

South Australia

Civil Liability (Serious Invasions of Privacy) Bill 2021

A BILL FOR

An Act to establish a cause of action for serious invasions of the privacy of natural persons, to provide for defences and remedies in respect of the cause of action and to make related amendments to the *Limitation of Actions Act 1936* and the *Survival of Causes of Action Act 1940*.

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The Parliament of South Australia enacts as follows:**Part 1—Preliminary****1—Short title**

This Act may be cited as the *Civil Liability (Serious Invasions of Privacy) Act 2021*.

5 2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

3—Interpretation

In this Act, unless the contrary intention appears—

individual means a natural person;

10 *journalist* means a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium;

statutory cause of action means a cause of action for a serious invasion of privacy under section 7(1).

4—Statutory cause of action an action in tort

- 15 (1) An action based on the statutory cause of action is an action in tort.

- (2) The statutory cause of action provided for in this Act is in addition to the existing general law relating to the law of torts and is not intended to detract from or otherwise affect that existing general law except to the extent that this Act provides otherwise (whether expressly or by necessary implication).

5—Jurisdiction of courts

- (1) An action on the statutory cause of action may be brought—
- (a) if no amount is claimed or the amount claimed does not exceed \$100 000—in the Magistrates Court; or
 - (b) in any other case—in the District Court.
- (2) If an action is brought in the Magistrates Court and the Court is of the opinion that the action should be heard and determined in the District Court, the Magistrates Court may refer the matter to the District Court for hearing and determination.

6—Application of *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*

Section 7 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* does not apply in relation to a liability in damages arising under this Act.

Part 2—Cause of action for serious invasion of privacy

Division 1—Cause of action

7—Cause of action for serious invasion of privacy

- (1) Subject to this Act, an individual (the *applicant*) has a cause of action for a serious invasion of privacy against a person (the *respondent*) if—
- (a) in circumstances in which the applicant has a reasonable expectation of privacy, conduct of the respondent amounts to—
 - (i) an intrusion into the applicant's seclusion (such as physical intrusion into the applicant's private surroundings or watching, listening to or recording the applicant's private activities or private affairs); or
 - (ii) a misuse of information about or relating to the applicant (such as disclosing or disseminating such information without lawful excuse); and
 - (b) the intrusion into seclusion or misuse of information (as the case requires) is serious; and
 - (c) the respondent engaged in the conduct—
 - (i) intending to intrude into the applicant's seclusion or misuse the information; or
 - (ii) being aware of a material risk that the intrusion or misuse would occur.

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- (2) In determining whether an intrusion into seclusion or misuse of information is serious, a court must consider—

- (a) the degree of offence, distress or harm to dignity likely to be caused to a person of ordinary sensibilities in the position of the applicant and as a result of the conduct of the respondent; and
- (b) the state of mind of the respondent in respect of the respondent's conduct including—
 - (i) whether the respondent was acting with malicious intent; or
 - (ii) whether the respondent knew the invasion of privacy was likely to offend, distress or harm the dignity of the applicant; and
- (c) any other matters the court considers relevant.

- (3) For the avoidance of doubt, the applicant is not required to have sustained actual loss, harm or other detriment to have a cause of action under this section.

Division 2—Limitations on actions on statutory cause of action**8—Only resident of, or visitor to, State may bring action**

An individual may only bring an action on a statutory cause of action if—

- (a) the individual ordinarily resides in this State; or
- (b) the cause of action arises from circumstances in which the individual was physically present in this State.

9—No action for, or against, deceased person

A person (including a personal representative of a deceased person) cannot assert, continue or enforce an action on a statutory cause of action based on—

- (a) conduct alleged to have been committed against a deceased person (whether the conduct was engaged in before or after the death of the person); or
- (b) the conduct of a person who has since died.

10—Limitation on statutory cause of action in respect of certain conduct

An action on a statutory cause of action may not be brought in relation to—

- (a) the conduct of a person under the age of 16 years; or
- (b) the conduct of a person in the course of the person's occupation as a journalist where that conduct accords with relevant standards of professional conduct applying to the journalist; or
- (c) the conduct of a prescribed person or body or a person or body of a prescribed class; or
- (d) the conduct of a person in prescribed circumstances.

11—Countervailing public interest

- (1) An individual does not have an action on a statutory cause of action if a countervailing public interest balances with or outweighs the public interest in upholding the privacy of the individual.

(2) For the purposes of subsection (1), a court may, for example, consider the following countervailing public interest matters:

- (a) freedom of expression, including political communication and artistic expression;
- (b) the proper administration of Government;
- (c) open and transparent justice;
- (d) public health and safety and scientific advancement;
- (e) national security;
- (f) law enforcement and the detection of crime and fraud.

Part 3—Defences

Division 1—General defences

12—Defence of consent

(1) It is a defence to an action on a statutory cause of action if the respondent proves that the conduct on which the cause of action is based was undertaken with the consent of the applicant.

(2) In this section—

consent means express consent or implied consent.

13—Defence of lawful authority

(1) It is a defence to an action on a statutory cause of action if the respondent proves that the conduct on which the cause of action is based was required or otherwise authorised by law.

(2) For the purposes of this section, conduct is not to be taken to be authorised by law simply because the conduct may be undertaken without legal restriction, prohibition or other legal consequences.

14—Defence of necessity and lawful conduct to protect person or property

(1) It is a defence to an action on a statutory cause of action if the respondent proves that—

- (a) the respondent genuinely believed that the conduct on which the cause of action is based was necessary and reasonable—
 - (i) for a defensive purpose; or
 - (ii) to address a risk to the health, safety or security of the respondent or other person; and
- (b) the conduct was, in the circumstances as the respondent believed them to be, reasonably proportionate to the threat or risk that the respondent genuinely believed to exist.

(2) In this section—

defensive purpose means any of the following purposes:

- (a) self defence or defence of another;
- (b) to prevent or terminate unlawful imprisonment of a person;
- (c) to protect property from unlawful appropriation, destruction, damage or interference;
- (d) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass;
- (e) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large.

Division 2—Defences relating to publication or disclosure of information

15—Preliminary

In this Division, unless the contrary intention appears—

Australian court means any court established by or under a law of an Australian jurisdiction (including a court conducting committal proceedings for an indictable offence);

Australian jurisdiction means—

- (a) a State; or
- (b) a Territory; or
- (c) the Commonwealth;

Australian tribunal means any tribunal (other than a court) established by or under a law of an Australian jurisdiction that has the power to take evidence from witnesses before it on oath or affirmation (including a Royal Commission or other special commission of inquiry and the Independent Commissioner Against Corruption, the Deputy Commissioner or an examiner conducting an examination under the *Independent Commissioner Against Corruption Act 2012*);

country includes—

- (a) a federation and a state, territory, province or other part of a federation; and
- (b) an Australian jurisdiction;

law enforcement agency has the same meaning as in the *Independent Commissioner Against Corruption Act 2012*;

law reform body of a country means a body (however described and whether or not permanent or full-time) established by law to conduct inquiries into, and to make recommendations on, reforming the laws of that country;

learned society means a body, wherever formed—

- (a) the objects of which include the advancement of any art, science or religion or the advancement of learning in any field; and
- (b) authorised by its constitution—

- (i) to exercise control over, or adjudicate on, matters connected with those objects; and
- (ii) to make findings or decisions having effect, by law or custom, in any part of Australia;

5 **ombudsman** of a country means a person (however described and whether or not permanent or full-time) authorised by law to investigate complaints about the actions or other conduct of any public officials or public bodies of that country;

parliamentary body means—

- (a) a parliament or legislature of any country; or
- 10 (b) a house of a parliament or legislature of any country; or
- (c) a committee of a parliament or legislature of any country; or
- (d) a committee of a house or houses of a parliament or legislature of any country;

proceedings of public concern means—

- 15 (a) any proceedings in public of a parliamentary body; or
- (b) any proceedings in public of an international organisation of any countries or of the governments of any countries; or
- (c) any proceedings in public of an international conference at which the governments of any countries are represented; or
- 20 (d) any proceedings in public of—
 - (i) the International Court of Justice, or any other judicial or arbitral tribunal, for the decision of any matter in dispute between nations; or
 - (ii) any other international judicial or arbitral tribunal; or
- (e) any proceedings in public of a court or arbitral tribunal of any country; or
- 25 (f) any proceedings in public of an inquiry held under the law of any country or under the authority of the government of any country; or
- (g) any proceedings in public of a local government body of any Australian jurisdiction; or
- 30 (h) proceedings of a learned society, or of a committee or governing body of the society, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—
 - (i) a member or members of the society; or
 - (ii) a person subject by contract or otherwise by law to control by the society; or
- 35 (i) proceedings of a sport or recreation association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—
 - (i) a member or members of the association; or

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Part 3—Defences

Division 2—Defences relating to publication or disclosure of information

- (ii) a person subject by contract or otherwise by law to control by the association; or
- (j) proceedings of a trade association, or of a committee or governing body of the association, under its relevant objects, but only to the extent that the proceedings relate to a decision or adjudication made in Australia about—
 - (i) a member or members of the association; or
 - (ii) a person subject by contract or otherwise by law to control by the association; or
- (k) any proceedings of a public meeting (with or without restriction on the people attending) of shareholders of a public company under the *Corporations Act 2001* of the Commonwealth held anywhere in Australia; or
- (l) any proceedings of a public meeting (with or without restriction on the people attending) held anywhere in Australia if the proceedings relate to a matter of public interest, including the advocacy or candidature of a person for public office; or
- (m) any proceedings of an ombudsman of any country if the proceedings relate to a report of the ombudsman; or
- (n) any proceedings in public of a law reform body of any country; or
- (o) any other proceedings conducted by, or proceedings of, a person, body or organisation of another Australian jurisdiction that are treated in that jurisdiction as proceedings of public concern under a provision of a law of the jurisdiction corresponding to this section;

public document means—

- (a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law; or
- (b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including—
 - (i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction; and
 - (ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination; or
- (c) any report or other document that under the law of any country—
 - (i) is authorised to be published; or
 - (ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body; or
- (d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public; or
- (e) any record or other document open to inspection by the public that is kept—
 - (i) by an Australian jurisdiction; or

- (ii) by a statutory authority of an Australian jurisdiction; or
- (iii) by an Australian court; or
- (iv) under legislation of an Australian jurisdiction; or
- (f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to this section;

relevant objects of a learned society, sport or recreation association or trade association means—

- (a) in relation to a learned society—objects of the kind referred to in paragraph (a) of the definition of learned society; or
- (b) in relation to a sport or recreation association—objects of the kind referred to in paragraph (a) of the definition of sport or recreation association in this subsection; or
- (c) in relation to a trade association—objects of the kind referred to in paragraph (a) of the definition of trade association in this subsection;

sport or recreation association means a body, wherever formed—

- (a) the objects of which include the promotion of any game, sport, or pastime to the playing of which or exercise of which the public is admitted as spectators or otherwise and the promotion or protection of the interests of people connected with the game, sport, or pastime; and
- (b) authorised by its constitution—
 - (i) to exercise control over, or adjudicate on, matters connected with the game, sport, or pastime; and
 - (ii) to make findings or decisions having effect, by law or custom, in any part of Australia;

trade association means a body, wherever formed—

- (a) the objects of which include the promotion of any calling, that is to say, a trade, business, industry or profession and the promotion or protection of the interests of people engaged in any calling; and
- (b) authorised by its constitution—
 - (i) to exercise control over, or adjudicate on, matters connected with a calling or the conduct of people engaged in the calling; and
 - (ii) to make findings or decisions having effect, by law or custom, in any part of Australia.

16—Defence of absolute privilege

- (1) It is a defence to an action on a statutory cause of action, where the conduct of the respondent on which the cause of action is based is the publication or other disclosure of information, if the respondent proves that the publication or disclosure was made on an occasion of absolute privilege.

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(2) Without limiting subsection (1), publication or other disclosure of information is made on an occasion of absolute privilege if—

(a) the publication or disclosure is made in the course of the proceedings of a parliamentary body, including (but not limited to)—

(i) the publication or other disclosure of a document by order, or under the authority, of the body; and

(ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law; and

(iii) the publication or other disclosure of information while giving evidence before the body; and

(iv) the publication or other disclosure of information while presenting or submitting a document to the body; or

(b) the information is published or otherwise disclosed in the course of the proceedings of an Australian court or Australian tribunal, including (but not limited to)—

(i) the publication or other disclosure of information in any document filed or lodged with, or otherwise submitted to, the court or tribunal (including any originating process); and

(ii) the publication or other disclosure of information while giving evidence before the court or tribunal; and

(iii) the publication or other disclosure of information in any judgment, order or other determination of the court or tribunal; or

(c) the information is published or otherwise disclosed on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section; or

(d) the information is published or otherwise disclosed by a person or body in any circumstances prescribed by the regulations.

17—Defence of fair report of proceedings of public concern

(1) It is a defence to an action on a statutory cause of action, where the conduct of the respondent on which the cause of action is based is the publication or other disclosure of information, if the respondent proves that the publication or disclosure amounts to a fair report of any proceedings of public concern.

(2) A defence established under subsection (1) is defeated if, and only if, the applicant proves that the information was not published or disclosed honestly for the information of the public or the advancement of education.

18—Defence for publication or disclosure of public documents

(1) It is a defence to an action on a statutory cause of action, where the conduct of the respondent on which the cause of action is based is the publication or other disclosure of information, if the respondent proves that the information was contained in—

(a) a public document or a fair copy of a public document; or

(b) a fair summary of, or a fair extract from, a public document.

- (2) For the purposes of subsection (1), if a report or other document under the law of a country would be a public document except for non-compliance with a provision of that law about—

(a) the formal requirements for the content or layout of the report or document;
or

(b) the time within which the report or document is prepared, or presented, submitted, tabled or laid to or before a person or body,

the report or document is a public document despite that non-compliance.

- (3) A defence established under subsection (1) is defeated if, and only if, the applicant proves that the information was not published or otherwise disclosed honestly for the information of the public or the advancement of education.

Part 4—Remedies

19—Remedies

- (1) If a court finds that an action on a statutory cause of action for a serious invasion of privacy against a respondent is proven, the court may, subject to this Act, make 1 or more of the following orders:

(a) a declaration as to the legal rights and obligations between the parties to the cause of action;

(b) an order that the respondent pay an amount of damages to the applicant (which may include an award of exemplary damages);

(c) an order that the respondent account for any profits made as a result of the invasion of privacy and to make payment of all or some of those profits to the applicant or other person or organisation;

(d) an order that the respondent is restrained or prohibited from doing a particular act or thing;

(e) an order that the respondent is required to do a particular act or thing;

(f) an order that the respondent apologise to the applicant in a manner and form specified by the court;

(g) an order that the respondent correct any incorrect information forming part of the invasion of privacy;

(h) an order that the respondent, or other person, deliver to the applicant, the court or other person, any information, documentation, photograph, film or other item obtained in the course of or due to the invasion of privacy;

(i) any other remedy that the court considers appropriate in the circumstances.

- (2) In considering whether to make an order that a respondent is restrained or prohibited from doing a particular act or thing or an order that a respondent is required to do a particular act or thing, whether during or at the completion of proceedings, the court must consider relevant competing public interests and be satisfied that making the order is appropriate in the circumstances.

- (3) The maximum amount of damages (excluding damages for economic loss but including any award of exemplary damages) that may be awarded on an action based on the statutory cause of action is \$432 500 or any other amount adjusted in accordance with this section from time to time that is applicable at the time damages are awarded.
- (4) The Minister is, on or before 1 July following the commencement of this Act and on or before 1 July in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (3).
- (5) The amount declared under subsection (4) is to be the amount applicable under subsection (3) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.
- (6) An amount declared for the time being under this section applies to the exclusion of the amount of \$432 500 or any amount previously adjusted under this section.
- (7) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (5), the amount declared is to be determined in accordance with the regulations.
- (8) In adjusting an amount to be declared for the purposes of subsection (3), the amount determined in accordance with subsection (5) is to be rounded to the nearest \$500.
- (9) A declaration made or published in the Gazette after 1 July in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.
- (10) In this section—

Australian Statistician means the Australian Statistician under the *Australian Bureau of Statistics Act 1975* of the Commonwealth.

20—Damages to bear rational relationship to harm

- (1) In making an order for damages in respect of an action on a statutory cause of action the court must, subject to subsection (2), seek to ensure that there is an appropriate and rational relationship between the loss, harm or other detriment sustained by the applicant and the amount of damages awarded.
- (2) Despite subsection (1), a court may award an amount of nominal damages in circumstances where no actual loss, harm or detriment has been suffered.
- (3) Without limiting the matters that a court may take in account in fixing the amount of damages awarded, the court may consider any of the following:
- (a) whether the respondent has made an appropriate apology to the applicant;
 - (b) economic loss to the applicant as a result of the invasion of privacy;
 - (c) harm to the applicant (including physical or psychological harm) as a result of the invasion of privacy;
 - (d) emotional distress caused as a result of the invasion of privacy (including humiliation, anxiety, distress and embarrassment);

- (e) whether the applicant has already recovered an amount of compensation, or has agreed to receive compensation, in relation to the conduct of the respondent;
- (f) in the case of an invasion of privacy involving the publication of incorrect information, whether the respondent has published a correction;
- (g) any reasonable steps taken by the applicant or respondent to settle the applicant's claim without litigation;
- (h) the conduct of the respondent following the conduct on which the cause of action was based and following the initiation of proceedings on the cause of action and whether such conduct has subjected the applicant to additional embarrassment, harm, distress or humiliation.

21—Damages for multiple causes of action may be assessed as single sum

If a court, in proceedings under this Act, finds for the applicant as to more than 1 statutory cause of action, the court may assess damages in a single sum.

Part 5—Miscellaneous

22—Regulations

The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.

Schedule 1—Related amendments

Part 1—Preliminary

1—Amendment provisions

In this Schedule, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendments to *Limitation of Actions Act 1936*

2—Insertion of section 36A

After section 36 insert:

36A—Serious invasions of privacy

- (1) Subject to subsection (2), a person may only bring an action on a statutory cause of action for a serious invasion of privacy under the *Civil Liability (Serious Invasions of Privacy) Act 2021* within—
 - (a) 1 year after the date on which the applicant becomes aware of the conduct on which the cause of action is based; or
 - (b) 6 years after the date of the conduct on which the cause of action is based,
- whichever occurs earlier.

- (2) A court may extend the period referred to in subsection (1)(a) if satisfied that exceptional circumstances exist in the particular case but such an extension of time may not exceed the period referred to in subsection (1)(b).

5 **Part 3—Amendments to *Survival of Causes of Action Act 1940***

3—Amendment of section 2—Survival of causes of action

Section 2(2)—delete subsection (2) and substitute:

- (2) This section does not apply to—
- (a) a cause of action in defamation; or
 - (b) a cause of action for a serious invasion of privacy under the *Civil Liability (Serious Invasions of Privacy) Act 2021*.