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# Recent developments in confidentiality in mediation

Tom Altobelli

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## Legal practice and ADR

# Recent developments in confidentiality in mediation

*Tom Altobelli*

"... the obligation as to confidentiality may well arise under the common law, possibly under statute, as well as contractually out of the mediation agreement."

The *Evidence Amendment (Confidential Communications) Act 1997* (NSW) was assented to on 10 December 1997.

This curious piece of legislation may have achieved, perhaps unintentionally, a level of confidentiality in mediation that has hitherto not been attained either by the common law, or by legislation in New South Wales.

The legislation amends the *Evidence Act 1995* (NSW). There are two divisions: Div 1A dealing with professional confidential relationship privilege; and Div 1B dealing with sexual assault communications privilege. Division 1B is not of relevance for present purposes, even in mediations involving allegations of sexual assault. This is because the definition of 'protected confidence' in Div 1B refers to a communication made 'in the course of a relationship in which the counsellor is treating the person for any emotional or psychological conditions suffered by the person'. The relevant division for present purposes is Div 1A.

## 'Protected confidence' defined

The key concept is that of 'protected confidence' which is defined in the new s 126A(1). A protected confidence is a communication made by a person in confidence to another person:

- (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.

It is submitted that a 'protected

confidence' can arise in the average mediation context. First, the mediator, especially lawyer mediators, would be 'acting in a professional capacity'. This probably does not mean acting as a professional mediator, but rather as a professional who is providing mediation in the course of another professional activity. Secondly, in an average mediation setting, the confidant (that is the person to whom the communication was made in confidence in other words the mediator and, in effect, any other person present) is under an express or implied obligation not to disclose its contents. Most mediation agreements expressly provide that the mediator and the parties and other persons present agree not to disclose what transpires during the mediation session. In any event, the obligation as to confidentiality may well arise under the common law, possibly under statute, as well as contractually out of the mediation agreement.

A communication is still deemed to be a 'protected confidence' even if it is made in the presence of a third party, provided the third party's presence is necessary to facilitate communication. This would clearly include all other parties present at a mediation including the mediator, the parties, the representatives of the parties, interpreters or experts.

It should be noted that what is protected is the 'protected confidence' that is the communication. The protection extends to a document which records a protected confidence (s 126B(1)(b)). It is interesting to compare what is protected in this legislation, to what is protected in other NSW legislation: for example, the *Retail Leases Act* (s 69) only protects >



> statements or admissions made in the course of mediation; the *Native Title Act* (NSW) only protects words spoken or acts done at a mediation conference (s 45(3)) but the *Farm Debt Mediation Act*, *Strata Schemes Management Act* and the *Legal Aid Commission Amendment Act* all protect documents as well as statements and admissions. This is also the case with the *Court's Legislation (Mediation and Evaluation) Act 1994*. The idea of protecting the 'communication' may be more versatile than the concepts used in these other Acts.

### Defining the 'protection'

The protection of the 'protected confidence' is set out in s 126B. Section 126B(1) provides that the court may direct that evidence not be adduced if admitting it would disclose a protected confidence, or the contents of a document recording a protected confidence, or what is called 'protected identity information'. Under s 126B(2) the court may give such direction on its own initiative or on the application of the protected confider (a person who made a protected confidence) or the confidant (the person to whom that statement was made).

Under s 126B(3) the court must give such direction, that is, must exclude the evidence if it is likely that harm would or might be caused to a protected confider if the evidence is adduced and the nature and extent of the harm outweighs the desirability that the evidence be given. In other words, there is mandatory exclusion of protected confidences where the protected confider might suffer harm which outweighs the desirability of giving the evidence. The concept of 'harm' includes physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm such as shame, humiliation and fear.

Section 126B(4) goes on to say that in determining whether to exclude evidence of protected confidences, the court is entitled to take into account matters such as the probative value of the evidence, the importance of the evidence in the proceedings, and various other factors as set out in s 126B(4).

By way of overview of s 126B, the court *must* exclude evidence of the protected confidence if harm (in a very extended sense) would or might be caused to a protected confider, and the harm outweighs the desirability of the evidence being given. In all other circumstances (that is, irrespective of whether harm is caused) the evidence *may* be excluded.

An argument exists, therefore, that a mediator would suffer harm if the protected confidence were admitted into evidence, even if the harm was merely loss of reputation.

Section 126D confirms that the protected confider, that is, the person who made the protected confidence, can waive the privilege. The confidant has no say in the matter. Nor, for that matter, does anybody else who was present at the time that the protected communication was made.

Section 126B confirms that the privilege does not prevent the admission into evidence of the protected confidence where there has been a fraud, or the commission of an act which renders a person liable to a civil penalty.

Section 126E empowers the court to mitigate the possible adverse consequences of disclosure of a protected confidence by, for example, ordering that evidence be heard in camera, and making suppression orders about publication.

Finally, s 126F(4) confirms that the protection given under the section is in addition to any other privilege that might be granted under the *Evidence Act*.

In the preamble to this article, it was suggested that there had been an unintentional possible extension to confidentiality in mediation. The explanatory memorandum to the bill contains this statement:

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.

There is no express reference in the explanatory memorandum to protecting the confidentiality in mediation.

Notwithstanding that, the basic rules of statutory interpretation are that legislation is applied according to its express terms. One can only have regard to extrinsic materials such as explanatory memorandum or Hansard, if the legislation is otherwise unclear. It is submitted that on a plain reading of Div 1A protected confidence includes communications made in mediation.

If this is correct, this is a significant development in mediation confidentiality. Protection at common law is very limited, and while s 131(1) of the *Evidence Act* expands protection to communications and documents made in an attempt to negotiate a settlement of a dispute, s 131(2) contains very substantial exceptions to the otherwise broad protection provided under s 131(1).

What the proposed legislation does is, in effect, to provide a higher standard of mediation confidentiality because ss 126A, B, C, D, E and F are *not* subject to s 131(2) of the *Evidence Act*. There were at least 13 types of situations where the confidentiality of an ADR process could be violated pursuant to s 131(2) of the *Evidence Act*. However, if Div 1A is deemed to apply to mediation conferences, then s 131(2) will simply not apply.

### Practical implications

One practical issue that may arise out of the legislation, if it is interpreted as suggested here, is that mediation clauses and mediation agreements could expressly state that any communication made in the mediation is deemed to be a protected confidence for the purposes of Div 1A of Pt 3.10 of the *Evidence Act* (NSW). This may well help to bring the mediation under the coverage of the Act, and resolve any uncertainty as to whether Div 1A applied.

It remains to be seen whether the legislation will in fact be applied in such a way as to extend its protection to mediation. ●

Tom Altobelli, Lecturer,  
Faculty of Law, University  
of Western Sydney, Macarthur.