

RELEVANCE

NOTES

- **Is the evidence relevant?** First hurdle to admissibility – if not relevant, it is excluded. Only rule of inclusion. All other thresholds are rules of exclusion.
- For evidence to be relevant, it must have some bearing on est a fact in issue. We need to show how the evidence is relevant – it can be relevant to more than one thing.

SECT 55: Relevant evidence

- (1) The evidence that is relevant in a proceeding is evidence that, **if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue** in the proceeding.
- (2) In particular, evidence is not taken to be irrelevant only because it relates only to:
 - (a) the credibility of a witness, or
 - (b) the admissibility of other evidence, or
 - (c) a failure to adduce evidence.

NOTES

- Does the evidence make any difference in establishing the fact in issue? **Determine what is the fact in issue?**
- Civil matter: The facts outlined in the pleadings.
- **Criminal matter: the elements of the charge.** Primary facts are the facts that the court needs to establish in order to establish the elements and then the ultimate fact in issue (the crime).
- (??) Credibility rule: not allowed to discredit a witness by putting them into moral disrepute. Only to assess whether that person is truthful, has good memory, intelligent or biased in some way.

SECT 56: Relevant evidence to be admissible

- (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
- (2) **Evidence that is not relevant in the proceeding is not admissible.**

SECT 57: Provisional relevance (Not covered in the course)

- (1) If the determination of the question whether evidence adduced by a party is relevant depends on the court making another finding (including a finding that the evidence is what the party claims it to be), the court may find that the evidence is relevant:
 - (a) if it is reasonably open to make that finding; or
 - (b) subject to further evidence being admitted at a later stage of the proceeding that will make it reasonably open to make that finding.
- (2) Without limiting subsection (1), if the relevance of evidence of an act done by a person depends on the court making a finding that the person and one or more other persons had, or were acting in furtherance of, a common purpose (whether to effect an unlawful conspiracy or otherwise), the court may use the evidence itself in determining whether the common purpose existed.

58 Inferences as to relevance (Not covered in the course)

- (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
- (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.

- Relevant evidence: evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- The court assumes the credibility of the evidence – ‘if it were accepted’ and considers the effect the evidence could have

- The trial judge may be under a duty to exclude the evidence even in the absence of an objection to admissibility
- If an objection is made on the grounds of relevance for the first time on appeal, the failure to object at trial will not necessarily mean that the evidence is admissible, although it will clearly be relevant to the court's exercise of its discretion as to whether to grant leave to appeal, or to apply the proviso.

PAPAKOSMAS V THE QUEEN (1999)

Papakosmas convicted of sexually assaulting a colleague at a xmas office party. The victim claimed that Papakosmas forced her to have sex in a room. He claimed she was consenting. The core issue was consent. 3 witnesses gave evidence that when the complainant returned to the party, she was crying and when asked what was wrong, said that she was raped by Papakosmas – 'P raped me'. She then repeated this to another witness, and then again to another woman.

1. It was **relevant to proving the facts asserted by the complainant** (that she had not consented to the sex) – see more in Hearsay rule.

2. It was **relevant to supporting the credibility of the complainant**.

Court held: Probative of the facts in issue that she was raped, as well as credibility that she is to be believed.

For Hearsay Rule – application of s66 exception

SECT 66: Hearsay - Exception: criminal proceedings if maker available

(2) If that person [...] is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

- that person, or
- a person who saw, heard or otherwise perceived the representation being made,

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

- Complainant is the maker of the representation (V) – maker has to have personal knowledge of the asserted fact. But person has to make it when the facts in issue are 'fresh in the memory' – V complained about rape immediately after the incident (and she also did it frequently/often).
- At CL, evidence of a recent complaint was only relevant for the credibility purpose – now under EA it can be relevant for more than this purpose???
- McHugh: test of relevance is a test of logic, questions of reliability come later.

EXCLUSIONS (SEE LATER LECTURE NOTES)

SECT 135: General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- be unfairly prejudicial to a party, or
- be misleading or confusing, or
- cause or result in undue waste of time.

SECT 136: General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- be unfairly prejudicial to a party, or
- be misleading or confusing.

SECT 137: Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

SECT 138: Exclusion of improperly or illegally obtained evidence

- Evidence that was obtained:
 - improperly or in contravention of an Australian law, or
 - in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. [see rest of s138]

RELATIVITY OF "RELEVANCE"

- **R V NEAL** [2005] TASSC 70:
 - Neal charged with sexually assaulting a child. Trial judge admitted evidence of Neal's unhappy, loveless and sexless marriage to evaluate D's motive to commit the crime. Whilst motive is itself not a fact in issue – goes to proving a fact.
 - 2 judges characterised the motive as a motive to seek sexual gratification/relief. 1 judge characterised motive as to commit the alleged acts with the child. Hill J: not relevant to show the motive to have sex with a child.
 - Neal said the evidence was not relevant under the Act as there was no rational or logical connection b/w the evidence and a fact in issue (FI) of the alleged crime.
 - D also claimed that even if relevant, it should be excluded under s137 as it is unfairly prejudicial. 2 judges held the evidence to be unfairly prejudicial.
 - On appeal, found it was relevant as it was evidence akin to establishing a motive, also not unfairly prejudicial merely based on the fact he is more likely to be convicted.
- **NOT IN COURSE - R V ROBYN KINA** (1994) 29 (1) Aust Lawyer 53: Kina charged with murder of her abusive de facto. Conviction was quashed as the court found on appeal because she was unable to properly communicate with her lawyers. Evidence that could have been admitted was not highly relevant to the defence.

SMITH V THE QUEEN (2001)

Smith indicted in District Court, being in company of others, robbed a bank. Charged as an accomplice in a bank robbery. He pleaded not guilty, but convicted. Appeal dismissed. The bank robbery and the fact that it was committed by 4 young men was not an issue in the trial, but bank security showed the bank robbery in progress. Video shown to jury. The prosecution showed an image of the perpetrator standing near the ATM.

Fact in issue: whether the person in the photographs was Smith (concerning the identity of the accused).

Police identify Smith in the photographs as he was known to them. The issue was how the police's evidence relevant to the determination. Police were not eye-witnesses to the robbery.

Prosecution argument: police was in a better position than a juror to make that determination (identification) due to their prior dealings with Smith, making the evidence relevant and an exception to the opinion rule as it's an opinion from the PO.

Defence argued that the police was in no better position than the jury to make the comparison as they were not eye-witnesses to the robbery.

HCA Held (majority): Agreed with Defence - Police officers were in no better position than the jury to decide whether or not the D was the person in the photograph.

Kirby J dissented that police officers were in a better position because they had seen him in a variety of situations, and the jurors had only seen the D immobile before them. Thus, evidence was relevant, but inadmissible under the Opinion rule (as PO were not present at the robbery).

Other notes:

- Also possible in the event of an unclear photograph that the evidence was not reliable?
- HCA ordered that MS be retried. Jury were given warnings about recognition of aboriginal ppl.

EVANS V THE QUEEN [2007] HCA 59

Evans was on trial for armed robbery at Strathfield Council Chambers. Robber was filmed on security camera wearing a balaclava, overalls and sunglasses and had a lisp. During the trial, the prosecution made Evans:

1. put on the balaclava, overalls and sunglasses (the dress),
2. walk around, and say the words the robber did during the tape. Evans appealed.

Question: Was it relevant for the jury to see Evans dressed up walking around saying those words? It could not rationally affect the jury. At most, E would resemble the offender (as would anyone else).

Fact in issue: the identity of the offender. There was nothing for the jury to compare Evans against??

Gummow and Hayne JJ: The evidence must be separated.

1. The evidence of him dressing up was not relevant, could not rationally affect the jury to see the D dress up in that way. At most this would resemble the robber in the footage. It would not assist the jury's identification as anyone could be dressed up to look like the person in the footage.
2. HOWEVER, held the walking and talking as the man in the footage could be relevant because the jury could draw a relevant comparison.

Kirby J (in dissent): Following his own reasoning in Smith – relevance is a broad threshold and should not be used to artificially exclude evidence. Seeing him dressed like that was relevant as it could rationally affect the assessment for the jury. However, Kirby excluded the evidence under s137 as it was dangerous, prejudicial, humiliating and unfair and so should not have been admitted.

- Requiring the appellant to sit, in the jury's presence, in attire often associated with armed robberies, inescapably similar to the appearance of the offender, created an image unfairly prejudicial to the appellant, and should not have been allowed.

Heydon J (Crennan J agreed): found evidence was relevant. The evidence on its own did not need to be sufficient to prove the FII. It could be one of a cumulating of the facts. Importantly, if the wearing of the clothes went to demonstrate that there was no resemblance to the person in the footage then it would have CERTAINLY been relevant to exclude the defendant as the offender. It can exculpate and inculpate.

PHILLIPS V R

Evidence from a number of complainants that they had not consented to the sexual acts performed on them by the appellant was irrelevant on the issue of whether or not another complainant had also not consented to the acts. 'Evidence that five complainants did not consent could not rationally affect the assessment of the probability that a sixth complainant did not consent'.

1. What is the fact in issue – the elements of the crime
 - 'The ultimate issues' (Smith v R)
 - Facts relevant to facts in issue – facts which a circumstantial inference can be drawn – evidence that rationally affects the assessment of the probability of the existence of the facts in issue themselves, satisfies the requirement of relevance (s55).
2. What is the evidence? What is the evidence relevant to prove?
 - Direct or circumstantial evidence have a direct connection to the facts
 - Credibility evidence affects the probability that a witness is telling the truth and thus affects the probability of the existence of facts to which they are testifying
3. Could the evidence rationally affect the assessment of the probability of the existence of a fact in issue? (Does it satisfy the test in s55?). Identify the specific fact in issue that is in question.
 - Logical relevance – relevance is a low threshold
 - If it is capable of rationally affected the assessment of possibilities of the existence of the facts in issue, it is relevant, no matter how minimally it does so
4. If it is relevant do any of the exclusionary rules apply?
5. If not so excluded, is its probative value outweighed by prejudicial effect?
6. Do any of the discretionary exclusions apply or is a warning as to reliability sufficient?

PRIVILEGE

NOTES

- Despite the piece of evidence being relevant, it may attract privilege and therefore be inadmissible.
- Privilege is a right rather than a matter of admissibility – meant to protect the rights of individual witnesses.
- Balancing process between protecting principles and relationships on one hand, and disclosing information and evidence on the other hand (Public interest/Matter of administration vs. principle of confidentiality).
 - E.g. confidentiality that attaches to the doctor-client relationship is a matter of public benefit.
- Impedes the fact-finding process of the court.

CLIENT LEGAL PRIVILEGE

DOMINANT PURPOSE TEST: PRE-TRIAL AND AT TRIAL PRIVILEGE

Only if the document was created for the **dominant purpose of providing legal advice**

- May include documents that record legal work carried out by the lawyer for the benefit of the client, even if they are never actually provided to the client; ie research memoranda, chronologies, summaries of documents and drafts (*AWB v Cole*)
- File notes are inherently non-confidential (*Raunio v Hills*), however documents recording a witness statement obtained by the solicitor for a party can be regarded as confidential, even if the interests of the witness and party in litigation are adverse (*ACCC v Aus Safeway Stores*)
- Presence of third party does not preclude communication from being confidential (*In the Marriage of CW*)
- **Privilege belong to client, not the lawyer!** Use the term client legal privilege, rather than legal professional privilege.
- *Note:* 131A (part 3 point 10) applicable to pre-trial privilege as well now – so only ONE test used now for both stages – the dominant purpose test.

Eso v Federal Commission for Taxation (1999) 201 CLR 49

Authority for the Dominant Purpose test: what was the dominant purpose for which the doc was created?

SECT 117 Definitions

(1) In this Division:

"Client" includes the following:

- (a) a **person or body who engages a lawyer** to provide **legal services** or who employs a lawyer (including under a contract of service);
- (b) an employee or agent of a client;
- (c) an employer of a lawyer if the employer is— (i) the Commonwealth or a State or Territory; or (ii) a body established by a law of the Commonwealth or a State or Territory;

(d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client--a manager, committee or person so acting;

(e) if a client has died--a personal representative of the client;

(f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

"Confidential communication" means a communication made in such circumstances that, when it was made

- (a) the **person who made it**; or
- (b) the **person to whom it was made**;

was under an **express or implied obligation not to disclose its contents**, whether or not the obligation arises under law;

"Confidential document" means a document prepared in such circumstances that, when it was prepared:

- (a) the **person who prepared it**; or

(b) the **person for whom it was prepared**;

was under an **express or implied obligation not to disclose its contents**, whether or not the obligation arises under law;

"lawyer" means:

- (a) an Australian lawyer; and
- (b) an Australian-registered foreign lawyer; and
- (c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and
- (d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).

"party" includes the following:

- (a) an employee or agent of a party;
- (b) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a party--a manager, committee or person so acting;
- (c) if a party has died--a personal representative of the party;
- (d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a confidential communication was made.

(2) A reference in this Division to the commission of an act includes a reference to a failure to act.

SECT 118 Legal Advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of—

- (a) a confidential communication made between the **client and a lawyer**; or
- (b) a confidential communication made **between 2 or more lawyers acting for the client**; or
- (c) the contents of a confidential document (whether delivered or not) **prepared by the client, lawyer or another person**;

for the **dominant purpose** of the lawyer, or one or more of the lawyers, **providing legal advice to the client**.

Notes:

- s118 requires a lawyer-client relationship
- What is the purpose of the communication? If the dominant purpose is for legal advice – then privileged (even if litigation is not privileged).
- Client Legal Privilege applies for both criminal and civil matters.

Sharon Notes:

- Under CL, privilege protects copies of unprivileged documents, provided that the copies were made for one of the privileged purposes (*AFP v Propend Finance*), under 118(c), 119(b) and 120(1)(b), the document must be 'prepared' for the privileged purposes and copying a document does not constitute the preparation of the copy.
- *AWB v Cole*: legal advice is not confined to telling the client the law but includes professional legal advice as to what should prudently and sensibly be done in the relevant legal context. Furthermore, in view of the HoL's decision in *Three Rivers*, I also accept that legal advice includes professional advice given by lawyers to a client as to what evidence and submissions should be placed before a commission of enquiry.
- Commercial advice not privileged
- *Pratt Holdings v CoT*: Where a person directs or authorises a third party to prepare and make a documentary communication on that person's behalf to a legal adviser for the dominant purpose of obtaining legal advice, that documentary communication by the agent attracts legal privilege. HOWEVER, where a person directs or authorises a third party who is not an employee of that person to prepare a documentary communication for the dominant purpose of its being communicated by the person and not directly by the third party to a legal adviser for the purpose of obtaining legal advice, does not attract privilege.
- Facts: Pratt asked solicitors ABL on tax implications of restructure. ABL advised Pratt to obtain valuation from independent accountant, PWC. PWC gave valuation to Pratt rather than ABL, then Pratt passed onto ABL.
- If Pratt had its own in-house accountants, that would have been privileged, or if Pratt had directed PWC to send report directly to ABL, then also privileged as PWC would have been Pratt's agents for the purpose of making the communication

- HOWEVER, in this case, the Court thought it overly artificial to deny the report privilege and so extended the CL privilege → would now be covered by 118(c).

SECT 119 Litigation

Evidence is **not to be adduced** if, **on objection by a client**, the court finds that adducing the evidence **would result in disclosure of—**

- (a) a **confidential communication** between the **client and another person**, or between a **lawyer acting for the client and another person**, that was made; or
- (b) the contents of a **confidential document** (whether delivered or not) that was prepared; for the **dominant purpose** of the client **being provided with professional legal services** relating to an **Australian or overseas proceeding** (including the proceeding before the court), or an **anticipated or pending** Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Notes

- s119 for third parties: application of the privilege to 3rd party communications, and third parties? s118 does not do this.
- **Professional legal services include** legal advice and representation, the preparation or settling of documents to be used in, or in connection with, litigation, such as a witness statement and estimates of the likely outcome or cost of litigation (*New Cap Reinsurance Corp v Renaissance Reinsurance*)
- **Litigation is anticipated or pending where** it is actually contemplated; but a mere apprehension or recognition that litigation is possible does not mean it is anticipated.
- Where communication is said to have been made for the dominant purpose of litigation, litigation must have either been commenced or there must be a reasonable probability or likelihood that such proceedings would be commenced.
- Communications made, or documents prepared, for the purposes of investigation, including a decision as to whether or not proceedings should be commenced, may have difficulty in satisfying the dominant purpose test
- Communications in relation to litigation between lawyer and client would fall within s118.

DOMINANT PURPOSE TEST

- Dominant purpose test – flexible approach to what constitutes legal advice (*Esso Australia Resources*)
- The onus of establishing this fact lies on the party claiming the privilege.
- **Establishing dominant purpose means more than just establishing that the privileged purpose was the most important purpose.**
 - A purpose can be ‘greater’ without being ‘dominant’ in the relevant sense – to say that an intended use was the most important use does not make it dominant.
 - A dominant purpose is one that **predominates over other purposes, it is the prevailing or paramount purpose** (*AWB v Cole*)

Consider what was the intended use or uses of the document which accounted for it being brought into existence? Consider stated intentions of the person who made the communication, the identity of the person to whom the communication was made

Note: Sole purpose: *Grant v Downs* (1976) 135 CLR 674 – no longer applicable where the uniform Evidence Acts are in force. Dominant purpose test is less demanding than the sole purpose test.

CASES

Carter v Managing Partner (1995) 153 CLR 500

- **Affirmed the dominant purpose test**
- Protects the frankness required in a lawyer client relationship

Kennedy v Wallace (2004) FCAFC 337

- **Following this case, s117 confirmed to extend to overseas lawyers.**
- Notes were made by a client whilst outside of Australia. Claimed that the notes were made to seek legal advice from lawyer in Switzerland.
- Federal Court on appeal held that the notes were not made for the dominant purpose of obtaining legal advice but privilege did extend to lawyers outside of Australia

Privilege in Perspective: Client Legal Privilege in Federal Investigations, ALRC Report 107

- 41 pieces of legislation that gave different bodies “coercive information gathering powers”.

Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme (Cole Inquiry), 2005-6

- AWB argued that a lot of the docs were subject to client legal privilege – did not assist into the decision whether the AWB acted legally or improperly.
- The inquiry had to ascertain whether those documents attracted client legal privilege.

Daniels v ACCC (2002) 213 CLR 543

- ACCC given coercive powers from the TPA. However, these powers did not explicitly say that these powers should override client legal privilege.
- **If the govt wanted to give agency powers which would interfere with this right, then these powers must be EXPLICIT in the legislation** (must specifically abrogate by legislation).

S120 Unrepresented parties

(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of:

- (a) a **confidential communication between the party and another person**; or
- (b) the **contents of a confidential document** (whether delivered or not) that was **prepared, either by or at the direction or request of, the party**;

for the **dominant purpose of preparing for or conducting the proceeding.**

Note:

- Thus, client legal privilege also applies to self-represented litigants – DP is preparing for or conducting the proceeding (i.e. made in anticipation of litigation). So if a SRL creates docs to assist a legal matter – the docs will be privileged.
- Only person who can waive client legal privilege is the client – not the lawyer (as the privilege resides with the client).
- HOWEVER more limited than under 119 because section 120 is limited to the particular proceedings in which the evidence is sought to be adduced

S122 Loss of client legal privilege: consent and related matters

(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (5), this Division **does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence** because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a **client or party is taken to have so acted if:**

- (a) the **client or party knowingly and voluntarily disclosed the substance of the evidence to another person**; or
- (b) the **substance of the evidence has been disclosed with the express or implied consent of the client or party.**

(4) The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or

party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.

(5) **A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:**

(a) **the substance of the evidence has been disclosed:**

(i) in the course of making a confidential communication or preparing a confidential document; or

(ii) as a result of duress or deception; or

(iii) under compulsion of law; or

(iv) if the client or party is a body established by, or a person holding an office under, an Australian law--to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or

(b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or

(c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

NOTE:

- **Test of inconsistency:** express or implied, intentional or unintentional. The test is not one of fairness. In particular, see (3).

R v Brahm:

- D had been arrested and taken to police station. Asked to make phone call to solicitor. Police Officer stands beside person whilst making the call.
- Held that D waived client privilege as he knew PO was standing beside him.

Armstrong Strategic Management:

- If you **accidentally send a document**, you will not necessarily have lost your privilege.
- HCA held: as documents had not been read by the party they had been sent to, promptly sent a letter that docs were privileged.

s121: Loss of client legal privilege: generally

(1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a **client or party who has died**.

(2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, **from enforcing an order of an Australian court**.

(3) This Division does not prevent the adducing of evidence of a communication or document that **affects a right of a person**. (interference of someone else's rights)

Note: privilege exists in a hierarchy of rights.

s125: Loss of client legal privilege: misconduct

(1) This Division does not prevent the adducing of evidence of:

(a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, **in furtherance of the commission of a fraud or an offence (crime) or the commission of an act that renders a person liable to a civil penalty**, or

(b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared **in furtherance of a deliberate abuse of a power**.

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

(a) the fraud, offence or act, or the abuse of power, was committed, and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,
the court may find that the communication was so made or the document so prepared.
(3) In this section: **power** means a power conferred by or under an Australian law.

Other Loss of privilege sections (not looked at in lec)

123. Loss of client legal privilege: defendants
Where the evidence is being adduced by the D in a criminal proceeding.

124. Loss of client legal privilege: joint clients
Where two or more parties to the proceeding have previously jointly retained a lawyer in relation to the same matter

126. Loss of client legal privilege: related communications and documents
Where the communication or document is necessary to a proper understanding of another communication or document with respect to which privilege has been lost.

Thus, summary of steps thus far:

1. **Relevance**
2. **Privilege test: Dominant Purpose**
3. **Has Privilege been lost for any reason? s120-122, s125.**

PROFESSIONAL CONFIDENTIAL RELATIONSHIP PRIVILEGE

126A Definitions (note this section only applies in NSW)

(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).

(Note 'Harm' is given a wide definition.)

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 (Also applies to pre-trial context under 131A)

(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,
- (i) the **public interest in preserving the confidentiality of protected confidences**,
- (j) the **public interest in preserving the confidentiality of protected identity information.**

(5) The **court must state its reasons** for giving or refusing to give a direction under this section.

Notes:

- Judge needs to undertake a balancing exercise- 'guided discretion'. This privilege is not absolute (like client legal privilege).

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.

Note: → Must be made with the intention of facilitating fraud.

NAR v PPC1 [2013] NSWCCA 25

Accused wanted access to complainant's medical records. Complainant had consented to the police to access and copy all of her medical records.

NSW CCA held:

- (1) The consent did not expressly relate to the privileged materials – she only agreed to disclose her medical records, not necessarily the same as the privileged docs under the CPA. The consent must expressly relate to the document being adduced and must be written?
- (2) Consent has to be in agreement for both parties to view the material – not sufficient that C had agreed to disclose the material for only the Prosecution and Police (and not the accused?).