

Division 1A—Professional confidential relationship privilege

126AA Object of Division

The object of this Division is to achieve a balance between:

- (a) the public interest in the administration of justice; and
- (b) the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts.

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 a journalist (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.

Note: This definition differs from the corresponding definition in subsection 126A(1) of the NSW Act, which is not limited to communications to journalists.

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.
3. The proper administration of any trial to avoid delay caused by an application for a direction under section 126B.
4. To enable parties to consider the likely evidence and any alternate evidence if the discretion is exercised.

126AB Exclusion of evidence of protected confidences

1. A person seeking to adduce evidence in a proceeding that is likely to disclose:

- (a) a protected confidence;
- (b) the contents of a document recording a protected confidence; or
- (c) protected identity information;

may not adduce such evidence unless:

- (d) that party has given reasonable notice in writing to each other party, any protected confider (if known) and the confidant of the party's intention to adduce the evidence; and

- (e) on the application of a party seeking to adduce the evidence, the court directs that it is satisfied that the public interest in the desirability of the disclosure outweighs the public interest in the media communicating facts and opinion to the public, having taken into account the matters set out in section 126B and or any adverse effect of the disclosure on the protected confider and confidant .
- 2. Notices given under paragraph (1)(d) are to be given in accordance with any regulations or rules of court made for the purposes of this section.'
- 3. The Notice given under paragraph (1)(d) must state the particular provisions of this Division or other matter, including the public interest, on which the party intends to rely in asserting that and the evidence intended to be called in support of the application the court should be satisfied of the matters referred to in paragraph (1)(e)..

126B Matters to be taken into account

- 1. Without limiting the matters that the court may take into account for the purposes being satisfied of the matters referred to in subsection 126AB(1)(e), it must 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.
 - (i) whether the evidence is 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;
 - (j) any risk of prejudice to national security (within the meaning of section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).
- 2. For the purposes of paragraph (4)(i), 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 do prepared.

3. 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: Protected confider / confidant right to representation

A protected confider or confidant shall have a right to be represented and to put submissions in relation to any application under this Division.

126E: Right of appeal

A protected confider or confidant has have an immediate right of appeal which may be exercised prior to or during the proceedings.

126F 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.

126G 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.

Note: The NSW Act includes a subsection (3) relating to sexual assault communications privilege.

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.

Note: Subsection 69ZX(4) and section 100C of the *Family Law Act 1975* have the effect of modifying this Division as it applies to certain proceedings under that Act.

5. In this section

commencement of this Division means the commencement of Schedule 1 to the *Evidence Amendment (Journalists' Privilege) Act 2007*.

131B Extended application of Division 1A etc. to all proceedings for Commonwealth offences

In addition to its application under section 4 to all proceedings in a federal court or an ACT court, Division 1A and section 131A apply to all proceedings in any other Australian court for an offence against a law of the Commonwealth, including proceedings that:

- (a) Relate to bail; or
- (b) Are interlocutory proceedings or proceedings of a similar kind; or
- (c) Are heard in chambers; or
- (d) Relate to sentencing.