evidence of reasons for judicial decisions, matters of state and settlement negotiations may be excluded on public policy grounds (sections 129–131).

Explanatory note

The object of this Bill is to amend Part 3.10 of the *Evidence Act 1995* so as to expand the categories of privilege that may prevent evidence being adduced to include:

- (a) evidence protected from disclosure on the ground that it concerns a confidential communication made to a confidant acting in a professional capacity in circumstances in which the confidant was under an express or implied obligation not to disclose its contents, a document recording such a communication or information about the identity of the maker of the confidential communication, and
- (b) evidence protected from disclosure on the ground that it concerns a confidential communication or a document recording such a communication made in the course of a relationship in which a person against whom a sexual assault offence has been committed, or has been alleged to be committed, is being treated by a counsellor for any emotional or psychological condition.

Under section 134 of the *Evidence Act 1995*, evidence that because of Part 3.10 must not be adduced or given in a proceeding is inadmissible in the proceeding.

Creation of the new categories of privilege for these kinds of confidential communications will also provide a ground for a person to object to the production of a document by subpoena on the ground that to do so would disclose such a communication (see, for example, rule 13 of Part 36 of the *Supreme Court Rules 1970*).

Section 132 of the *Evidence Act 1995* will require a court to be able to satisfy itself that a witness or party is aware of his or her rights to claim either of the new privileges if it appears that the witness or party may have a ground for making an application under the proposed provisions.

Section 133 of the *Evidence Act 1995* gives a court the power to order the production of, and inspect, any document in respect of which a claim for privilege is made under Part 3.10.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendment to the *Evidence Act 1995* set out in Schedule 1.

Schedule 1 inserts proposed Divisions 1A (sections 126A–126F) and 1B (sections 126G–126L) into Part 3.10 of the *Evidence Act 1995*.

Division 1A Professional confidential relationship privilege

Division 1A sets out the grounds for claiming that evidence should not be required to be adduced described in paragraph (a) of the Overview of this Bill.

Division 1A will enable claims such as the claim of a doctor to refuse to answer questions about his or her patients and the claim of a journalist to refuse to disclose his or her sources to be tested.

Proposed section 126A defines terms (including *protected confidence*, *protected confider* and *protected identity information*) for the purposes of Division 1A. A *protected confidence* is a communication made by a person in confidence to another person (in Division 1A 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 identity information is information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

Proposed section 126B enables a court to direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose a protected confidence, the contents of a document recording a protected confidence or protected identity information. The court will be required to give such a direction if it is satisfied that if the evidence is adduced it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider and that the nature and extent of the harm outweighs the desirability of the evidence being given.

A court will be able to ensure that any part of a communication or document that should not be disclosed is not adduced.

The court may give such a direction on its own initiative or on the application of the protected confider or confidant concerned (whether or not either is a party).

Proposed section 126B (4) sets out some of the matters the court may take into account in determining whether to exclude evidence. These include, for example, the probative value of the evidence in the proceeding, the nature of the subject matter of the proceeding and the importance of the evidence.

Proposed sections 126C and 126D set out some circumstances when the proposed Division will not prevent the adducing of evidence. Evidence will be able to be adduced with the consent of the protected confider concerned. Professional confidential relationship privilege will be lost for communications made and documents prepared in the furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty.

Proposed section 126E gives some examples of ancillary orders that a court may make to limit the harm, or extent of the harm, that may be caused if evidence of a protected confidence or protected identity information is disclosed.

Proposed section 126F provides for the application of the Division. It makes it clear that the Division does not apply in relation to a proceeding the hearing of which began before the commencement of the Division but applies to protected confidences made whether before or after the commencement. The court will be able to give a direction under the Division in respect of a protected confidence or protected identity information whether or not the confidence or information is privileged under another section of Part 3.10 or would be so privileged except for a limitation or restriction imposed by that section. For example, existing section 127 of the *Evidence Act 1995* entitles members of the clergy to refuse to divulge the contents of communications made to them in their professional capacity but is limited to communications made as religious confessions. The proposed Division will enable clergy to object to disclosure of confidences made to them other than confessions.

Division 1B Sexual assault communications privilege

Division 1B sets out the grounds for claiming that evidence should not be adduced described in paragraph (b) of the Overview of this Bill.

Division 1B provides a means for testing claims to privilege such as the claim of a sexual assault counsellor to refuse to disclose notes made in the course of counselling sessions with a victim of sexual assault.

Proposed section 126G defines the terms *protected confidence*, *protected confider*, *protected counselling communication*, *protected identity information* and *sexual assault offence*.

A *protected counselling communication* is a communication made by a person in confidence to another person (in Division 1B called the *counsellor*) in the course of a relationship in which the counsellor is treating the person for any emotional or psychological condition.

A **protected confidence** is 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.

A **protected confider** is a person who makes a protected confidence.

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

A **sexual assault offence** is:

- (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.

Proposed section 126H prevents evidence of a protected confidence or the contents of a document recording such a confidence from being adduced unless the court gives leave to adduce the evidence. The court must not give leave unless it is satisfied that:

- (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 concerning the matters to which the protected confidence or document relates 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.

The evidence cannot be adduced unless the party seeking to adduce it has given reasonable notice in writing of its intention to do so.

Proposed sections 126I and 126J set out some circumstances when the proposed Division will not prevent the adducing of evidence. Evidence will be able to be adduced with the consent of the protected confider concerned. Sexual assault communication privilege will be lost for communications made and documents prepared in the furtherance of a fraud, an offence or an act that renders a person liable to a civil penalty.

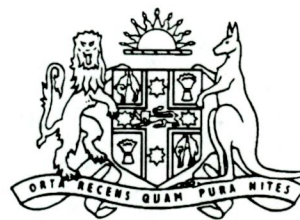
Proposed section 126K gives some examples of ancillary orders that a court may make to limit the harm, or extent of the harm, that may be caused if evidence of a protected confidence is disclosed. The proposed section will

Explanatory note

not limit the power of a court to make orders under provisions such as section 577A of the *Crimes Act 1900*. (Section 577A provides that a witness in a criminal proceeding is not required to disclose his or her private, business or official address or telephone number unless it is a materially relevant part of the evidence or a court makes an order requiring disclosure. Such an order can only be made if the court is satisfied that the disclosure is not likely to present a reasonably ascertainable risk to the welfare or protection of any person or the interests of justice outweigh the risk).

Proposed section 126L provides for the application of the Division. It makes it clear that the Division does not apply in relation to a proceeding the hearing of which began before the commencement of the Division but applies to a protected confidence whether made before or after the commencement. The court will be able to give a direction under the Division in respect of a protected confidence whether or not the protected confidence is privileged under another section of Part 3.10 or would be so privileged except for a limitation or restriction imposed by that section.

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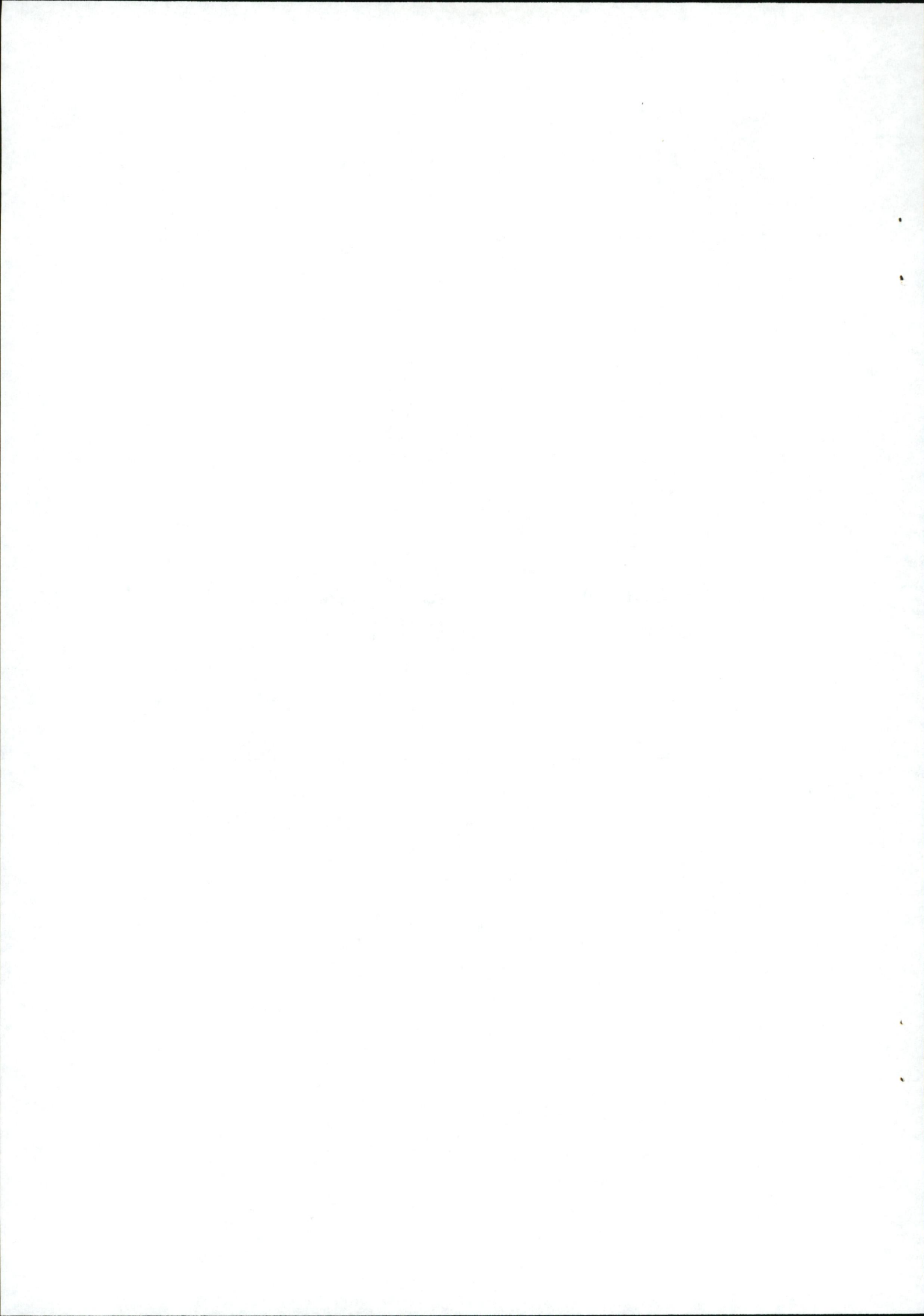


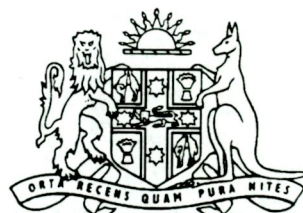
New South Wales

Evidence Amendment (Confidential Communications) Bill 1997

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New South Wales

Evidence Amendment (Confidential Communications) Bill 1997

No . , 1997

A Bill for

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.

The Legislature of New South Wales enacts:

1 Name of Act

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

2 Commencement

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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 5

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). 10

protected confidence means a communication made by a person in confidence to another person (in this Division called the *confidant*): 15

(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. 20

protected confider means a person who made a protected confidence. 25

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. 30

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 5
 - (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 10
 - (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 15
 - (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, 25
 - (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, 30

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- (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, 5
- (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, 10
- (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, 15
- (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. 20

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. 25

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. 30

- (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 10

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. 25
- (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. 30

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- (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. 5

Division 1B Sexual assault communications privilege

126G Definitions

- (1) In this Division: 10

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). 15

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. 20

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. 25

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. 30

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. 5

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. 10

126H Exclusion of evidence of protected sexual assault communications

- (1) Evidence is not to be adduced in a proceeding if it would disclose: 15
 - (a) a protected confidence, or
 - (b) the contents of a document recording a protected confidence,unless the court gives leave to adduce the evidence. 20
- (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: 25
 - (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: 30

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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 concerning the matters to which the protected confidence or document relates is not available, and 5
- (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. 10
- (4) Without limiting the matters that the court may take into account for the purposes of subsection (3) (c), the court may 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. 15
- (5) The court must state its reasons for giving or refusing to give leave under this section. 20
- (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** 25
- 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** 30
- (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. 35

- (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, 5
- the court may find that the communication was so made or document so prepared.

126K Ancillary orders 10

- (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 15
 - (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 20
 - (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. 25
- (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. 30

- (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.

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