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LEVEL 23 RIALTO TOWERS 525 COLLINS STREET MELBOURNE
GPO BOX 769 MELBOURNE VIC 3001 AUSTRALIA
DX 204 MELBOURNE www.minterellison.com
T +61 3 8608 2000 F +61 3 8608 1000

BY EMAIL senator.brandis@aph.gov.au

Attention: Hon George Brandis QC

Attorney-General

GPO Box 228

Brisbane QLD 4001

Dear Attorney

Serious invasions of privacy

I urge you not to support the introduction of a statutory tort for "serious invasions of privacy".

As you know, the Australian Law Reform Commission (ALRC) has released a Discussion Paper, "Serious invasions of privacy in the digital era." It is an impressive paper. The ALRC has invited submissions or comments on the paper.

I have sent a copy of this letter to the ALRC but its Terms of Reference only seek a Report on what a tort should look like and not whether Australia needs such a tort. This is despite the fact that then Attorney-General, Mark Dreyfus expressed concern about the risk to freedom of speech in circumstances where legislation would encourage people to sue for a breach of privacy.

The ALRC noted in its earlier Issues Paper "the ALRC take the view that it is not useful to ask again...whether respondents support or oppose a statutory cause of action." I find this extraordinary, especially as in one of its three earlier reports the ALRC recommended that no such cause of action be introduced.

The reality is that Australia has many laws that already protect an individuals right to privacy. This is in a multitude of areas including telecommunications, surveillance, data protection, children, victims of sexual assaults, family court matters, medical records, stalking, trespass and many more. Furthermore, radio and television broadcasters have codes of conduct that contain privacy obligations. These are required under the Broadcasting Services Act and are regulated by the Australian Communications and Media Authority. For the ALRC to argue that there are gaps in these laws is unconvincing; the existing legal framework is more than capable of protecting individuals in appropriate circumstances.

The ALRC also fails to recognise that invasions of privacy are not such a big issue in Australia as they are in the United Kingdom or the United States. It is important to keep in mind that privacy developments overseas come on the back of the phone hacking scandal in the UK.

Media culture is remarkably different in Australia and there is no evidence of such outrageous behaviour occurring here.

While Australia have seen a number of high profile and improper things being published they are few and far between. The number of complaints to the Australian Press Council and the Australian Communications and Media Authority and the number of court cases related to breach of privacy simply do not justify the introduction of such a far reaching claim.

As a UK Parliamentary Committee found last year:

"The concepts of privacy and public interest are not set in stone and evolve over time. We can conclude that the current approach where judges balance the evidence and make a judgment on a case by case basis, provides the best mechanism for balancing" privacy and freedom of speech rights.

The Committee noted quite correctly, that these rights are equally important and that the courts can apply the balancing acts on a case by case basis.

The ALRC discussion paper recommendations, if supported by you, are likely to lead to many legal actions against the media. There is little doubt that this would have a chilling effect on the media. Such a tort will be attractive to those who welcome the media one day and seek redress the next. It will not protect the interests of a vast number of Australians who would not take action and incur significant legal costs. Such legislation would upset the present balance between freedom of speech and a persons rights to privacy.

Thus any extension of the right to sue for a breach of privacy should be left to the court. The courts are best placed to balance the interests of privacy and freedom of speech in any given situation. The courts are best placed to allow the law to develop as technology and accepted conduct change over time.

If the Australian government was to accept the recommendations of the ALRC it would be like cracking a nut, a small nut, with a sledge hammer.

Yours faithfully

MINTER ELLISON



Contact: Peter Bartlett Direct phone: +61 3 8608 2677 Direct fax: +61 3 8608 1088
Email: peter.bartlett@minterellison.com

The comments expressed in this letter are my personal views and do not necessarily represent the views of Minter Ellison.