



Evidence Amendment (Journalists' Privilege) Act 2007

No. 116, 2007

An Act to amend the *Evidence Act 1995*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

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Evidence Amendment (Journalists' Privilege) Act 2007

No. 116, 2007

An Act to amend the *Evidence Act 1995*, and for related purposes

[Assented to 28 June 2007]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Evidence Amendment (Journalists' Privilege) Act 2007*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	28 June 2007
2. Schedule 1	The 28th day after the day on which this Act receives the Royal Assent.	26 July 2007

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Evidence Act 1995

1 After Division 1 of Part 3.10

Insert:

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 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.

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.

The court must also take into account, and give the greatest weight to, any risk of prejudice to national security (within the meaning of section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).

- (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.

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*.

2 Before section 132

Insert:

131A Extended application of Division 1A

- (1) If:
 - (a) a person is required by a disclosure requirement to give information, or to produce a document, which would result in

the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1A; and

- (b) the person objects to giving that information or providing that document;

the court must determine the objection by applying the provisions of Division 1A with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence.

- (2) In this section, ***disclosure requirement*** means a court process or court order that requires the disclosure of information or a document and includes the following:
 - (a) a summons or subpoena to produce documents or give evidence;
 - (b) pre-trial discovery;
 - (c) non-party discovery;
 - (d) interrogatories;
 - (e) a notice to produce;
 - (f) a request to produce a document under Division 1 of Part 4.6.

Family Law Act 1975

3 At the end of section 69ZX

Add:

- (4) The court must not, in proceedings under this Part in which the court is required to regard the best interests of the child as the paramount consideration, direct under:
 - (a) subsection 126B(1) of the *Evidence Act 1995*; or
 - (b) a law of a State or Territory relating to professional confidential relationship privilege specified in the regulations;
 that evidence not be adduced if the court considers that adducing the evidence would be in the best interests of the child.

4 After section 100B

Insert:

100C Evidence in respect of which a child is a protected confider

- (1) In any proceedings in the Family Court, or in the Federal Magistrates Court when exercising jurisdiction under this Act, a person described in subsection (2) may, on a child's behalf, apply to the court for:
 - (a) a direction under subsection 126B(1) of the *Evidence Act 1995*; or
 - (b) an order under section 126E of that Act;in relation to evidence in respect of which the child is a protected confider (within the meaning of section 126A of that Act).
- (2) For the purposes of subsection (1), the following persons may apply to the court on a child's behalf:
 - (a) the independent children's lawyer; or
 - (b) a parent of the child who has responsibility for making decisions about major long-term issues in relation to the child; or
 - (c) a person other than a parent who has responsibility for making decisions about major long-term issues in relation to the child.

James Hardie (Investigations and Proceedings) Act 2004

5 Subsection 3(1)

Insert:

professional confidential relationship privilege means privilege under:

- (a) Division 1A of Part 3.10 of the *Evidence Act 1995*; or
- (b) Division 1A of Part 3.10 of the *Evidence Act 1995* of New South Wales or a similar law of a State or Territory.

6 After section 4

Insert:

4A Application of professional confidential relationship privilege

Privilege does not apply for proceedings

- (1) Professional confidential relationship privilege does not apply in relation to James Hardie material for the purposes of, or in connection with, a James Hardie proceeding.

Authorised persons not affected

- (2) This section does not apply to any claim of professional confidential relationship privilege made by an authorised person in relation to James Hardie material.

7 At the end of section 6

Add “or professional confidential relationship privilege”.

Note: The heading to section 6 is altered by inserting “**and professional confidential relationship privilege**” after “**legal professional privilege**”.

Proceeds of Crime Act 2002

8 After paragraph 197(2)(b)

Insert:

- (ba) the answer would be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of *professional confidential relationship privilege;

9 Section 338

Insert:

professional confidential relationship privilege means privilege under:

- (a) Division 1A of Part 3.10 of the *Evidence Act 1995*; or
- (b) Division 1A of Part 3.10 of the *Evidence Act 1995* of New South Wales or a similar law of a State or Territory.

*[Minister's second reading speech made in—
House of Representatives on 24 May 2007
Senate on 13 June 2007]*

(90/07)
