



New South Wales

Civil Remedies for Serious Invasions of Privacy Bill 2016

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 Legal 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 two 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 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 person 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 one year from the date on which the applicant became aware of the invasion of privacy or three 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 two 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 person 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 the court 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, exemplary damages or an account of profits.

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 Commission 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 one 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 this 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 one year from the date on which the plaintiff became aware of the invasion of privacy or three 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*.



New South Wales

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New South Wales

Civil Remedies for Serious Invasions of Privacy Bill 2016

No. , 2016

A Bill for

An Act to provide civil remedies for serious invasions of privacy; and to confer jurisdiction on the Privacy Commissioner and the Civil and Administrative Tribunal to deal with serious invasions of privacy.

The Legislature of New South Wales enacts:	1
Part 1 Preliminary	2
1 Name of Act	3
This Act is the <i>Civil Remedies for Serious Invasions of Privacy Act 2016</i> .	4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6
3 Definitions	7
In this Act:	8
apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.	9 10 11
conduct includes the publication of matter.	12
general law means the common law and equity (as modified from time to time by legislation).	13 14
governmental entity includes an entity prescribed by the regulations or an entity of a class prescribed by the regulations as being within this definition, but does not include an entity prescribed by the regulations or an entity of a class prescribed by the regulations as not being within this definition.	15 16 17 18
NCAT means the Civil and Administrative Tribunal of New South Wales under the <i>Civil and Administrative Tribunal Act 2013</i> .	19 20
Privacy Commissioner means the Privacy Commissioner under the <i>Privacy and Personal Information Protection Act 1998</i> .	21 22
private information includes untrue information, but only if the information would be private if it were true.	23 24
statutory cause of action means the cause of action referred to in section 6 (1).	25
Note. The <i>Interpretation Act 1987</i> contains definitions and other provisions that affect the interpretation and application of this Act.	26 27
4 Notes	28
Notes included in this Act do not form part of this Act.	29

Part 2	Cause of action for serious invasion of privacy	1
Division 1	Preliminary	2
5	Introduction	3
	This Part creates a statutory cause of action in tort.	4
	Note. The statutory cause of action is actionable in the Supreme Court or in the District Court (see section 44 of the <i>District Court Act 1973</i>).	5 6
Division 2	Statutory cause of action for serious invasion of privacy	7
6	Statutory cause of action	8
(1)	An individual has a cause of action against a person under this Part if that person's conduct is a serious invasion of the individual's privacy.	9 10
(2)	An action based on the statutory cause of action is an action in tort.	11
(3)	The plaintiff is not required to prove actual damage.	12
7	Exemption for conduct of minors	13
	The statutory cause of action does not apply to conduct of a person who had not reached the age of 18 years when the alleged conduct occurred.	14 15
8	Time limit for bringing action	16
	The limitation period for bringing an action based on the statutory cause of action is provided for in section 56E of the <i>Limitation Act 1969</i> .	17 18
9	Types of invasion of privacy	19
	In an action based on the statutory cause of action, the plaintiff must prove that the plaintiff's privacy was invaded in one of the following ways:	20 21
(a)	intrusion upon seclusion, such as by physically intruding into the plaintiff's private space or by watching, listening to or recording the plaintiff's private activities or private affairs,	22 23 24
(b)	misuse of private information, such as by collecting or disclosing private information about the plaintiff.	25 26
10	Reasonable expectation of privacy	27
(1)	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, in all of the circumstances.	28 29 30
(2)	In determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider the following, among other things:	31 32 33
(a)	the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters,	34 35
(b)	the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology,	36 37
(c)	the place where the intrusion occurred, such as in the plaintiff's home,	38
(d)	the purpose of the misuse, disclosure or intrusion,	39
(e)	how the private information was held or communicated, such as in private correspondence or a personal diary,	40 41

(f)	whether and to what extent the private information was already in the public domain,	1 2
(g)	the relevant attributes of the plaintiff, including the plaintiff's age, occupation and cultural background,	3 4
(h)	the conduct of the plaintiff, including whether the plaintiff invited publicity or manifested a desire for privacy.	5 6
11	Proof of fault	7
(1)	In an action based on the statutory cause of action, the plaintiff must prove:	8
(a)	a fault element of intent, recklessness or negligence—if the defendant is a government, a governmental entity or a corporation, and	9 10
(b)	a fault element of intent or recklessness—if the defendant is an individual.	11
(2)	An apology made by the defendant does not constitute an admission of fault or liability and is not relevant to the determination of fault or liability.	12 13
12	Invasion of privacy to be serious	14
	A plaintiff may bring an action based on the statutory cause of action only where the invasion of privacy was serious, having regard, among other things, to:	15 16
(a)	the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff, and	17 18 19
(b)	whether the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff.	20 21
13	Balancing privacy with other interests	22
(1)	For the plaintiff in an action based on the statutory cause of action to have a cause of action, the court must be satisfied that the public interest in privacy outweighs any countervailing public interest.	23 24 25
(2)	The court may consider the following countervailing public interest matters, along with any other relevant public interest matter:	26 27
(a)	freedom of expression, including political communication and artistic expression,	28 29
(b)	freedom of the media, particularly to responsibly investigate and report matters of public concern and importance,	30 31
(c)	the proper administration of government,	32
(d)	open justice,	33
(e)	public health and safety,	34
(f)	national security,	35
(g)	the prevention and detection of crime and fraud.	36
(3)	The defendant has the burden of adducing evidence that suggests there is a countervailing public interest for the court to consider.	37 38
(4)	The plaintiff has the legal onus to satisfy the court that the public interest in privacy outweighs any countervailing public interest that is raised in the proceedings.	39 40

14	Single publication rule	1
(1)	This section applies in relation to a statutory cause of action if:	2
(a)	the plaintiff alleges that the plaintiff's privacy was invaded by misuse of private information by the defendant publishing a statement to the public (<i>the first publication</i>) based on the private information, and	3 4 5
(b)	the defendant subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.	6 7
(2)	Any cause of action against the defendant for serious invasion of privacy in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.	8 9 10
(3)	This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.	11 12
(4)	In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (among other matters):	13 14 15
(a)	the level of prominence that a statement is given, and	16
(b)	the extent of the subsequent publication.	17
(5)	In subsection (1), <i>public</i> includes a section of the public.	18
Division 3	Defences	19
15	Preliminary	20
	In an action based on the statutory cause of action, the defendant has the defences set out in this Division.	21 22
16	Defences	23
(1)	Lawful conduct	24
	It is a defence if the defendant proves that the conduct of the defendant was required or authorised:	25 26
(a)	by or under New South Wales law or Commonwealth law, or	27
(b)	by an Australian court or tribunal or a process of such a court or tribunal.	28
(2)	Protection of person or property	29
	It is a defence if the defendant proves that the conduct of the defendant was done for the purpose of lawfully defending or protecting a person or property (including the prosecution or defence of civil or criminal proceedings) and that conduct was a proportionate, necessary and reasonable response to the situation concerned.	30 31 32 33
(3)	Absolute privilege, publication of public document and fair report of proceedings of public concern	34 35
	It is a defence if the defendant proves that the conduct of the defendant was the publication of matter that, if it is assumed that the publication is defamatory, would attract any of the following defences to an action for defamation:	36 37 38
(a)	the defence of absolute privilege (whether at general law or under section 27 of the <i>Defamation Act 2005</i>),	39 40
(b)	the defence of publication of a public document under section 28 of the <i>Defamation Act 2005</i> ,	41 42
(c)	any of the defences of fair report of proceedings of public concern under section 29 of the <i>Defamation Act 2005</i> .	43 44

(4) Necessity	1
It is a defence if the defendant proves that the conduct of the defendant was based on necessity, where the defendant had a reasonable belief that the conduct in invading the plaintiff's privacy was necessary to prevent an imminent and greater harm and that conduct was a reasonable response to the situation concerned.	2 3 4 5
(5) Consent	6
It is a defence if the defendant proves that the plaintiff, or another person having lawful authority to do so for the plaintiff, expressly or impliedly consented to the conduct.	7 8 9
(6) Definition	10
In this section:	11
<i>public document</i> means:	12
(a) a public document or a fair copy of a public document, or	13
(b) a fair summary of, or a fair extract from, a public document.	14
Division 4 Remedies	15
17 Preliminary	16
In an action based on the statutory cause of action, the court may (subject to any jurisdictional limits of the court) grant relief in accordance with this Division.	17 18
18 Monetary relief	19
(1) The court may award damages, including damages for emotional distress.	20
(2) When determining the amount of damages, the court may consider the following, among other matters:	21 22
(a) whether the defendant had made an appropriate apology to the plaintiff,	23
(b) whether the defendant had published a correction,	24
(c) whether the plaintiff had already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant,	25 26
(d) whether either party took reasonable steps to settle the dispute without litigation,	27 28
(e) whether the defendant's conduct following the invasion of privacy, including during the proceedings, was unreasonable and had subjected the plaintiff to particular or additional embarrassment, harm, distress or humiliation.	29 30 31
(3) The court may not award aggravated damages.	32
(4) The court may award exemplary damages in exceptional circumstances only.	33
(5) The amount of damages for non-economic loss that may be awarded, together with any exemplary damages, is not to exceed the maximum damages amount that may be awarded under section 35 (1) of the <i>Defamation Act 2005</i> for non-economic loss in defamation proceedings and that is applicable at the time damages are awarded.	34 35 36 37
(6) The court may award an account of profits in circumstances where the defendant has profited from an invasion of privacy.	38 39

19 Non-monetary relief	1
(1) Injunction	2
The court may at any stage of proceedings grant an interlocutory or other injunction to restrain the threatened or apprehended invasion of privacy, where it appears to the court to be just or convenient and on such terms as the court thinks fit.	3 4 5
(2) Factors to be considered in relation to injunctions	6
When considering whether to grant injunctive relief before trial to restrain publication of private information, the court must have particular regard to freedom of expression and any other matters of public interest.	7 8 9
(3) Declaration	10
The court may make an order declaring that the defendant's conduct has seriously invaded the privacy of the plaintiff.	11 12
(4) Delivery up or destruction of material	13
The court may make an order requiring that the defendant deliver to the plaintiff or destroy any articles, documents or other material, and all copies of them, concerning the plaintiff or belonging to the plaintiff that:	14 15 16
(a) are in the possession of the defendant or that the defendant is able to retrieve, and	17 18
(b) were obtained or made as a result of the invasion of the plaintiff's privacy or were published during the course of the conduct giving rise to the invasion of privacy.	19 20 21
(5) Correction	22
The court may make an order for the publication of a correction where false private information has been published.	23 24
(6) Apology	25
The court may make an order requiring the defendant to make an apology in a specified manner.	26 27
(7) Other relief	28
The court may grant such other non-monetary relief as the court considers necessary in the circumstances.	29 30
Division 5 Miscellaneous	31
20 Relationship of cause of action to other rights	32
(1) To the extent that the general law recognises a specific cause of action or tort for the invasion or violation of a person's privacy, that cause of action or tort is abolished.	33 34
(2) Subject to subsection (1), the right of action for serious invasion of privacy under this Act and the remedies under this Act are in addition to, and not in derogation of, any other right of action or other remedy available otherwise than under this Act.	35 36 37
(3) Without limiting subsection (2), subsection (1) does not operate to abolish or otherwise limit any of the following kinds of causes of action at general law to the extent that they provide for a remedy for the invasion or violation of an individual's privacy:	38 39 40 41
(a) an action for defamation,	42
(b) an action for trespass,	43
(c) an action for a breach of confidence,	44

(d)	an action for negligence,	1
(e)	an action for nuisance,	2
(f)	an action for injurious falsehood,	3
(g)	an action for passing off,	4
(h)	an action for intentional infliction of harm,	5
(i)	an action for breach of a statutory duty.	6
(4)	Nothing in this Act requires any compensation awarded in an action for invasion of privacy under this Act to be disregarded in assessing compensation or damages in any other proceedings arising out of the same conduct giving rise to the invasion of privacy.	7 8 9 10
21	Non-survival of statutory cause of action	11
(1)	A cause of action for serious invasion of privacy does not survive for the benefit of the plaintiff's estate or against the defendant's estate.	12 13
(2)	Subsection (1) has effect despite section 2 of the <i>Law Reform (Miscellaneous Provisions) Act 1944</i> .	14 15

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Division 1	Preliminary	2
22	Introduction	3
	This Part confers jurisdiction on NCAT in relation to claims for serious invasion of privacy.	4 5
23	Definitions	6
	In this Part:	7
	<i>application</i> means an application to NCAT under this Part.	8
	<i>claim for serious invasion of privacy</i> means a claim to NCAT under this Part.	9
	<i>the applicant</i> and <i>the respondent</i> —see section 24 (3).	10
Division 2	Jurisdiction of NCAT	11
24	Jurisdiction of NCAT in relation to serious invasion of privacy	12
(1)	NCAT has jurisdiction to hear and determine, in accordance with this Part and relevant provisions of and under the <i>Civil and Administrative Tribunal Act 2013</i> , a claim made by an individual on the ground that another person’s conduct is a serious invasion of the individual’s privacy.	13 14 15 16
(2)	A claim for serious invasion of privacy is made by application to NCAT.	17
(3)	In this Part:	18
(a)	the individual is referred to as <i>the applicant</i> , and	19
(b)	the other person is referred to as <i>the respondent</i> .	20
25	Exemption for conduct of minors	21
	A claim for serious invasion of privacy may not be made in respect of conduct of a person who had not reached the age of 18 years when the alleged conduct occurred.	22 23
26	Limitation period for making application	24
(1)	An application is to be made before the end of a limitation period of the earlier of:	25
(a)	one year from the date on which the applicant became aware of the invasion of privacy, or	26 27
(b)	three years from the date on which the invasion of privacy occurred.	28
(2)	However, if:	29
(a)	the invasion of privacy occurred before the date on which the applicant reached the age of 18 years, and	30 31
(b)	a claim for serious invasion of privacy based on that invasion cannot be made under subsection (1),	32 33
	a claim based on that invasion may be brought within a limitation period of one year from the date on which the applicant reached that age.	34 35
27	Types of invasion of privacy	36
	In a claim for serious invasion of privacy, the applicant must prove that the applicant’s privacy was invaded in one of the following ways:	37 38

(a)	intrusion upon seclusion, such as by physically intruding into the applicant's private space or by watching, listening to or recording the applicant's private activities or private affairs,	1 2 3
(b)	misuse of private information, such as by collecting or disclosing private information about the applicant.	4 5
28	Reasonable expectation of privacy	6
(1)	A claim for serious invasion of privacy may be made only where a person in the position of the applicant would have had a reasonable expectation of privacy, in all of the circumstances.	7 8 9
(2)	In determining whether a person in the position of the applicant would have had a reasonable expectation of privacy in all of the circumstances, NCAT may consider the following, among other things:	10 11 12
(a)	the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters,	13 14
(b)	the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology,	15 16
(c)	the place where the intrusion occurred, such as in the applicant's home,	17
(d)	the purpose of the misuse, disclosure or intrusion,	18
(e)	how the private information was held or communicated, such as in private correspondence or a personal diary,	19 20
(f)	whether and to what extent the private information was already in the public domain,	21 22
(g)	the relevant attributes of the applicant, including the applicant's age, occupation and cultural background,	23 24
(h)	the conduct of the applicant, including whether the applicant invited publicity or manifested a desire for privacy.	25 26
29	Proof of fault	27
(1)	In a claim for serious invasion of privacy, the applicant must prove:	28
(a)	a fault element of intent, recklessness or negligence—if the respondent is a government, a governmental entity or a corporation, and	29 30
(b)	a fault element of intent or recklessness—if the respondent is an individual.	31
	Note. A claim for serious invasion of privacy does not attract strict liability.	32
(2)	An apology made by the respondent does not constitute an admission of fault or liability and is not relevant to the determination of fault or liability.	33 34
30	Invasion of privacy to be serious	35
	A person may make a claim for serious invasion of privacy only where the invasion of privacy was serious, having regard, among other things, to:	36 37
(a)	the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the applicant, and	38 39 40
(b)	whether the respondent was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the applicant.	41 42

31	Balancing privacy with other interests	1
(1)	For a claim for serious invasion of privacy to succeed, then among other matters, NCAT must be satisfied that the public interest in privacy outweighs any countervailing public interest.	2 3 4
(2)	NCAT may consider the following countervailing public interest matters, along with any other relevant public interest matter:	5 6
(a)	freedom of expression, including political communication and artistic expression,	7 8
(b)	freedom of the media, particularly to responsibly investigate and report matters of public concern and importance,	9 10
(c)	the proper administration of government,	11
(d)	open justice,	12
(e)	public health and safety,	13
(f)	national security,	14
(g)	the prevention and detection of crime and fraud.	15
(3)	The respondent has the burden of adducing evidence that suggests there is a countervailing public interest for NCAT to consider.	16 17
(4)	The applicant has the legal onus to satisfy NCAT that the public interest in privacy outweighs any countervailing public interest that is raised in the proceedings.	18 19
32	Single publication rule	20
(1)	This section applies in relation to a right to make a claim for serious invasion of an applicant's privacy if:	21 22
(a)	the applicant alleges that the applicant's privacy was invaded by misuse of private information by the respondent publishing a statement to the public (<i>the first publication</i>) based on the private information, and	23 24 25
(b)	the respondent subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same.	26 27
(2)	Any right to make a claim against the respondent for serious invasion of privacy in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.	28 29 30
(3)	This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the manner of the first publication.	31 32
(4)	In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which NCAT may have regard include (among other matters):	33 34 35
(a)	the level of prominence that a statement is given, and	36
(b)	the extent of the subsequent publication.	37
(5)	In subsection (1), <i>public</i> includes a section of the public.	38
Division 3	Defences	39
33	Preliminary	40
	In a claim for serious invasion of privacy, the respondent has the defences set out in this Division.	41 42

34 Defences	1
(1) Lawful conduct	2
It is a defence if the respondent proves that the conduct of the respondent was required or authorised:	3
(a) by or under New South Wales law or Commonwealth law, or	4
(b) by an Australian court or tribunal or a process of such a court or tribunal.	5
(2) Protection of person or property	6
It is a defence if the respondent proves that the conduct of the respondent was done for the purpose of lawfully defending or protecting a person or property (including the prosecution or defence of civil or criminal proceedings) and that conduct was a proportionate, necessary and reasonable response to the situation concerned.	7
(3) Absolute privilege, publication of public document and fair report of proceedings of public concern	8
It is a defence if the respondent proves that the conduct of the respondent was the publication of matter that, if it is assumed that the publication is defamatory, would attract any of the following defences to an action for defamation:	9
(a) the defence of absolute privilege (whether at general law or under section 27 of the <i>Defamation Act 2005</i>),	10
(b) the defence of publication of a public document under section 28 of the <i>Defamation Act 2005</i> ,	11
(c) any of the defences of fair report of proceedings of public concern under section 29 of the <i>Defamation Act 2005</i> .	12
(4) Necessity	13
It is a defence if the respondent proves that the conduct of the respondent was based on necessity, where the respondent had a reasonable belief that the conduct in invading the applicant's privacy was necessary to prevent an imminent and greater harm and that conduct was a reasonable response to the situation concerned.	14
(5) Consent	15
It is a defence if the respondent proves that the applicant, or another person having lawful authority to do so for the applicant, expressly or impliedly consented to the conduct.	16
(6) Definition	17
In this section:	18
public document means:	19
(a) a public document or a fair copy of a public document, or	20
(b) a fair summary of, or a fair extract from, a public document.	21
Division 4 Remedies	22
35 Preliminary	23
In a claim for serious invasion of privacy, NCAT may grant relief in accordance with this Division.	24
36 Monetary relief	25
(1) NCAT may award damages, including damages for emotional distress.	26

(2)	When determining the amount of damages, NCAT may consider the following, among other matters:	1
		2
(a)	whether the respondent had made an appropriate apology to the applicant,	3
(b)	whether the respondent had published a correction,	4
(c)	whether the applicant had already recovered compensation, or has agreed to receive compensation in relation to the conduct of the respondent,	5
		6
(d)	whether either party took reasonable steps to settle the dispute without litigation,	7
		8
(e)	whether the respondent's conduct following the invasion of privacy, including during the proceedings, was unreasonable and had subjected the applicant to particular or additional embarrassment, harm, distress or humiliation.	9
		10
		11
(3)	The amount of damages that may be awarded is not to exceed an amount equal to the jurisdictional limit of the District Court (as defined in section 4 of the <i>District Court Act 1973</i>) that is applicable at the time damages are awarded.	12
		13
		14
	Note. At the time of enactment of this Act, the jurisdictional limit of the District Court was \$750,000.	15
		16
(4)	Subject to subsection (3) and without affecting the generality of that subsection, the amount of damages for non-economic loss that may be awarded is not to exceed the maximum amount that may be awarded for non-economic loss in defamation proceedings and that is applicable at the time damages are awarded.	17
		18
		19
		20
	Note. Section 35 (1) of the <i>Defamation Act 2005</i> specifies the maximum amount that may be awarded for non-economic loss in defamation proceedings, but this is subject to the jurisdictional limit, referred to in subsection (3) of this section, for damages generally.	21
		22
		23
(5)	NCAT may not award:	24
(a)	aggravated damages, or	25
(b)	exemplary damages, or	26
(c)	an account of profits.	27
37	Non-monetary relief	28
(1)	Restraint of conduct	29
	NCAT may at any stage of proceedings grant an order restraining the threatened or apprehended invasion of privacy, where it appears to NCAT to be just or convenient and on such terms as NCAT thinks fit.	30
		31
		32
(2)	Factors to be considered in relation to interim restraint of conduct	33
	When considering whether to grant relief under subsection (1) before the complaint is finally dealt with, NCAT must have particular regard to freedom of expression and any other matters of public interest.	34
		35
		36
(3)	Declaration	37
	NCAT may make an order declaring that the respondent's conduct has seriously invaded the privacy of the applicant.	38
		39
(4)	Delivery up or destruction of material	40
	NCAT may make an order requiring that the respondent deliver to the applicant or destroy any articles, documents or other material, and all copies of them, concerning the applicant or belonging to the applicant that:	41
		42
		43
(a)	are in the possession of the applicant or that the applicant is able to retrieve, and	44
		45

(b)	were obtained or made as a result of the invasion of the applicant's privacy or were published during the course of the conduct giving rise to the invasion of privacy.	1 2 3
(5)	Correction	4
	NCAT may make an order for the publication of a correction where false private information has been published.	5 6
(6)	Apology	7
	NCAT may make an order requiring the applicant to make an apology in a specified manner.	8 9
(7)	Other relief	10
	NCAT may grant such other non-monetary relief as NCAT considers necessary in the circumstances.	11 12

Part 4	Role of Privacy Commissioner	1
Division 1	Preliminary	2
38	Introduction	3
	This Part gives functions to the Privacy Commissioner in relation to alleged serious invasions of privacy.	4 5
39	Definitions	6
	In this Part:	7
	<i>complaint</i> means a complaint to the Privacy Commissioner under this Part.	8
	<i>determination</i> means a determination of the Privacy Commissioner under section 47.	9
	<i>the complainant</i> and <i>the respondent</i> —see section 41 (2).	10
Division 2	Role of Privacy Commissioner	11
40	Role	12
(1)	The Privacy Commissioner may, in accordance with this Part, receive and deal with complaints about serious invasions of privacy.	13 14
(2)	The Privacy Commissioner may assist a court as amicus curiae, or assist NCAT in a similar role, in connection with an alleged serious invasion of privacy, where the Commissioner considers it appropriate to do so, and with the leave of the court or NCAT.	15 16 17 18
(3)	The Privacy Commissioner may intervene in proceedings before a court or NCAT in connection with an alleged serious invasion of privacy, where the Commissioner considers it appropriate to do so, and with the leave of the court or NCAT.	19 20 21
Division 3	Complaints	22
41	Making of complaint	23
(1)	An individual may make a complaint to the Privacy Commissioner about an alleged serious invasion of the individual’s privacy by a person.	24 25
(2)	In this Part:	26
(a)	the individual is referred to as <i>the complainant</i> , and	27
(b)	the other person is referred to as <i>the respondent</i> .	28
42	Provisions about complaints	29
(1)	A complaint may be in writing or verbal, but the Privacy Commissioner may require a verbal complaint to be put in writing.	30 31
(2)	The Privacy Commissioner may require information about a complaint to be provided by the complainant in a particular manner or form, and may require a complaint to be verified by statutory declaration.	32 33 34
(3)	A complaint must be made within 6 months (or such later time as the Privacy Commissioner may allow) from the time the complainant first became aware of the conduct the subject of the complaint.	35 36 37
(4)	The complainant may amend or withdraw a complaint.	38

43 Preliminary assessment of complaint	1
(1) The Privacy Commissioner may conduct a preliminary assessment of a complaint for the purpose of deciding whether to deal with the complaint.	2 3
(2) The Privacy Commissioner may decide not to deal with a complaint if the Commissioner is satisfied that:	4 5
(a) the subject-matter of the complaint does not amount to a serious invasion of privacy, or	6 7
(b) the complaint is frivolous, vexatious or lacking in substance, or is not in good faith, or	8 9
(c) the subject-matter of the complaint relates to a matter permitted or required by or under any law, or	10 11
(d) the subject-matter of the complaint should be dealt with by a court or NCAT, or	12 13
(e) there is available to the complainant another alternative, satisfactory and readily available means of redress.	14 15
44 Referring complaint to other authorities	16
(1) The Privacy Commissioner may refer a complaint for investigation or other action to any person or body (<i>relevant authority</i>) considered by the Commissioner to be appropriate in the circumstances.	17 18 19
(2) The Privacy Commissioner may communicate to the relevant authority any information that the Privacy Commissioner has obtained in relation to the complaint.	20 21
(3) The Privacy Commissioner may refer a complaint to a relevant authority under this section only after appropriate consultation with the complainant and the relevant authority, and after taking their views into consideration.	22 23 24
(4) A complaint is not to be referred to a court or NCAT under this section.	25
45 Dealing with complaint	26
(1) If the Privacy Commissioner decides to deal with a complaint, the Commissioner may deal with the complaint and make such inquiries and investigations in relation to the complaint as the Commissioner thinks appropriate.	27 28 29
(2) If the Privacy Commissioner declines to deal with a complaint, the Commissioner must advise the complainant of the reasons for declining to deal with the complaint.	30 31
46 Conciliation	32
(1) In dealing with a complaint, the Privacy Commissioner may endeavour to resolve the complaint by conciliation.	33 34
(2) The Privacy Commissioner may by written notice request the complainant and the respondent to appear before the Commissioner in conciliation proceedings.	35 36
(3) The parties to any such conciliation proceedings before the Privacy Commissioner are not entitled to be represented by any other person except by leave of the Commissioner.	37 38 39
(4) The procedures for conciliation are to be determined by the Privacy Commissioner.	40
Division 4 Determination of complaints	41
47 Determination of Privacy Commissioner	42
(1) After investigating a complaint, the Privacy Commissioner may:	43

(a)	if the Commissioner finds the complaint is not substantiated—make a determination dismissing the complaint, or	1 2
(b)	if the Commissioner finds the complaint is substantiated—make a determination that includes one or more of the following:	3 4
(i)	a declaration that the respondent has engaged in conduct constituting a serious invasion of the privacy of an individual and must not repeat or continue conduct of that kind,	5 6 7
(ii)	a declaration that the respondent must take specified steps within a specified period to ensure that any conduct of that kind is not repeated or continued,	8 9 10
(iii)	a declaration that the respondent must perform any reasonable act or course of conduct within a specified period to redress any loss or damage (including emotional distress) suffered by the complainant, including, for example, to make an apology to the complainant or to cause any relevant material to be taken down,	11 12 13 14 15
(iv)	a declaration that it would be inappropriate for any further action to be taken in the matter.	16 17
(2)	The Privacy Commissioner is, in a determination, to state any findings of fact upon which the determination is based.	18 19
(3)	The Privacy Commissioner may include, in a determination, a declaration that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred by the complainant in connection with the making of the complaint and the investigation of the complaint.	20 21 22 23
(4)	A determination under subsection (1) (b) may include any order that the Privacy Commissioner considers necessary or appropriate.	24 25
(5)	A determination is not binding or conclusive between any of the parties to the determination.	26 27
48	Proceedings to enforce determination	28
(1)	Proceedings to enforce a determination may be commenced in NCAT by the complainant or the Privacy Commissioner by application to NCAT.	29 30
(2)	If NCAT is satisfied that the respondent has engaged in conduct that constitutes a serious invasion of the privacy of the complainant, NCAT may make an order confirming the determination.	31 32 33
(3)	A determination may be confirmed either without variation or with specified variations of a kind that may be made by the Commissioner.	34 35
(4)	An order under this section confirming a determination (with or without variation):	36
(a)	is taken to be an order in the same terms as the determination, and	37
(b)	is declared to be a designated order for the purposes of section 72 of the <i>Civil and Administrative Tribunal Act 2013</i> (Contravention of orders of Tribunal).	38 39
(5)	NCAT is to deal by way of a hearing de novo with the question whether the respondent has engaged in conduct that constitutes a serious invasion of the privacy of the complainant.	40 41 42
(6)	Despite subsection (5), the court may receive any of the following as evidence in proceedings about a determination:	43 44
(a)	a copy of the Commissioner’s written reasons for the determination,	45
(b)	a copy of any document that was before the Commissioner,	46

(c)	a copy of a record (including any audio or audio-visual recording) of any hearing before the Commissioner (including any oral submissions made).	1 2
49	Referral to NCAT	3
(1)	The Privacy Commissioner may refer a complaint on behalf of a complainant to NCAT where there is a failure to act within a reasonable time on a determination made in relation to the complaint.	4 5 6
(2)	The claim is then to be dealt with as if it had been the subject of an application to NCAT under Part 3.	7 8
50	Reports of Privacy Commissioner	9
(1)	The Privacy Commissioner may make a written report as to any findings or recommendations by the Commissioner in relation to a complaint dealt with by the Commissioner under this Part.	10 11 12
(2)	The Privacy Commissioner may give a copy of any such report to the complainant, and to such other persons or bodies as appear to be materially involved in matters concerning the complaint.	13 14 15
Division 5	Miscellaneous	16
51	Complainant may commence proceedings in court or NCAT	17
	Nothing in this Part prevents a complainant or former complainant from at any time:	18
(a)	bringing an action in a court based on the statutory cause of action under Part 2, or	19 20
(b)	making an application to NCAT for serious invasion of privacy under Part 3, in relation to the same or substantially the same subject-matter as that alleged in the complaint.	21 22 23

Part 5	Miscellaneous	1
52	NCAT rules	2
	Without limiting anything in the <i>Civil and Administrative Tribunal Act 2013</i> , the power of NCAT to make rules under that Act includes power to make rules, not inconsistent with this Act, for or with respect to any aspect of NCAT's jurisdiction or functions under this Act, including (without limitation):	3 4 5 6
	(a) the composition of the Administrative and Equal Opportunity Division of NCAT when exercising jurisdiction or functions under this Act, and	7 8
	(b) applications to and proceedings in NCAT under Part 3 or 4.	9
53	Regulations	10
	The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.	11 12 13 14
54	Act does not apply to pre-existing invasions of privacy	15
	This Act does not apply to alleged invasions of privacy occurring before the commencement of this section.	16 17
55	Review of Act	18
(1)	The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.	19 20 21
(2)	The review is to be undertaken as soon as possible after the period of 5 years from the day appointed by proclamation for the commencement of this Act or, if more than one day is appointed, the first of those days.	22 23 24
(3)	A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.	25 26

Schedule 1	Amendment of Limitation Act 1969 No 31	1
[1] Section 14C		2
Insert after section 14B:		3
14C Serious invasion of privacy		4
(1) An action on a cause of action for serious invasion of privacy under Part 2 of the <i>Civil Remedies for Serious Invasions of Privacy Act 2016</i> is not maintainable if brought after the end of a limitation period of the earlier of:		5
(a) one year from the date on which the plaintiff became aware of the invasion of privacy, or		6
(b) three years from the date on which the invasion of privacy occurred.		7
(2) However, if:		8
(a) the invasion of privacy occurred before the date on which the plaintiff reached the age of 18 years, and		9
(b) an action on the cause of action is not maintainable under subsection (1),		10
an action on the cause of action is maintainable if brought within a limitation period of one year from the date on which the plaintiff reached that age.		11
[2] Section 15 Accounts		12
Insert at the end of the section:		13
(2) However, in the case of an action on a cause of action for serious invasion of privacy under Part 2 of the <i>Civil Remedies for Serious Invasions of Privacy Act 2016</i> :		14
(a) subsection (1) does not apply, and		15
(b) the action is not maintainable if brought after the expiration of the relevant limitation period under section 14C.		16
[3] Part 3, Division 2B		17
Insert after Division 2A:		18
Division 2B Serious invasion of privacy		19
56E Extension of limitation period by court		20
(1) A person claiming to have a cause of action for serious invasion of privacy under Part 2 of the <i>Civil Remedies for Serious Invasions of Privacy Act 2016</i> may apply to the court for an order extending the limitation period mentioned in section 14C (1) (a) or (2) for the cause of action.		21
(2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date on which the cause of action first accrued, extend the limitation period mentioned in section 14C (1) (a) to a period of up to 3 years running from that date.		22
(3) A court may not order the extension of the limitation period for a cause of action for serious invasion of privacy under Part 2 of the <i>Civil Remedies for Serious Invasions of Privacy Act 2016</i> other than in the circumstances specified in subsection (2).		23

56F	Effect of order	1
	If a court orders the extension of a limitation period for a cause of action under section 56E, the limitation period is accordingly extended for the purposes of:	2
		3
	(a) an action brought by the applicant in that court on the cause of action that the applicant claims to have, and	4
		5
	(b) section 26 (1) (b) in relation to any associated contribution action brought by the person against whom the cause of action lies.	6
		7
56G	Costs	8
	Without affecting any discretion that a court has in relation to costs, a court hearing an action brought as a result of an order under section 56E may reduce the costs otherwise payable to a successful plaintiff, on account of the expense to which the defendant has been put because the action was commenced outside the original limitation period.	9
		10
		11
		12
		13
56H	Prior expiry of limitation period	14
	An order for the extension of a limitation period, and an application for such an order, may be made under this Division even though the limitation period has already expired.	15
		16
		17

Schedule 2	Amendment of Privacy and Personal Information Protection Act 1998 No 133	1
		2
Section 45 Making of privacy related complaints		3
Insert after section 45 (2A):		4
(2B)	A complaint about a matter referred to in section 41 of the <i>Civil Remedies for Serious Invasions of Privacy Act 2016</i> is not to be dealt with under this Division but is to be dealt with by the Privacy Commissioner as a complaint under Part 4 of that Act.	5
		6
		7
		8