A STATUTORY RIGHT OF PRIVACY

A submission by Peter A P Clarke (Barrister at Law)

1. Responding *in seriatim* to the questions raised by the discussion paper:

Do recent developments in technology mean that additional ways of protecting individuals' privacy should be considered in Australia

2. The underlying premise of the statement presupposes that technological advances warrant additional credit protections for individuals privacy. There has always been a need for privacy protection. An underlying fundamental human rights and goes to the essence of an individual's autonomy. There has been a long-standing gap in the protection citizen has from unreasonable intrusion. The fact that there has been no tort of privacy is not a reflection of an adequate legal protection rather disinterest by the legislature, to date, and resistance by the judiciary until the recent past. Must be remembered that *Victoria Park Racing v Taylor* the High Court was asked to find that there was a right of privacy. It didn't. There have been many instances in other areas of law where reform has been late coming. The fact that legislative reform occurs is not mean that there was no prior need, even over a long period of time. Legislatures move at their own pace and courts are cautious in the development of new law.

3. There is no doubt that technological developments provide greater impetus, if not urgency, for individuals to have a definable and enforceable right of privacy. Through computers, the Internet and specific programs is possible to be far more intrusive in a far more efficient manner and never before. Whereas previously the ability to undertake surveillance, through eavesdropping, photographing, videotaping and data mining was once the province of the State because of the sheer cost and effort in undertaking such activities miniaturisation of equipment, the massive reduction in costs and simplification of its use makes the opportunity for and frequency of privacy abuses a significant cause for concern.

4. The legislative responses within Australia have been minimalist, haphazard and generally weak in effect. The *Privacy* act 1988 is deeply flawed legislation which provides an individual with with limited protections. Exemptions within the Act, most particularly relating to the media and small business (the overwhelmingly largest employer of individuals within the community) means there is lack of coverage. The legislation is unduly bureaucratic, the enforcement by the Privacy Commissioner in the past has been uneven and anaemic on too many occasions. The fact that an individual cannot take an action on his or her own behalf, rather than work through the Privacy/Information Commissioner to prosecute a claim for a breach is a significant denial of an individual's right to protect one's own autonomy.

Is there a need for a cause of action for serious invasion of privacy in Australia?

5. There is an overwhelming need for a private right to privacy. The right to be let alone is a well accepted and fundamental human right. It is curious and strange that in criminal law a person must not enter another's property or listen in on their conversations without a warrant but in civil law individuals or organisations can undertake intrusions which have far more devastating upon an individual little concern about the consequences.

6. At present there is a gap in the law To highlight this it is worth reciting the circumstances affecting Gordon Kaye in the United Kingdom over 20 years ago. A well known actor from the comedy series *Allo Allo* Kaye was seriously injured when a piece of timber crashed through his car windscreen during a storm and a splinter entered his brain. While laying in a coma attached to a life support machine journalists from the Sunday Sport ignored a notice posted by the hospital prohibiting entry, gained access to his room, photographed him in his bed and attempted to interview him. The paper published his photograph and an accompanying a story. The Court of Appeal[1] overturned an injunction obtained by Kaye in the High Court on the basis that there was no breach of any recognised tort, such as trespass to the person, libel or passing off. The Court found there was only malicious falsehood available to him. The development of the law in the United Kingdom has filled that gap.[2]

7. There has been no equivalent development of the law in Australia to deal with the Kaye situation or any similar breach of privacy. The tentative isolated cases, cited in the Discussion Paper, by two disparate intermediate courts, *Doe v ABC* and *Grosse v Purvis* [3] finding there is a tort of privacy *per se* do not give any significant cause for optimism. Neither is a court of precedent and both cases involve the court reaching its findings on inchoate grounds. The fact that such cases are relied upon at all highlights the precarious basis for claiming such protections at common law. The only superior court's determination to date regarding "privacy rights" is that of the Victorian Court of Appeal's decision in *Giller v Procepets*[4]. In *Giller* the Plaintiff/Appellant was successful on equitable grounds, namely a breach of confidence.

8. In *Giller* Neave JA considered *Doe v ABC* and *Grosse v Purvis* in the context of a discussion regarding a tort of privacy but having found that Ms Giller had a right of compensation on "..other grounds, it is unnecessary to say more about whether a tort of invasion of privacy

[1] Kaye v Robertson [1991] FSR 62
[2] See comments by Lord Justice Keene in *Douglas and Others v Hello! Limited* ([2007] UKHL 21
[3] *Doe v Australian Broadcasting Corporation* [2007] VCC 281 and *Grosse v Purvis* [2003] QDC 151
[4] [2008] VSCA 236

should be recognised by Australian law."[5] The other justices were equally cautious. As such the common law protections of privacy rests on the restrictive equitable basis of a breach of confidence action by way of three somewhat disparate judgements of the Court of Appeal of Victoria. There is a divergence between the Court of Appeal and those of *Doe* and *Grosse*. At best there is some protection in very restricted factual circumstances. Based on the *Giller ratio*, the pre requisite of a relationship of confidence limits the circumstances which a protection may exist and does not encompass the many circumstances where a person may have a reasonable expectation of privacy but not be in such a relationship with the transgressor. At law a person may find himself/herself in the situation of Gordon Kaye, having their most basic expectation of privacy traduced but having no viable course of action to seek remedy.

Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?

9. As discussed above the development of the common law has been, at best, tentative and uncertain in Australia. The Court of Appeal in *Giller* opted to follow the United Kingdom authorities which are grounded in the equitable principles of breach of confidence. In the United Kingdom case law is itself moving more towards a stand-alone tort of privacy. Relying upon the common-law development of the tort of privacy is at best hoping that the High Court will embrace such a rights, as it hinted it may consider in *ABC v Lenah Game Meats*[6] when the right vehicle presents itself. That decision was 10 years ago and the High Court has not revisited the issue. While the issue awaits jurisdiction acts which breach individuals reasonable expectation of privacy do not stop.

10. It is not good policy to hope the common law will at some stage in the future consider this issue at the High Court level and do so with sufficient clarity and scope as to fill the current gap. Significant reform requires, at minimum, a legislative base. Just as the *Trade Practices* Act 1967 and 1974 provided a necessary consumer protections in the commercial environment a statutory right of privacy is a necessity in this area. Such legislation should not be drafted so as to be effectively a code. The courts, through the common law, will need the flexibility and freedom to meet the challenges incrementally.

[5] Ibid at [452]
[6] 208 CLR 199

Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?

11. Establishing a "highly offensive" threshold is not particularly helpful. There is no basis for claiming that a lesser standard of "offensive" will give rise to a flood of unmeritorious cases. Intentional torts, such as trespass and nuisance, do not absorb significant court resources. In common law countries with established rights to privacy, either by a standalone tort or breach of confidence, there is no evidence that this cause of action has clogged the court lists and resulted in oppressive claims upon defendants. There is no basis for claiming that absent the adjective "highly" there will be a surge of trivial claims.

12. As a matter of public policy "offensive", in and of itself, is a bar sufficiently high to cover genuine breaches. Why should someone be forced to tolerated intrusions offensive to a person of reasonable sensibilities. The NSWLRC's view that highly offensive requirement is not good policy or principle is correct.

13. The meaning of "highly offensive" could and probably will result in unnecessary legal wrangling and arcane arguments over what extent does that set a higher threshold than offensive. A better approach is to provide as a defence that a claim is frivolous, vexatious, misconceived or lacking in substance (or all of the above). A provision permitting the court to strike out a claim or give summary judgement for a Defendant/Respondent on that basis would provide a means to deal with unmeritorious claims at an early stage.

14. There is very limited utility in including a list of factors relevant for the consideration of whether offensiveness meets the threshold test. Those factors could easily revert to "the only relevant factors" (or the first tier factors) and become part of a rigid code. Listing factors, even if they are specifically stated to be non exhaustive, is that they may soon become *de facto* an exhaustive list. A tort must be allowed to breath and develop to meet the changing times and social mores. It is relevant to note that section 52 of the *Trade Practices* Act 1974 (now Schedule 2 section 18 *Competition and Consumer* Act 2010) provides:

> " A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

This section has been a very effective tool of consumer protection and has been considered over varying and disparate fact situations to give rise to a very significant body of law. There is no suggestion that the courts have traversed widely and created a legal behemoth. Trial courts in Australia are by their nature cautious, conservative and incremental. The Appellate jurisdiction is even more so. The courts can develop the common law interpretation of clearly but simply drafted statutory tort of privacy with specific elements.

15. As suggested above the best way of meeting a possible issue of litigating on small matters so that the actions become an abuse of process and meet the inevitable claim such actions constitute " ..a chill on free speech" is to provide a defence of triviality which is contained in Defamation legislation (see section 33 of the *Defamation* Act (Vic)). Further, cost orders reflecting the abusive nature of bringing a trivial claim should be specifically made available to the Court. Such orders as ordering costs on a solicitor client or indemnity basis should be permitted.

Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLRC) or constitute a separate defence (VLRC)?

16. Requiring a plaintiff/applicant to plead a public interest requirement will give rise to confusion and is inconsistent with the manner in which a claim based on a intentional tort should be pleaded. From a practical legal perspective, drawing a claim for breach of privacy the pleading that the balance of interest favours the plaintiff would be an exercise in vague drafting and involve motherhoodish statements. The claim would either be a bland statement or would be particularised by a philosophical discourse. Naturally the plaintiff would claim the threshold is met. Courts are loathed to shut out individuals at the first step. As such the public interest issue would probably only be dealt with at trial. What is the purpose of requiring the plaintiff to discharge that burden

17. It also presupposes that there must be a public interest on each occasion where there is a breach of privacy before a person can take action to protect his or her rights. That is not logical. In short it is the legal equivalent of putting the cart before the horse or perhaps, more aptly, assuming there will always need to be a cart. The protection of

one's privacy should be separate and independent of such concerns whereas a defence may have regard to the public interest justifying such a breach.

18. The burden should be upon the Defendant/Respondent to show there is a public interest in the intrusion. The benefit of the Victorian approach is that the defence is a matter that can be considered discretely and for the defendant to crystallise what public interest is in issue. To that end it may be useful to set out under defences what recognised public interest defences exist at present though such a list should not be exhaustive and should be focused on the issues of:

    (a) right of political communication;

    (b) matters of good governance; and

    (c) exposure of corruption and maladministration.

How best could a statutory cause of action recognise the public interest in freedom of expression?

19. The misnomer in the debate between freedom of speech and the right of privacy is that they are in constant tension. That is not the case. Many potential breaches of privacy relate to matters not even vaguely regarded as involving freedom of expression issues. Many breaches of privacy are acts which have no bearing upon a free exchange of ideas or the expression of views. Breaches of privacy are often action based, intrusions upon ones' private space or intruding upon a person's reasonable expectation of privacy. Freedom of expression is focused upon the exchange of ideas and comment. There is however overlap, particularly as it relates to media reportage versus individual privacy. On that plane tension between the two rights does occur.

20. It would be a mistake to give pre eminence to one or other right. The rights must be balanced within the context of the particular facts. To do less would be to give primacy of one right at the expense of another. The balancing of such rights and interests is not a matter beyond the wit of the courts. It is a process adopted throughout the civil jurisdiction of the courts on a daily basis involving other causes of action. It is true that such balancing is not an exact science however including a public interest defence of a right of political communication or even the more broad freedom of speech would deal with this issue makes it clear to courts hearing cases that the right of freedom of expression must be given sufficient weight.

Is the inclusion of 'intentional' or 'reckless' as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?

21. The ALRC recommendation is the only viable approach. The tort of privacy should be an intentional tort and not a branch of the tort of negligence. As an intentional tort there should be two elements; a direct act and either intention or recklessness on the part of the tortfeasor. The nature of the act is direct and intentional (includes reckless indifference to the consequences[7]). Accordingly the Discussion Paper is correct to equate the tort to an intentional tort which is actionable *per se*. The element of intention in a tort of privacy is the intention to do the act, not the intention to cause injury or harm. Requiring proof that the person breaching or invading another's privacy intended to cause harm of any kind is unnecessary. "Directness" has traditionally been an element of the tort of battery in Australian law.[8] There are good policy reasons to make it an element of any statutory tort of privacy.

22. There are strong policy reasons against formulating the cause of action on the basis of negligence or a mixed negligence/intentional tort. As the law stands in Australia there is a clear and unequivocal distinction between intentional torts and negligence. The generalised principle of liability for "careless" conduct has been the core of the development of the tort of negligence. That is the antithesis of an intentional tort. While in *Letang v Cooper*, Lord Denning MR, with whom Danckwerts LJ agreed, held (at 239, 242), that the distinction between trespass and case is obsolete and should be abolished, to be replaced with an inquiry into whether the acts were intentional (assault and battery) or unintentional (negligence)[9] the High Court in *Williams v Milotin* maintained the distinction between intentional torts and negligence.

23. The requirement of directness marks out an important boundary of the operation of a direct tort. In *Letang v Cooper* [1965] 1 QB 232 at 246-7 Diplock LJ said

> " I would observe in passing that a duty not to inflict direct injury to the person of anyone is by its very nature owed only to those who are within range- a narrower circle of Atkinsonian neighbours than in the tort of negligence.

---

7 *Nationwide News Pty Ltd Naidu* (2007) 71 NSWLR 471 at 487-488 per Spigelman CJ.

8 *Williams v Milotin* (1957) 97 CLR 465 at 470

9 Although he proceeded to say that if one man intentionally applied force directly to another the plaintiff had a cause of action in assault or battery. Accordingly, some confusion remains as to whether directness continues to distinguish trespass from case in England.

In *National Australia Bank Ltd v Nemur Varity Pty Ltd* (2002) 4 VR 252, Batt JA considered[10] the "sliding scale [of remoteness] from strict liability to intention wrongdoing"[11] and noted that "[s]o dominant is negligence in the law of torts that it is easy to treat negligence and tort as co-extensive and unquestioning to apply the same test of remoteness in the case of all other torts"[12]. Citing *Palmer Bruyn & Parker* (2001) 208 CLR 388, Batt JA confirmed that, in intentional torts, no requirements of reasonable foreseeability or proximity apply to limit liability for consequential loss and damage. The controlling mechanisms of foreseeability and remoteness so important to the law of negligence simply do not apply to intentional torts.[13]

24. To plead the invasion as being an element of the tort leads to circularity and unnecessary confusion. Similarly pleading negligence complicates the process and potentially expands the scope of liability of potential defendants, diminishes the potential egregiousness of the behaviour and, taken to its extreme, opens the possibility (subject to strict drafting to the contrary) that secondary victims (as is permissible under negligence) could maintain a cause of action as is the case in negligence as the common law now stands.

Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?

25. Ultimately allowing the consideration of "relevant matters" runs the risk of those matters being the touchstone for a court to consider at the exclusion of other matters. The NSWLRC description of matters that a court of competent jurisdiction should consider should not be set out in legislative form. Some or all of those matters a court would have regard to depending on the fact situation. As with misleading and deceptive conduct provisions of the Trade Practices Act courts should be allowed an element of flexibility determining what may be the relevant factors in the balance. Specified defences, as is the case in defamation law, provides certainty for the defendant. In other common law jurisdictions the legislature haves not required a

---

[10] at 275 [56] – 280 [65]
[11] At 276 [58], quoting Lord Steyn in *Smith New Court Securities Ltd v Scrigmour Vickers (Asset Management) Ltd* [1997] AC 254.
[12] at 275 [57]
[13] Balkin, R. P., and Davis, J. L. R., *Law of Torts* (Butt: 4th end, 2009), [3.14], p. 40.

large list of relevant factors or even a small list of relevant factors to allow for the effective operation of the law and the common law has developed without such uncertainty as to give rise to confusion or prejudice to individuals undertaking their activities (even the media).

26. As previously discussed, the development of technology, social mores, reasonable expectations and the activities of those who seek to intrude into person's private life may, and probably will, outpace the relevant factors that a legislative drafter may regard as being appropriate in the circumstances.

27. Parsimony in drafting is a virtue. Excessive direction from the legislature on matters where the fact situation is maybe so fluid and varied may give rise to unnecessary constriction upon a court's exercise of its discretion and unjust results.

Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?

28. Listing types of invasions does not help in interpretation but may hamstring the operation of the tort in a short space of time. The Law should be stable but it should never stand still. Setting out a list of examples giving rise to a breach of privacy risks atrophying the development of the tort over time. That constriction can lead to significant distortion, with the courts taking a limited restrictive line with respect to the development of the tort. Courts in Australia are in the main conservative and parsimonious in developing rights. They should be relied upon to develop the law on a case by case basis in a conservative manner.

29. Reference to a list in the explanatory memorandum and the Second reading speech is considerably more efficacious. It would assist the courts and counsel but not constitute a code.

30. The limited benefits in listing activities which would constitute serious invasions of privacy are far outweighed by the scope of human activities which give rise to complaints. It is a facet of some modern legislative drafting to incorporate applicable examples and notations to assist in the interpretation of a provision. In the context of

defining a right that would inevitably lead to a confinement of the right to privacy to genuses' of privacy rights. It may become a check list of variable weight. It is more a codification than a provision that can be considered by a court in light of the evidence.

What should be included as defences to any proposed cause of action?

31. The ALRC recommendations provide sufficient basis in protecting competing rights. As drafted the proposed defences are consistent with those rights that should be protected. Consent would be an appropriate defence as well. This may be an issue in dispute at trial but it is a matter that should be pleaded by way of defence.

Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

32. No. Organisations, such as police or other governmental bodies, may act outside the responsibilities or egregiously. To insulate an organisation to complicate the operation of the law in those circumstances. The necessary test should be the action, not the party performing it. If there is to be any protections they should be included within the defences. A list of defences are sufficient to cover organisations that may need to intrude upon a person's privacy, provided they are acting according to law.

Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

33. With respect to the remedies recommended by the ALRC:

(a) damages, including aggravated damages, but not exemplary damages;

In the main this is acceptable. There is no good policy reason why exemplary damages should be precluded. Egregious behaviour where the person committing a tort has had contumelious disregard for another's rights should be the subject of punitive penalties. Exemplary damages are not commonly awarded in common law. But there is strong reasons for maintaining them.

(b) an account of profits;

This is entirely appropriate given the potential consequences of a breach of one's privacy may have upon person earning ability and opportunities in the future.

(c) an injunction;

Injunctive relief is an important part protection when there is an ongoing breach of privacy.

(d) an order requiring the respondent to apologise to the claimant;

Forced apologies are never a good idea. There should be provision in legislation providing that an apology may constitute a mitigating factor and be taken into account on the question of damages and other remedies ordered. Requiring an unwilling party to formulate and send to other parties apologies which are clearly not felt by the defendant does little to assuage the hurt felt by the aggrieved party.

(e) a correction order;

The danger of an corrections order is that it maintains a breach in the eyes of the public or the relevant audience. The plaintiff wishes to protect his or her rights and obtain the appropriate remedy, whether by way of damages or injunctive relief. It is unlikely that a plaintiff would wish to have the matter ready agitated again by way of a corrections order. While it may be prudent to have such an order available for a court in those particular circumstances where is warranted it seems to be destined to be dead letter in most situations.

(f) an order for the delivery up and destruction of material; and

This order is of particular importance. Similarly intrusions involving obtaining items belonging to a person (an action which would normally be regarded as theft or conversion) should be dealt with by such an order .

(g) a declaration

A declaration is an important form of relief.

Should the legislation prescribe a maximum award of damages for non-economic loss, and if so, what should that limit be?

34. In the area of intentional torts Australian courts have not in the past and are unlikely in the future to be excessive, or even generous, in the award of damages for non economic loss. Egregious breach of privacy in *Giller v Procopets* resulted in a modest award of damages.

35. The discussion paper seems to favour a statutory cap on the basis that:

> " However, a decision not to cap damages in line with defamation law may create an incentive for those with a claim that could be brought under either the privacy cause of action or under defamation law to prefer the former. It may create inconsistency, and the opportunity for substitution into the privacy sphere of actions that should be pursued under the uniform defamation law."

36. Defamation and Privacy are distinct causes of actions involving differing issues. They involve specific elements which are distinct. The publication of defamatory statement orally or by printed word is different to an act involving the invasion of privacy notwithstanding a breach of privacy can be evidenced in the same manner as a defamatory utterance, by publication of photographs, video depictions or utterances or in the written word. However the development of the law in the United States and the UK indicates that there has been no merging of the causes of action or systemic pleading privacy over defamation to suit the interests of the plaintiff rather than the lawful requirements. More importantly courts can deal with an attempt to plead a defamation case as a breach of privacy case. As a matter of law and practice inappropriate pleading is dealt with by the courts and these issues and the principles to deal with improper pleading are well established and exercised when appropriate. The concerns about forum shopping are more theoretical than actual.

37. If there is to be a cap it should be commensurate with that which applies to defamation. Otherwise the ill complained of in pleading privacy instead of defamation in a party shoe horning a set of facts more probably defamatory would be pleaded as privacy. Any such cap should be on compensatory damages.

38. Of all the intentional torts an egregious breach of one's privacy should give rise to a court exercising a discretion to award exemplary damages. Such damages may be

awarded at common law in relation to intentional torts. Such damages should be independent of any cap.

Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?

39. Intentional torts are actionable *per se*. Damages are presumed. There is no reason why the normal civil rules regarding calculation of damages should not apply to this tort. General damages are those pain and suffering, which is present to a greater or lesser degree in an intentional tort. Economic loss is relevant head of damage, often called special damages, and needs to be substantiated. Proof of loss of earnings and loss of opportunity would be required.

Should any proposed cause of action also allow for an offer of amends process?

40. There may be some scope for such a process in a privacy action. It may provide some utility towards resolution of a proceeding. In the normal course privacy actions would ultimately involve some form of mediation. During mediation any number of possible solutions could arise.

Should any proposed cause of action be restricted to natural persons

41. Yes. The appropriate protections that a company or an organisation should have and rely upon those in equity not an intentional tort.

Should any proposed cause of action be restricted to living persons?

42 Yes. For the same reason that deceased should not have protections against defamation there are no good reasons for an estate being able to sue for breach of privacy.

Within what period, and from what date, should an action for serious invasion of privacy be required to be commenced?

43. A three-year period as a reasonable period within which to bring an action. While it is an intentional tort and should be given similar limitations period in the normal course, 6 years, given the desire to have parties bring their actions promptly a three year period is reasonable.

44. The most important issue in a breach of privacy case on the question of timing is that period should run only when the aggrieved party becomes aware, or should have been aware, of the breach. There may be very egregious breaches made available to the public which is not brought to the attention of an individual until weeks, months or even years later. The fact that the individuals did not become aware of that breach should not be held against him or her by operation of a rigid limitations provision.

45. On any limitations provision, it is important that the court should be able to exercise the discretion to extend the period.

Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy

46. Intentional tort claims are normally the province of state courts. That is not to say that the Federal Court (including the Federal Magistrates Court) should not have jurisdiction. On balance state courts are more experienced in dealing with claims of trespass, nuisance and breach of confidence. There is no reason why it should not be shared jurisdiction as between the federal courts and state courts.

Representative actions.

44. There should be some scope available for representative actions. It is conceivable that one person may breach a large number of individuals privacy simultaneously, for example through use of the computer hacking, telephone hacking or surveillance.

I am happy to discuss any of the above on (03) 9225 8751 or contacted at papclarke@optusnet.com.au.

Peter Clarke
Barrister at Law
C/-
Isaacs Chambers,
Level 8, Room 802
555 Lonsdale Street,
Melbourne 3000
Victoria