

PRIVILEGE INVOLVING LAWYERS/LITIGATION

A. Satisfy one of the below to establish PRIVILEGE

Legal advice – s 118 - was communication made for the purpose of obtaining/giving legal advice?

1. Not extended to **third party communications** – if third party see s 119 below
2. Not extended to **documents provided by third party** – for purpose of giving/providing legal advice – note that it can be **prepared** by third party
3. Must be **actual legal advice** – not merely communication – *Carter v Managing Partner* (1995)
 - If you told lawyer about plan to rob bank then no privilege
 - If lawyer tried to dissuade then privilege will attach

OR

Litigation – s 119- Was communication made in relation to litigation?

1. Extends to **third parties**
2. Extends to **documents provided by third parties**
3. Litigation can be pending or in contemplation

OR

Self-represented litigants – s 120 – Was communication in relation to litigation?

1. Confidential communication between litigant and another person
2. Confidential documents prepared either by or at the direction or request of the party

IF NOT SATISFIED, SEE GENERAL PROFESSIONAL CONFIDENTIAL RELATIONSHIP PRIVILEGE

B. Determine if privilege has been lost/excluded

Legislation – Exclusion by legislation - *Daniels v ACCC* (2002) – must be **explicitly excluded** in legislation, **not by implication**

Consent – s 122 – Can be express or implied - Client acts in a way that is inconsistent with privilege

But

Mistaken disclosure – does not mean privilege is lost – *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013]

- Delay between discovery that documents were privileged and the mistaken sending to other side
- Although there was delay, this did not amount to waiver

Loss by death – s 121 - client deceased

Interferes with someone else's right/ waiver of court order – s 121

PROFESSIONAL CONFIDENTIAL RELATIONSHIP PRIVILEGE

A. Definition – s 126A

Harm – s 126A – includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear) – if information is disclosed

Protected confidence –

- 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

B. Does it apply?

S 126B – court takes into account balancing **harm of protected confider** and **desirability** of evidence being given

- Probative value
- Nature and gravity of cause of action
- Availability of other evidence
- Effect on protected confider
- Whether evidence is given elsewhere

Sexual assault counsellors – s 295-306 - protected in **criminal proceedings**

- *R v Young* (1999)
 - Girl was sexual assaulted and saw a counsellor
 - Defence sought access to counsellor's notes
 - Counsellor refuses to hand over notes and held in contempt of court and imprisoned as professional confidential relationship privilege did not apply to non-medically qualified counsellors.

Religious Confessions – s 127 – **Members of clergy** of any church or religious denomination entitled to **refuse to divulge** that a religious denomination is entitled to refuse