



New South Wales

Civil Remedies for Serious Invasions of Privacy Bill 2020

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to implement the proposals for legislation in the Report on civil remedies for serious invasion of privacy, which is a Report of the Standing Committee on Law and Justice of the Legislative Council, published in March 2016.

That Report recommends—

- the substantial adoption of the proposals for legislation in the Report of the Australian Law Reform Commission (Report 123 of 2014) in relation to the creation of a statutory tort of serious invasion of personal privacy, to be enforceable by court proceedings, and
- the conferral of similar jurisdiction on the Civil and Administrative Tribunal (*NCAT*), and
- the conferral of power on the Privacy Commissioner to receive and deal with complaints about serious invasion of personal privacy.

The proposed Act is divided into Parts, the significant ones being—

- Part 2, which creates rights to proceed against a person in the Supreme Court or the District Court for a serious invasion of privacy, based on a statutory cause of action created by the proposed Act, and
- Part 3, which creates rights to proceed against a person in NCAT for a serious invasion of privacy, based on rights analogous to the statutory cause of action in Part 2, and
- Part 4, which enables a person to make a complaint to the Privacy Commissioner about a serious invasion of privacy.

Outline of provisions

Part 1 Preliminary

Part 1 contains preliminary provisions relating to the name of the proposed Act, its commencement by proclamation, definitions and the status of notes in the proposed Act.

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 contains definitions used in the proposed Act.

Clause 4 provides that notes included in the proposed Act do not form part of the proposed Act.

Part 2 Cause of action for serious invasion of privacy

Part 2 creates a statutory cause of action enforceable in the Supreme Court or District Court as a tort (ie a civil wrong). The Part follows the recommendations in the Report of the Standing Committee on Law and Justice, which in turn recommends substantial adoption of legislation recommended by the Australian Law Reform Commission.

Division 1 Preliminary

Clause 5 is an introductory clause.

Division 2 Statutory cause of action for serious invasion of privacy

Clause 6 provides that an individual has a statutory cause of action for a serious invasion of privacy.

Clause 7 provides that an action cannot be brought in respect of conduct of minors for serious invasion of privacy.

Clause 8 states that the limitation period for bringing an action based on the statutory cause of action is provided for in the *Limitation Act 1969* (see **Schedule 1** to the proposed Act).

Clause 9 states the 2 types of invasion of privacy covered by the statutory cause of action, namely intrusion upon seclusion and misuse of private information.

Clause 10 provides that the statutory cause of action is actionable only where a person in the position of the plaintiff would have had a reasonable expectation of privacy. Criteria are set out for consideration.

Clause 11 requires the plaintiff to prove intent, recklessness or negligence (if the defendant is a government, a governmental entity or a corporation) or intent or recklessness (if the defendant is an individual).

Clause 12 provides that an action based on the statutory cause of action can succeed only where the invasion of privacy was serious, having regard to criteria set out in the clause.

Clause 13 provides that the court must be satisfied that the public interest in privacy outweighs any countervailing public interest. Criteria are set out for consideration.

Clause 14 introduces a “single publication rule”. This rule will apply where a person’s privacy was invaded by misuse of private information by publishing a statement to the public based on the private information and the statement is later repeated in substantially the same form. The clause provides that any cause of action against the defendant for serious invasion of privacy in respect of a subsequent publication is to be treated as having arisen on the date of the first publication.

Division 3 Defences

Clause 15 is an introductory clause.

Clause 16 states the defences that are available. These are lawful conduct, protection of a person or property, absolute privilege, publication of a public document, fair report of proceedings of public concern, necessity and consent.

Division 4 Remedies

Clause 17 is an introductory clause.

Clause 18 provides that the court may give monetary relief, principally by way of an award of damages, including damages for emotional distress. The court may not award aggravated damages, may award exemplary damages in exceptional circumstances, and may award an account of profits.

Clause 19 provides that the court may give non-monetary relief, including by way of an injunction, a declaration, an order to deliver up or destroy material or an order requiring a correction or an apology.

Division 5 Miscellaneous

Clause 20 abolishes any other specific cause of action or tort for the invasion or violation of a person's privacy, but preserves any rights to proceed for defamation, trespass, breach of confidence, negligence, nuisance, injurious falsehood, passing off, intentional infliction of harm or breach of a statutory duty.

Clause 21 provides that the statutory cause of action does not survive the death of the person whose privacy was invaded.

Part 3 NCAT proceedings for serious invasion of privacy

Part 3 entitles a person to apply to NCAT for relief for an alleged serious invasion of privacy with provisions based on (though varying from) Part 2 of the proposed Act. The Part follows the recommendations in the Report of the Standing Committee on Law and Justice.

Division 1 Preliminary

Clause 22 is an introductory clause.

Clause 23 contains definitions used in the Part.

Division 2 Jurisdiction of NCAT

The provisions of this Division are analogous to those in Division 2 of Part 2.

Clause 24 confers jurisdiction on NCAT to deal with a claim made by application by an individual (*the applicant*) on the ground that the conduct of another person (*the respondent*) is a serious invasion of the applicant's privacy.

Clause 25 provides that an application cannot be made in respect of conduct of minors for serious invasion of privacy.

Clause 26 states an application is to be made before the end of a limitation period of the earlier of 1 year from the date on which the applicant became aware of the invasion of privacy or 3 years from the date on which the invasion of privacy occurred. If the invasion of privacy occurred before the applicant reached the age of 18 years and the application would otherwise be excluded by that limitation period, an application can be made within 12 months of reaching that age.

Clause 27 states the 2 types of invasion of privacy covered by the right to make a claim for serious invasion of privacy, namely intrusion upon seclusion and misuse of private information.

Clause 28 provides that an application can be made only where a person in the position of the applicant would have had a reasonable expectation of privacy. Criteria are set out for consideration.

Clause 29 requires the applicant to prove intent, recklessness or negligence (if the respondent is a government, a governmental entity or a corporation) or intent or recklessness (if the respondent is an individual).

Clause 30 provides that an application can succeed only where the invasion of privacy was serious, having regard to criteria set out in the clause.

Clause 31 provides that NCAT must be satisfied that the public interest in privacy outweighs any countervailing public interest. Criteria are set out for consideration.

Clause 32 introduces a “single publication rule”. This rule will apply where a person’s privacy was invaded by misuse of private information by publishing a statement to the public based on the private information and the statement is later repeated in substantially the same form. The clause provides that any right to make a claim against the respondent for serious invasion of privacy in respect of a subsequent publication is to be treated as having arisen on the date of the first publication.

Division 3 Defences

The provisions of this Division are analogous to those in Division 3 of Part 2.

Clause 33 is an introductory clause.

Clause 34 states the defences that are available. These are lawful conduct, protection of a person or property, absolute privilege, publication of a public document, fair report of proceedings of public concern, necessity and consent.

Division 4 Remedies

The provisions of this Division are analogous to those in Division 4 of Part 2. However, the monetary relief that may be given under clause 36 is narrower than that under clause 18.

Clause 35 is an introductory clause.

Clause 36 provides that NCAT may give monetary relief, principally by way of an award of damages, including damages for emotional distress. Damages cannot be greater than an amount equal to the jurisdictional limit of the District Court (\$750,000). NCAT may not award aggravated damages or exemplary damages.

Clause 37 provides that NCAT may give non-monetary relief, including by way of an order restraining conduct, a declaration, an order to deliver up or destroy material or an order requiring a correction or an apology.

Part 4 Role of Privacy Commissioner

Part 4 provides a role for the Privacy Commissioner in respect of serious invasion of an individual’s privacy. The Part follows the recommendations in the Report of the Standing Committee on Law and Justice.

Division 1 Preliminary

Clause 38 is an introductory clause.

Clause 39 contains definitions used in the Part.

Division 2 Role of Privacy Commissioner

Clause 40 provides that the role of the Privacy Commissioner under the proposed Act is—

- (a) to receive and deal with complaints about serious invasions of privacy, and
- (b) to assist a court as *amicus curiae* (friend of the court), or assist NCAT in a similar role, in connection with an alleged serious invasion of privacy, and
- (c) to intervene in proceedings before a court or NCAT in connection with an alleged serious invasion of privacy.

Division 3 Complaints

Clause 41 authorises an individual (*the complainant*) to make a complaint to the Privacy Commissioner about an alleged serious invasion of the complainant's privacy by a person (*the respondent*).

Clause 42 contains provisions about making and withdrawing complaints.

Clause 43 empowers the Privacy Commissioner to conduct a preliminary assessment of a complaint to decide whether to deal with the complaint.

Clause 44 authorises the Privacy Commissioner to refer a complaint to another authority.

Clause 45 provides for the Privacy Commissioner to deal with a complaint.

Clause 46 provides that the Privacy Commissioner may endeavour to deal with a complaint by conciliation.

Division 4 Determination of complaints

Clause 47 provides that the Privacy Commissioner may make a determination dismissing the complaint or, if the complaint is substantiated, a determination that includes 1 or more of the following—

- (a) declaring that the respondent has engaged in conduct constituting a serious invasion of privacy and must not repeat or continue conduct of that kind,
- (b) declaring that the respondent must take steps to ensure that certain conduct is not repeated or continued,
- (c) declaring that the respondent must redress any loss or damage suffered by the complainant, including, for example, to make an apology or to cause any relevant material to be taken down,
- (d) declaring that it would be inappropriate for any further action to be taken.

Clause 48 provides that proceedings to enforce a determination may be commenced in NCAT by the complainant or the Privacy Commissioner by application to NCAT.

Clause 49 provides that the Privacy Commissioner may refer a complaint to NCAT where there is a failure to act within a reasonable time on a determination made in relation to the complaint.

Clause 50 enables the Privacy Commissioner to make reports of findings and recommendations and to furnish any such reports to the complainant and other relevant persons or bodies.

Division 5 Miscellaneous

Clause 51 states that Part 4 does not prevent a complainant or former complainant from commencing proceedings at any time in a court or NCAT in respect of a serious invasion of privacy.

Part 5 Miscellaneous

Clause 52 provides that NCAT rules may be made for or with respect to any aspect of NCAT's jurisdiction or functions under the proposed Act, including—

- (a) the composition of the Administrative and Equal Opportunity Division of NCAT when exercising jurisdiction or functions under the proposed Act, and
- (b) applications to and proceedings in NCAT under the proposed Act.

Clause 53 authorises regulations to be made for the purposes of the proposed Act.

Clause 54 provides that the proposed Act does not apply to existing invasions of privacy.

Clause 55 provides for the proposed Act to be reviewed after 5 years.

Schedule 1 Amendment of Limitation Act 1969 No 31

The *Limitation Act 1969* is proposed to be amended to provide a limitation period for commencing actions based on the statutory cause of action. The limitation period is the earlier of 1 year from the date on which the plaintiff became aware of the invasion of privacy or 3 years from the date on which the invasion of privacy occurred. If the invasion of privacy occurred before the plaintiff reached the age of 18 years and the action would otherwise be excluded by that limitation period, an action can be commenced within 12 months of reaching that age.

Schedule 2 Amendment of Privacy and Personal Information Protection Act 1998 No 133

The *Privacy and Personal Information Protection Act 1998* is proposed to be amended to make it clear that a complaint under the proposed Act is to be dealt with under the proposed Act and not under the *Privacy and Personal Information Protection Act 1998*.