

The new Privacy Bill

Fintan Lawlor, Partner with Lawlor Partners, discusses Ireland's Privacy Bill, including the major criticisms of the Bill in its current form

In late September 2012, Minister for Justice, Alan Shatter, revealed his intention to revisit the provisions of the Privacy Bill 2006 ('the Bill') to prevent "flagrant violation" of the right to privacy by the press. Mr Shatter was speaking in the context of the publication by the Irish *Daily Star* newspaper of topless photographs of the Duchess of Cambridge.

The purpose of the Bill is to provide for a new tort of violation of privacy, taking into account the jurisprudence of Irish courts and the European Court of Human Rights. This article considers the proposed Bill in the context of the guarantees which currently exist to safeguard the right to privacy, and the practical implications of its proposed enactment.

Background to the right to privacy

The right to privacy in Ireland is guaranteed both in Ireland's Constitution as well as at a European level. Article 40.3 of the Irish Constitution states that:

'The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'

The right to privacy was first recognised in 1974 in the case of *McGee v Attorney General*, in which Walsh J. in the Supreme Court held that "Article 41 of the Constitution guarantees the husband and wife against...invasion of their privacy by the State." In the 1987 case of *Kennedy and Arnold v Attorney General*, Hamilton P held that the right to privacy was one of the unenumerated rights recognised by Article 40.3 of the Constitution.

Article 8 of the European Convention on Human Rights ('the ECHR') is entitled 'Right to respect for personal and family life' and states that:

'Everyone has the right to respect for his private and family life, his home and his correspondence...There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-

being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The ECHR became part of Ireland's domestic law on the commencement of the European Convention on Human Rights Act 2003. Section 2(1) of the Act provides:

'in interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.'

Furthermore, Recital 2 of the Data Protection Directive (95/46/EC) sets out that the design of data processing systems 'must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy'. The Data Protection Acts 1988 and 2003 ('the DPAs') — which implement the Directive in Ireland — must be interpreted in a manner compatible with Article 8 of the ECHR.

New Bill: an overview

The Bill was proposed in the Seanad by Senators David Norris, Seán Barrett and Feargal Quinn. The proposed Bill is undoubtedly of particular interest to Senator Norris who took a case against the State in 1984 under Article 8 of the ECHR and in light of revelations about the Senator's past during his presidential campaign.

If enacted, the Bill will provide for a new tort of violation of privacy. Section 2 of the Bill provides that it is unlawful for a person wilfully and without lawful authority to violate the privacy of an individual. The tort is actionable without proof of special damage. Section 3 provides that a person's entitlement to privacy is that which might be reasonable in all the circumstances having regard to the rights of others and to public order and the common good.

Violations of privacy occur, subject to the provisions of sections 5 (defences) and 6 (certain disclosures not a violation of privacy), by:

- subjecting another person to

surveillance and by the disclosure of information so obtained using surveillance;

- unauthorised use of name, voice or likeness of an individual for commercial purpose;
- the disclosure of personal information or documents of a person; or
- the commission of an act (of harassment) as described in section 10 of the Non-Fatal Offences Against the Person Act 1997.

Section 4 of the Bill provides for a range of factors to which a court shall have regard in determining whether a violation of privacy of an individual has occurred.

Section 5 provides for a number of defences to an allegation of violation of privacy. These essentially involve:

- where the act was that of a public servant acting, or reasonably believing themselves to be acting, in the course of their duties;
- the installation and operation of a closed circuit television system for a purpose authorised by law, for the protection of persons or property, or for the prevention or investigation of crime; or
- where the act was one of newsgathering by a newspaper or broadcaster provided that any disclosure of material obtained was done in good faith, was for the purpose of discussing a subject of public importance, was for the public benefit and was fair and reasonable in all of the circumstances.

Section 6 provides for a number of instances whereby the disclosure of any matter concerning an individual is not a violation of privacy. These include where the disclosure was done in good faith for the purpose of discussing a subject of public importance.

Section 7 provides a jurisdiction for actions taken in the Circuit Court where the claim does not exceed €50,000.

Section 8 provides that, in a privacy

action, the court may grant any one or more of the following remedies to the plaintiff:

- an injunction;
- an award of damages;
- an order for the defendant to account to the plaintiff for profits that have accrued or may later accrue to the defendant because of the violation of privacy;
- an order for the defendant to deliver to the plaintiff any material, articles, photographs or documents that have come into the defendant's possession because of the violation of privacy;
- an order for the defendant to publish an apology; and
- the granting of any other relief to the plaintiff that appears to the court proper in the circumstances.

Shortcomings of the Bill

The proposed Bill represents a one-sided view of privacy.

First, the Bill is arguably overly concerned with the right to privacy of the well known and wealthy, while failing to address the rights of ordinary individuals. It is predominantly about media invasion of privacy, and does not cover other areas where privacy protection is at least as crucial. For example, there is little or no focus on any of the other modern challenges to privacy posed by the power of the State, by the culture of private surveillance, and by the rise of the internet.

Second (and related), the law of defamation serves to safeguard privacy and protect individuals from media intrusion. The tort, or civil wrong, of defamation is concerned with protecting an individual's (or indeed, corporate entity's) reputation from unjust attacks. If one were to examine various court decisions on defamation cases, it would be clear that the Irish courts generally place great importance and weight on the right to privacy in the context of media intrusion. For example, in 2007 a Carlow GAA player was awarded €6,500 in damages following the publication of a photograph of him on the pitch in

which his private parts were exposed. Though the publication was held to be accidental, the right to privacy held sway. In November 2012, music producer Louis Walsh received €50,000 in damages from *the Sun* newspaper following publication of a false story that he sexually assaulted a man in a Dublin nightclub.

As above, Section 8 of the proposed Bill sets out the redress for breach of the tort of privacy. It seems that there is no additional relief available here, that is not already set out in defamation law, e.g. injunctive relief, damages, publication of an apology.

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