

[Act 1997 No 122]



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).

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\* Amended in committee—see table at end of volume.

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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.

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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.

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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

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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.