REPORT

OF WORKING GROUP

ON PRIVACY

March 31 2006

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TERMS OF REFERENCE

A. The Working Group was appointed by decision of the Government, and constituted in July 2005. It comprised:

Brian Murray SC, Chairman

Liam O'Daly, Deputy Director General, Office of the Attorney General

Brendan Mac Namara, Principal Officer, Department of Justice, Equality and Law Reform.

Ciaran O'Hobain, Principal Officer, Department of Communications, Marine and Natural Resources.

B. The Working Group's Terms of Reference were as follows:

"Having regard to the duties of the State under Articles 8 and 10 of the European Convention on Human Rights and the principles stated by the European Court of Human Rights in relation to a protection of privacy and freedom of expression and the existence of privacy and freedom of expression rights under the Constitution, the Working Group is to consider and prepare proposals for further consideration by the Government on:

(a) a general tort of privacy subject to such defences as are necessary and proportionate in a democratic society to protect legitimate interests; and

(b) the identification of specific offensive forms of invasion of privacy and prescribing remedies and sanctions in respect of such specific conduct, taking into account the recommendations

contained in the Law Reform Commission Report on Privacy (LRC 57/1998).

The Working Group is to prepare its proposals and submit them for consideration by the Government by not later than 30 September 2005."

The date for the submission of this Report was subsequently extended.

Acknowledgement

The Group would like to express its gratitude to Caroline Murphy, Department of Justice, Equality and Law Reform, Secretary to the Group and Susan Singleton, Legal Researcher, Office of the Attorney General, for their contribution to the work of the Group.

THE STRUCTURE OF THIS REPORT

1. The question of whether there should be introduced into Irish law a general tort of privacy raises a number of distinct issues. The first is one of both definition and justification. It is necessary to record at the outset what exactly the Group means when it refers to privacy, why in principle the interests suggested by this term might be protected, and what countervailing considerations require to be taken account of in considering the nature or extent of any legal regulation to achieve that objective. We address these matters briefly and by way of introduction, in Section One of this Report.

2. The second question requires an examination of the extent to those interests are in fact protected by the law at present. Clearly, the nature and extent of existing legal protection is central to the issue of whether there should be introduced a distinct tort of the nature suggested. We address the content of Irish Law, statute, common law and constitutional protection in this area in Section Two.

3. The most dynamic and detailed consideration of privacy issues has taken place before the European Court of Human Rights over the past fifteen years. This is of significance in demonstrating the type of issues that can present themselves in a jurisdiction with an extensive protection of personal privacy. It is also of importance having regard to the State's obligations under the Convention, the increased willingness of Irish Courts to absorb Strasbourg jurisprudence within their constitutional analysis, and, of course, the impact upon domestic law of the European Convention on Human Rights Act 2003. In Section Three we consider the Strasbourg jurisprudence. Here we also consider whether there is an obligation on the State pursuant to the provisions of the European Convention on Human Rights, to introduce a general cause of action of the nature suggested in our terms of reference. We address in this

context also (as we have been specifically requested to do) the relationship between privacy guarantees, and the right to freedom of expression.

4. Following from this, in Section Four we outline the approaches that have been adopted in other jurisdictions to the protection of personal privacy. Those approaches, we believe, provide useful guidance in determining whether there should be a dedicated cause of action introduced by statute to protect personal privacy, and what precise dimensions and limitations should be imposed upon such a tort.

5. As noted, we have been specifically requested in our terms of reference to identify specific offensive forms of invasion of privacy and to prescribe remedies and sanctions in respect of such specific conduct, taking into account the recommendations contained in the Law Reform Commission Report on Privacy. We address this issue briefly in Section Five.

6. In the light of this consideration of the Irish legal regime, and the legal position reflected in the laws of other countries with similar legal systems, we outline what appear to us to be the principal legal and policy based arguments for and against the introduction of such a tort. This consideration appears in Section Six. We explain here the basis for our recommendation that such a specific tort be introduced.

7. In the event that a decision were made to introduce such a tort, the question arises as to the scope of the necessary exceptions and/or defences to such a claim. In Section Seven, we outline the exceptions and defences which might be reflected in any tort of the nature under consideration, and suggest possible wording to provide a statutory cause of action to reflect these claims.

8. We would observe in this regard at the outset the following. While the arguments for and against privacy laws are well rehearsed in the extensive literature that has developed around this topic, and while we believe we have outlined those arguments comprehensively in the course

of this Report, the Group did not (nor having regard to its Terms of Reference and the temporal requirement stated in them, could it) solicit or consider representations from the public or from parties that might be affected by the issues considered herein.

SUMMARY OF CONCLUSIONS

1. Privacy is widely viewed and understood as a fundamental human right, and is recognised both by the Constitution and the European Convention on Human Rights. However, the mechanisms for the enforcement of that right in Ireland lack clarity and effectiveness in some important respects.

2. The analysis we have conducted of the nature and extent of the protection afforded to the right to privacy in Irish law demonstrates that while both statute law and the common law afford protections in certain circumstances to some of the interests underpinning what is generally termed privacy, the causes of action afforded by the law at present in this regard are diffuse. In particular, they fail to capture many of aspects of the right as widely understood, and as reflected in Irish Constitutional and European Court of Human Rights jurisprudence.

3. While the Constitution has been held to provide a personal right of privacy, the nature and extent of the remedies derived from that guarantee are uncertain. An analysis of the constitutional jurisprudence demonstrates not merely an inherent, and we believe largely unavoidable, lack of clarity as to definition and the precise application of the general entitlement to privacy in particular circumstances, but the dimensions of the constitutional cause of action are also unclear in many other important respects, particularly in relation the considerations which the Courts will determine justify what might otherwise be considered an invasion of privacy. While it is likely that the Courts will, if and when called upon so to do, facilitate remedies for violations of privacy that are proportionate and effective, by definition they can only do this on a case by case basis.

4. We conclude that the consequent absence of any clearly defined and comprehensive cause of action in Ireland to provide a definite remedy for violations of privacy interests is undesirable and presents a potential fetter on the entitlement of citizens to have a clear, demonstrable legal basis for litigating complaints following violations of their privacy

entitlements. We also believe that the absence of such a defined cause of action is liable to render it more difficult for persons to predict whether their actions may generate legal liability for invasions of the privacy of others.

5. We are, nonetheless, conscious of the arguments regularly raised against the introduction of such a cause of action – that it is liable to introduce uncertainty into the law, that there is no workable definition of privacy which will both effectively protect the interests reflected in the right to privacy, while at the same time avoid subjecting others to an indeterminate legal liability, and that a dedicated privacy tort will represent a fetter on the conduct of effective investigative journalism.

6. We consider these objections in the course of this report, but conclude that notwithstanding their undoubted force, the arguments in favour of the introduction of such a clear statutory cause of action, outweigh the arguments against it. We are particularly influenced in this conclusion by the privacy guarantees stipulated in the European Convention on Human Rights, and the extensive development of those guarantees effected by decisions of the European Court of Human Rights. We also adopt the view that the force of these arguments (which have been successfully agitated at a policy level in some other jurisdictions) is diminished in Ireland because the probability is that there is in any event a pre-existing cause of action in respect of privacy interests afforded by the Constitution. The real question in Ireland, accordingly, is whether the scope of that cause of action should be clarified and regulated, not whether it should exist.

7. While we remain concerned that the scope of a cause of action directed to the protection of privacy may generate some uncertainty, we believe that the introduction of a rigid statutory definition of the term is liable to stifle the development of such a cause of action to reflect changing or unpredicted circumstances. This, again, is particularly the case having regard to the fact that in Ireland at present there is already, by reason of constitutional jurisprudence, a cause of action in respect of violations of

privacy interests, albeit one attended by the uncertainties to which we have referred.

8. We therefore recommend the introduction of a statutory tort of invasion of privacy, supplemented by a non-exhaustive definition of the term. We recommend that such a statutory cause of action be limited in its scope to conduct which is deliberate and intentional, and that it be combined with a statutory description of defences available in response to a claim of violation of privacy. We suggest that the statutory right to sue for invasions of privacy should be supplemented by short limitation periods, and speedy pre-action notification requirements. The combined effect of these elements will be, we believe, to both provide a clear cause of action which is effective, and to ensure that that tort is not unreasonably or disproportionately deployed.

9. To this end, we have prepared tentative heads of a Bill which reflect our view as to the scope a cause of action for violation of privacy might assume, as well as the nature and extent of defences to, and restrictions upon, such a claim. They do not purport to be legislative provisions in themselves but are merely indicative of the content of properly drafted provisions to be undertaken by Parliamentary Counsel.

1. SECTION ONE – DEFINITION AND RELEVANT CONSIDERATIONS

1.01. The debate as to whether the law should provide a cause of action to protect a general right of privacy has been conducted within a relatively clear compass in Courts, commentaries and official reports in other jurisdictions. The debate has focussed on three essential questions:

1. What is privacy and why should it be protected by the law?

2. If privacy is to be protected by way of a dedicated cause of action, how precisely is it to be defined?

3. By reference to what considerations and in what circumstances should a citizen's claim to enforce his or her privacy yield to competing rights and interests?

1.02. In the course of this Report, we address these issues in the light of the law as it stands today in Ireland, the nature and extent of protections of privacy interests afforded by the Irish Constitution, and experience elsewhere. At the outset, however, it is helpful to place those issues in a more general context. We shall thus consider here some more abstract issues relevant to the first and third of these questions, and shall return to the second in Section Six following our analysis of the law at present.

A. What is 'privacy' and why should it be protected by the law?

1.03. Affording a legal definition to the interests underpinned by the concept of privacy has proven notoriously difficult, and discussion of the meaning of, and purpose behind protection of, privacy has generated a vast body of literature. Much of the difficulty arises from the fact that what is often termed a right to privacy entails in fact not a single, but a number of (sometimes disparate) entitlements. These usually derive from the expectation of individuals that certain aspects of their personal affairs and their dealings with others will not be intruded upon, or generally

disclosed. That expectation often extends to a belief that some categories of information about a person, and photographic, video or audio recordings of them made in particular circumstances, will not be widely disseminated or published without their consent. The interests sought to be protected by this concept, have been well explained as follows:

> *Certain kinds of information about a person, such as information relating to health, personal relationships or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private*.[1]

These expectations have been grouped together under the description '*the right to be let alone*' [2] and have been authoritatively defined in Ireland as comprising "[*a*] *complex of rights, varying in nature, purpose and range, each necessarily a facet of the citizen's core of individuality within the constitutional order."* [3] They import amongst other things, a protection of the citizen's moral and physical integrity, personal identity, personal information, personal sexuality and personal or private space.[4]

1.04. The ambit of privacy thus understood has been variously defined, or extended, to freedom from disturbance or attention, the right to control personal information or to *informational autonomy*, the right to *personal space* or *autonomy*, the right to be protected against interference with physical or mental integrity or the use of one's likeness, name or

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[1] Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd (2001) 208 CLR 199, 226.
[2] The term originates in the majority judgement of the United States Supreme Court in Wheaton v Peters 33 US 591 (1834): Kennedy v. Ireland [1987] IR 587.
[3] Norris v. Attorney General [1984] IR 36 at 71, 80 (per Henchy J.).
[4] Clayton and Tomlinson Law of Human Rights ; Second Updating Supplement (2003) paras 12.86-12.92

identity. Each of these concepts has at its root a reasonable expectation within particular personal zones of seclusion, of freedom from unsolicited or unwarranted attention. They have been usefully identified as embracing four categories of privacy claim – territorial privacy, privacy of the person, informational privacy, and freedom from surveillance and the interception of communications.[5] Each, however, also entails a potential uncertainty as to scope or particular application.

1.05. For the purposes of our consideration of the questions raised in our Terms of Reference we have adopted the following description of privacy:

> *"The right of the individual to be protected against intrusion into his personal life or affairs, or those of his family, by direct physical means or by publication of information."*[6]

Thus viewed, the protection of the privacy of individuals against illegitimate intrusion by others is viewed as a legitimate objective in protecting those individuals from unwarranted distress, in vindicating their personal dignity,[7] in protecting a person's physical and psychological integrity,[8] and entitlement to express individual personality[9] and in vindicating their personal autonomy.[10] More generally, it has been rooted in the *democratic life of the polity*, and the social function of some guarantee of seclusion.[11]

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[5] Law Reform Commission Report 57/1998 paragraphs 2.2 and 2.3.

[6] This is the working definition adopted by the Report of the Committee on Privacy and Related Matters (Cm 1102 1990), chaired by David Calcutt QC.

[7] See Kennedy v. Ireland [1987] IR 587, 593 '*the nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution ..'*, per Hamilton P.

[8] Botta v. Italy (1998) 26 EHRR 241;p 257

[9] Per Henchy J. in Norris v. AG [1984] IR 36, 71-72

[10] The position is well explained in the authoritative analysis '*The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into undesirable and undesired publicity and to protect all persons whatsoever their position or station, from having matters which they may properly prefer to keep private, made public against their will*', Warren and Brandeis (1890) 4 Harv. Law Rev. 193 at 214-215.

[11] See Law Reform Commission Report on Privacy: Surveillance and the Interception of Communications (LRC 57-1998) paragraphs 1.13 and 1.14.

1.06. In principle, it seems difficult to gainsay the value of these interests, and equally difficult to dispute – at least as an abstract principle – that they are worthy of protection by the law. A consideration of some of the potential violations of personal privacy outlined in Section Five of this Report – we believe – amply demonstrates this.

1.07. In Ireland, as we explain in the next section, the debate as to whether privacy represents an interest worthy of discrete protection by the law has, in any event, been overtaken by events. The Constitution, it is now clear, enshrines protection for some form of personal privacy, and that protection is mirrored (if not supplemented) by the extensive interpretation afforded to the privacy guarantee in Article 8 of the European Convention on Human Rights, by the European Court of Human Rights. In Irish law, the question is one not of whether privacy should be protected by the law, but of how this is best and most effectively achieved, and what interests are reflected in the protection thus afforded.

B. Competing interests:

1.08. The right so identified is, of course, not an absolute one. Its exercise in any given circumstance is necessarily tempered by the constitutional rights of others, and the requirements of public order, public morality and the common good.[12] The consideration and fashioning of a cause of action to protect personal privacy must, obviously, reflect those qualifications. In this regard, it is useful to distinguish at the outset between two separate (but closely related) issues that these exceptions present – the relationship between the individual and the State, and the relationship between private citizens.

1.09. Generally, where issues have arisen in the Irish Courts relating to privacy, they have involved conflicts between the interests of the State, and those of individual citizens. The right of the citizen to be *let alone* by the State is well established, and widely accepted. Having regard to

[12] Cogley and others v. RTE [2005] 2 ILRM 529, 539.

the power of the State to legislate so as to intrude upon the private affairs of citizens, or to use its legislative authority to inquire into those affairs, or the ability of the State to gather, access, intercept and disseminate information, this is unsurprising. The adjudication of the proper balance to be struck between the privacy of the individual, and the legitimate interests of the State, present a range of particular, considerations including issues of proper law enforcement, the necessary ability of law enforcement agencies to conduct surveillance and collate information, the common good in the dissemination of certain types of information, or disclosure of or inquiry into, particular facts events or circumstances.[13] In the case of a conflict between these various factors and the privacy of a person, the resolution of whether State action is amenable to a cause of action by that citizen will generally depend either upon whether it has taken place pursuant to proper legal authority, and/or whether that legal authority is constitutionally defensible.[14] That latter inquiry, in turn, will depend upon whether any impairments of a right of privacy entailed by State action are undertaken with a view to a legitimate objective and, if so, whether the impairment of the right so effected is proportionate to that objective.

1.10. The conflict between the interests of individuals in their privacy, and the freedom of action of other citizens, raises some of the same issues, but also some different, and more complex, problems. The citizen's right to privacy can equally be assailed by intrusion by other private individuals through accessing and publication of information, surveillance, or the recording or publication of audio or visual images. Technological developments, and the power of print media, television and the internet render such intrusion easier now than before, and make it possible for information about and images of citizens to be disseminated faster and to a wider audience. These considerations heighten the concern for regulation by law of the prospect of intrusion enjoyed by some citizens into the affairs of others.

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13 See Bailey v. Flood 14 April 2000 Unreported Supreme Court.

14 See Kane v. Governor of Mountjoy Prison [1988] IR 757.

1.11. In certain circumstances, however, what might in one situation be regarded as an illegitimate intrusion upon the affairs of another may be felt justified by reference to the conduct of that person, or a public interest in the provision of information or exposing of wrongdoing. In other circumstances, the person alleged to be infringing the privacy of another may feel that he or she is merely exercising his or her own constitutional rights, whether of expression, or movement, or property. In all of these circumstances, those whose privacy is so infringed may feel that the law should afford them a remedy; as against this other citizens have an entitlement to have their conduct regulated by provisions that are clear and precise, and which take account of the exigencies of the common good, and their constitutional entitlements. Privacy, it has sceptically been said '*is the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is to be communicated to others*.'[15] Very careful attention must thus be paid to the striking of a proper and reasonable balance between the right to privacy of the individual, to the rights of other persons, and to the significant value within our society and constitutional order, of freedom of expression, and of the press.

1.12. The question of whether the law should be cast so as to enable a citizen assert an entitlement of privacy against the State, and against private individuals, thus raises distinct issues. In fact, as later explained, the existence of an entitlement to sue the State for invasions of privacy is both well established in Ireland, and has in large part been uncontroversial in its operation.

1.13. The question of whether private individuals should be accountable in law for their invasion of the privacy of another is addressed less clearly in the law at present, and raises issues of greater potential controversy. Once one moves outside the initial question of what in general terms, privacy is and whether it should be protected, the difficulties in determining whether to introduce such a cause of action revolve around questions of definition, that is of whether a workable legal formula that

[15] Westin Privacy and Freedom (1970) 7.

captures what are commonly understood to be privacy interests worthy of legal protection can be accurately formulated, and questions of justification, that is when apparent violations of those interests ought to be excused.

1.14. Those issues of justification, in turn, have tended to revolve around the entitlement of citizens to use their own property or freedom of movement to observe, or record, other persons, or to gather, process and disseminate information about them, and – more usually – the entitlement of the media to engage in these latter activities in the discharge of its function in reporting and informing the public. These in turn root justifications for intrusions on personal privacy in a formula necessarily prone to subjective considerations of public interest, calibrated by reference to the perceived value of the release of particular information, and dependant in turn upon the identity and function of the person to whom it relates.

1.15. Each of these issues of definition and justification fall in the first instance, to be appraised by reference to the law as it presently stands. That will be the focus of the next two sections of this Report.

2. SECTION TWO - EXISTING PROTECTION OF PRIVACY IN IRELAND

2.01. Defined as it is above, the privacy of the citizen enjoys some protection in Irish law. That protection, in turn, derives from a number of distinct sources:

1. statutory protection of privacy interests;

2. common law protection of privacy interests;

3. constitutional protection of the right to privacy.

In this section of the Report, we describe briefly the nature and extent of the protection afforded to rights of privacy (as we have defined them above) by these various sources. In the next section, we consider the significant protection now afforded to privacy interests by the provisions of Article 8 of the European Convention on Human Rights as applied in Irish law by the European Convention on Human Rights Act 2003.

A. Statutory Protection*:*

2.02. There is no dedicated statutory provision in Irish law which comprehensively seeks to protect the various privacy interests to which we have referred. The statute book does, however, contain protections applicable in certain circumstances to aspects of that right. These can be usefully categorised as follows.

2.03. First, there are those provisions which impose constraints upon statutory authorities or bodies regulated by statute, by reference to privacy entitlements.[16] These tend to be both constrained by the particular

[16] See, for example, Broadcasting Authority Act 1960 (as inserted by the Section 3 of the Broadcasting Authority (Amendment) Act 1976, inserting section 18(1B) Broadcasting Authority Act

context within which the authorities operate, and are often framed at a level of generality. While, clearly, conditioning the function of such statutory bodies as a matter of public law, the extent to which they confer specifically enforceable rights on individuals, is limited.

2.04. Second, there are a range of provisions which limit the provision or access by public bodies of or to records or information relating to third parties where information is private or personal. [17] These are, obviously, specific and limited in their application. They confer rights on private individuals only in the negative sense of restricting the rights of public bodies to disclose information in certain circumstances.

2.05. Third, various statutes make exception to general rules prescribed, or entitlements defined, by reference to privacy considerations.[18] Once again, legislation of this type protects privacy entitlements in a negative sense, by ensuring that statutory declarations or schemes are not operated to the detriment of other citizen's privacy.

1960 (the RTE Authority shall not in its programmes and in the means employed to make such programmes, unreasonably encroach on the privacy of an individual.); Radio and Television Act 1988, section 9(1)(e) (every broadcasting contractor shall ensure the programme is broadcast by and in the means employed to make such programme, the privacy of any individual is not unreasonably encroached upon.) Value Added Tax Act 1972 as amended by the Finance Act 1992 (exercise the power of inspection, ensure that searches conducted with due regard to privacy.) Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993, section 4(b) (……..importance of obtaining information even in the light of preserving privacy of postal packets and telecommunications messages.) Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act 1999, section 2(3) (b) (requiring Minister in publishing information from National Inventory of Architectural Heritage to have regard *inter alia* to privacy, property and persons affected.) Mental Health Act 2001, section 4(3) (decision……..concerning treatment of a person shall have due regard to *inter alia* the need to respect the right of the person to privacy.

[17] See, for example, Section 8 of the Adoption Act 1976 restricting entitlement of Court to make an Order under section 22(5) of the Adoption Act 1951 or an Order for discovery, inspection, production or copy of any book, document or record …….. unless it is satisfied it is in the best interests of the child, concerned to do so. Freedom of Information Act 1997, section 28(5)(a) requiring public interest requests for access to records to which that Act applies to outweigh the public interest that the right of privacy of the individual to whom the information relates should be upheld. National Disability Authority Act 1999, section 13(2) limiting right of National Disability Authority to information relevant to functions of Authority, not applying for information or data sought of a private or personal nature.

[18] See, for example, Employment Equality Act 1998, section 27(1)(a) (Act does not apply to the assignment of a Garda (man or woman) to a particular post where this is essential in the interests of privacy or decency) *inter alia* ;Equal Status Act 2000, section 5(2)(g) general prohibition on discrimination in disposing of goods and provision of services, differences in treatment of persons on gender grounds, are not prohibited where embarrassment or infringement of privacy can be reasonably be expected to result from persons of an other gender.

2.06. Fourth, disparate rights to privacy of particular persons or bodies are protected in special circumstances. Three particular provisions are worthy of specific mention. First, the Copyright and Related Rights Act 2000 declares that a person who for private and domestic purposes commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have the work or copies of the work made available to the public.[19] The effect is to extend the rights of the party commissioning the work even where copyright may vest in the photographer, and affords some mechanism for protecting against unauthorised dissemination of photographic images without the consent of the person who commissioned them. The protection, however, is operative only in respect of private and domestic commissions.

2.07. Second, Section 10 of the Non-Fatal Offences Against the Person Act 1997 imports into the definition of the criminal offence of harassment, interference with another's *peace or privacy* in the following terms:

> *(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.*
>
> *(2) For the purposes of this section a person harasses another where—*
>
> *(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and*
>
> *(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.*

[19] Copyright and Related Rights Act 2000, section 114(1). The rights are not infringed by an Act which would not infringe copyright consequent upon the provisions of sections 52, 71, 72, 76 or 88 of the Act.

2.08. The criminal offence created by the section, as evident from the above, entails a requirement of a continuum of behaviour, and by interposing an interference with *peace* as a precondition to the offence, demands more than merely an intrusion on privacy. The latter, it is to be noted, is not defined in the Act. While not conferring a private cause of action, the section is significant in that it identifies a legal constraint on private behaviour by reference to the privacy of others. That constraint is limited by the requirement that before an interference constitutes an offence under the section, it must impair not merely privacy, but also peace, the interference must be serious, and each of these elements must be established to an objective standard. It is also, significantly, a provision directed in large part to the actions of private individuals; the requirement that the actions prohibited by the section be without lawful authority or reasonable excuse probably exempts from the terms of the section surveillance by the Gardai.

2.09. A third provision of general application, and again of some importance in understanding the extent of protection of privacy afforded by the law, is the Data Protection Act 1988, as amended by the Data Protection (Amendment) Act 2003. This Act affords protection to individuals in respect of personal data maintained relating to them. The Act will apply if personal information is processed by a data controller or a data processor, established in Ireland. The Act regulates the collection, processing, keeping and disclosure of "personal data" which is defined as "*data relating to a living individual who can be identified either from the data or from the data in conjunction with other information in the possession of the data controller*."[20] A "*data controller*" is a person who controls data"[21] A data processor is a person who processes data for the data controller. Processing extends to a broad range of uses of information, including filing.

[20] Section 1 (1)
[21] Section 1 (1) of the Act

2.10. The Act confers upon individuals the right to establish the existence of personal data and the right of access to such material where it exists, [22] and provides offences of disclosure of unauthorised data without prior authorisation.[23]

2.11. The protections in this regard are enhanced by the Data Protection (Amendment) Act 2003. This amends the Data Protection Act of 1988 to extend the scope of the Act to manual data also and in order to implement in Irish law EC directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data. The Act expands the definition of processing[24]; provides new rights for data subjects in relation to access, rectification and other rights; (notably the right of the data subject to object to processing likely to cause damage or distress)[25]; new responsibilities for data controllers[26]; new rules regulating the registration process and new powers and functions of the Data Protection Commissioner.[27]

2.12. The Act also provides for a restriction on transfer of personal data outside the State unless "that country ensures an adequate level of protection for privacy and the fundamental rights and freedoms of data subjects in relation to the processing of data." The Act contains special exemptions for journalism, literature and art, if a number of conditions are met, including if: *"(a) the processing is undertaken solely with a view to the publication of any journalistic, literary or artistic material."*[28] This defence is conditioned by the requirement that the person who processes the data (for example, the newspaper that publishes the photograph) reasonably believes that, having regard, in particular, to the special importance of the public interest in freedom of expression, publication would be in the public interest.

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[22] Sections 3 and 4.
[23] Section 21.
[24] Section 2 (a) (v)
[25] Section 8
[26] for example; Section 3
[27] Section 10
[28] Section 21

2.13. The Data Protection Acts require those who process personal data to do so fairly and lawfully and only if certain pre-requisites exist: for example, the consent of the individual concerned. An individual who suffers damage or distress as a result of a breach of the Data Protection Acts is entitled to compensation under those statutes. The Court of Appeal in England in interpreting similar legislation in that jurisdiction[29] has recently determined that that publication of a photograph of an individual is 'processing personal data' for the purposes of the Data Protection Legislation there, and is seems likely that a similar conclusion would be reached in this jurisdiction.

2.14. The application of the exemption for journalistic publication to which we have referred clearly depends upon the circumstances, and invites the Courts to make a value judgement based upon the legitimacy of a belief of public interest in disclosure. Thus, in Campbell v. MGN Limited [2003] 1 All ER 224 publication of photographs of a well known model attending a drug treatment facility were held to be legitimately embraced by that defence, at least in circumstances where she had publicly and falsely asserted that she did not take drugs.

2.15. The Data Protection legislation is significant, in that it heralds a statutory remedy for invasion of at least some of the interests reflected in privacy. It also demonstrates how such an entitlement may be reconciled in a seemingly workable way, with demands of press freedom.

2.16. However, it is not without its disadvantages. Firstly, the Act does not protect privacy *per se.* Rather it provides a set of rules for the processing of data. It may be possible to infringe upon the privacy of an individual without breaching the Data Protection Act. For example, placing the personal data of an individual on a website from where it is downloaded by an individual in a country outside the EU may interfere

[29] Campbell v. MGN [2003] 1 All ER 224; as explained *infra* the Court determined, however, that the exemption from the operation of the English legislation (section 32 of the Data Protection Act 1998) in respect of processing of *inter alia* journalistic material believed to be in the public interest protected the publisher from liability. This was not an issue before the House of Lords, [2004] 2 All ER 995.

in an individual's privacy will not, in itself, be contrary to the Data Protection Act[30]. Secondly, the Act only applies to the processing of data. So an individual whose privacy is breached by their being watched, listened to or discussed by third parties cannot have recourse to the Data Protection Act if those third parties do not process the individual's data in the course of that breach. Thirdly, data protection law is not designed with modern technology in mind. It is really designed to deal with large data processing operations run by institutions, such as long obsolete Hollerith punch card processors. The Act was not designed to deal with data processing that may be dispersed across networks and significant doubts exist as to the Act's application to the Internet[31]. Fourthly, the Act is "…fiendishly complicated…[32]", the burden imposed by this complexity has been acknowledged by the EC Commission[33]. Perhaps as a result of this complexity, most Irish people would appear to have a limited understanding of the Act's protections[34]. Finally, there is some considerable doubt as to whether the damages available for breach of the provisions, which have been held not to include damages for pain or

[30] Lindqvist –v- Sweden, European Court of Justice, Case No. c-101/01, 6 November 2003. Of course, placing personal data on a website may interfere with an individual's data protection rights in other ways as was held by the ECJ in Lindqvist. However, making a person's data available on the Internet is in itself a quite significant interference in their privacy and it is clear from the Lindqvist judgment that this action is, of itself, not contrary to Data Protection Law. The Lindqvist judgment best illustrates why data protection does not offer satisfactory protections for privacy. Bodil Lindqvist was a church member who had quite innocently created a website which mentioned trivial gossip about fellow church members, including the fact that one had hurt their foot. The ECJ held that her convictions for breaching the Swedish Data Protection Act for all of the relatively trivial things that she did with the data. However, it found that the Swedish Data Protection Act and the Data Protection Directive did not apply to the action that most seriously breached the privacy of Ms Lindqvist's fellow church members: that is the action of making this information globally available on the Internet.

[31] "Given…the state of development of the internet at the time Directive 95/46 was drawn up and…the absence, in Chapter IV, of criteria applicable to use of the internet, one cannot presume that the Community legislature intended the expression transfer [of data] to a third country to cover the loading, by an individual in Mrs Lindqvist's position, of data onto an internet page, even if those data are thereby made accessible to persons in third countries with the technical means to access them" Lindqvist –v- Sweden, European Court of Justice, Case No. c-101/01, 6 November 2003, para 68.

[32] Rozenberg (2004), Privacy and the Press, OUP, p66.

[33] In its First Report on the Implementation of the Data Protection Directive (95/46/EC) the European Commission concluded that Member States and Supervisory Authorities needed: "... to create an environment in which data controllers ... can conform with their obligations in a less complex and burdensome way ... [33]" (European Commission, First Report on the Implementation of the Data Protection Directive (95/46/EC), COM (2003) 265 Final, Brussels 15 May 2003, p 27.

[34] The Eurobarometer Survey of Data Protection 1, found that whilst 25% of Irish people had heard of their right to access data under the DPA, 70% of Irish had not heard. Only some 6% of Irish people claimed to have exercised their right of access, with 85% admitting to not having exercised it. Figures for the right to object were higher, with 36% having heard that they had a right to oppose some uses of their personal data.

distress, [35] in fact afford a useful or attractive remedy to Plaintiffs in respect of a wrong which, by definition, may often be difficult to quantify in any other terms.

2.17. The Directive from which the provisions derive also, it should be noted, limits the potential scope of any privacy laws in this jurisdiction, in that Article 3(1) of Directive 95/46 precludes Member States from restricting or prohibiting the free flow of personal data between Member States for reasons connected with the protection of personal privacy.

2.18. Thus, while the statute book presently recognises the inherent value of protections against certain types of interference in personal privacy, it neither posits a general protection of those interests, nor affords a comprehensive cause of action in damages to compensate those whose privacy has been interfered with. It affords at most '*some piecemeal protection for personal information*.' [36]

B. Common Law Protections*:*

2.19. While aspects of the torts of defamation, malicious falsehood and certain statutory and common law actions intended to protect rights of intellectual property overlap with aspects of the interests underpinned by the concept of privacy as it is now understood, the torts of principal relevance are those of trespass, and nuisance, and the equitable action for breach of confidence.[37] Each of these has a role in supporting the enforcement of components of personal privacy, but none (as the law presently stands) provides a complete, workable remedy. More recent suggestions that these causes of action be expanded to create a specific tort of invasion of privacy (as has occurred in some other common law jurisdictions) have not been

[35] See for example Colman v. General Medical Council [2005] EWCA 433, 11 March 2005.
[36] Law Reform Commission Report 57/1998.
[37] A useful treatment of common law protections is to be found in Neill Privacy; A Challenge for the Next Century in Protecting Privacy (Ed. Markensis) (1999) at page 1. See also the decision of the High Court in Hanahoe v. Hussey [1998] 3 IR 69, where it was held that the tort of misfeasance in public office (operative only against bodies discharging public functions) was committed when confidential information was deliberately disclosed to the media by the Gardai.

sympathetically received in England, and the probability is in Ireland that attempts to create an actionable wrong based on invasion of privacy are more likely to focus upon constitutional remedies, to which reference will be made later.

2.20. Thus, the scope of the tort of trespass (which renders actionable unlawful incursions onto land) and nuisance (which affords a claim for interference with the enjoyment of property), are of some relevance in considering the state of the law today. However, these causes of action have in built restrictions which limit their utility in providing a general protection for privacy interests. Thus, the tort of trespass to land is, as the description suggests, limited in its operation to unlawful incursions on land. The protection afforded by the tort does not extend to surveillance activities which fall outside the boundaries of the property. [38] Thus, in one case, noteworthy for its illustration of the limitations of common law remedy, it was held that there was no remedy in trespass available to a person whose private home had been photographed from an aeroplane passing across the airspace over his land.[39]

2.21. The tort of nuisance is most probably similarly limited. This has proven a matter of particular concern in relation to interferences with peace or well-being which are not located in a particular proprietary interest, it having been held by the House of Lords that interference with the reception of television signals caused by the presence of a very high building on adjoining property did not amount to an actionable nuisance.[40] This principle, while as of yet of questionable application in Ireland,[41] would operate to considerably restrict the scope of the cause of action in addressing incidents of harassment which are not referable

[38] Law Reform Commission Consultation Paper on Privacy; Surveillance and Interception of Communications (1996) para 4.4/4.5

[39] Bernstein v. Skyviews and General Limited [1978] QB 479.

[40] Hunter v Canary Wharf Ltd [1997] AC 655.

[41] It has been suggested based upon the decision of Shanley J. in RDS v. Yates Unreported High Court 31 July 1997 and of O'Sullivan J. in Molumby v. Kearns Unreported High Court 19 January 1999, that Irish law may provide a somewhat broader protection than the law in England, in obviating the neccessity for the Plaintiff to have an interest in land underpinning the claim, see McMahon and Binchy Law of Torts (3rd Ed.) page 996.

to an interest in land. It would, for example, suggest that earlier case law positing a cause of action in nuisance for harassing telephone calls was wrong. [42]

2.22. The limitations thus inherent in the common law in protecting against what would generally be viewed as egregious instances of violation of privacy interests are well demonstrated by the facts of and decision in Kaye v Robertson [1991] FSR 62. There, the Plaintiff (a well known actor) had undergone extensive surgery and was photographed while allegedly being interviewed by a tabloid newspaper on his hospital bed. He unsuccessfully sought to ground a claim against those seeking to publish the photographs in passing off, trespass to the person and defamation. He failed in the greater part of his claims; his action in trespass could not be sustained because he was not the owner or occupier of the room in which the events occurred, and his body had not been touched, although limited injunctive relief was ultimately granted on the basis of malicious falsehood. This case provides a graphic illustration of the limits of miscellaneous causes of actions used to protect privacy interests. Gildewell J observed that: "*it is well known that in English law that there is no right to privacy and accordingly there is no right to action for breach of privacy.*" He observed '*the facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances statutory provision can be made to protect the privacy of individuals*.

2.23. The case highlighted for many the inherent limitations of the common law in protecting against what might have been viewed by many as a serious interference with the Plaintiff's rights. One English Judge observed, extra-judicially " *as everyone knows and journalists from Sunday Sport burst into the private hospital room where Gordon Kaye was recovering from brain surgery, took photographs of him and even purported to carry out an interview. I took the view then, and still do that*

[42] Khorasandijan v. Bush [1993] QB 727.

there is a serious gap in the jurisprudence of any civilised society if that can happen without redress."[43]

2.24. The *continuing widespread concern at the apparent failure of the law to give individuals a reasonable degree of protection from unwanted intrusion in many situations*,[44] combined with introduction of the Human Rights Act 1998 in England, has heralded a drive within the English Courts to expand the common law protections afforded to privacy interests. That has focussed attention on two particular issues – the extent to which the equitable action for breach of confidence can be harnessed to create a general cause of action protecting persons against the wrongful dissemination of information about them, and the question of whether a general common law tort of interference with privacy, should be recognised.[45]

2.25. The equitable action for breach of confidence affords a mechanism for the protection of confidential information, and presents one of the methods by which use and disclosure of personal information can be controlled. As traditionally understood, it is dependant upon specific circumstances which give rise to a reasonable expectation of confidence, and does not generate a general entitlement to protect against disclosure of information or other intrusions of the nature referred to in the preceding section. Clearly, persons may by contract agree that certain information or matters be maintained confidential,[46] and contractual stipulations to that effect will be upheld by the Courts. Both contractual and equitable claims for breach of confidence are subject to public interest considerations and, in particular, to the disclosing of wrongdoing; there is no *confidence in iniquity*.[47]

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[43] Mr. Justice Eady, in an address speech delivered on the occasion of the launch of the book "The Law of Privacy and the Media" by Tugendhat and Christie. The full text is available at portal.nasstar.com/75/files/ Eady%20J%2012%20Dec%202002.pdf

[44] Per Lord Nicholls in R v. Khan [1997] AC 558,582

[45] The recent developments in the law in England in this regard are comprehensively reviewed by Delany ;Breach of Confidence or Breach of Privacy : The Way Forward (2005) 27 DULJ 151.

[46] See ACC v. Irish Business Unreported Irish Times 9 August 1985 (Lardner J.), and AG for England and Wales v. Brandon Book Publishers [1986] IR 597.

[47] National Irish Bank v. RTE [1998] 2 IR 465, 474

2.26. The English Courts, however, have sought to free this cause of action from the significant constraint arising from the traditional requirement that of a relationship of trust and confidence between the person disclosing the information, and the person to whom it related or to whom the information belonged,[48] which effectively limited the claim to circumstances in which there was a pre-existing relationship between the Plaintiff and Defendant. This has been achieved by marrying this cause of action with Article 8 and Article 10 of the European Convention on Human Rights to expand the equitable claim. One English Judge has recently spoken of *absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence*.[49]

2.27. This is well illustrated by the decision of the English High Court in Thompson and Venables v Newsgroup Newspapers Ltd [50]. There, the English High Court granted injunctions at the suit of two individuals who had been convicted of the murder of a young boy, the effect of which orders was to restrain the publication of any information as to their appearance or whereabouts. Butler Sloss P. held that a duty of confidence could exist independently of any transaction or relationship between the parties, and in particular, in circumstances where (as she held to be the case there) confidential information comes into the possession of the media in circumstances giving rise to notice as to its confidentiality.

The central issue in that case was whether the court had jurisdiction to grant an injunction in respect of an adult to protect his identity and whereabouts and other relevant information. The Attorney General and Venables and Thompson maintained that the existing common law of confidence gave the court such a jurisdiction, the Attorney General submitting that: "*Information the disclosure of which would substantially impair a person's private life and imperil his safety must be capable of protection…notwithstanding the general public interest in knowing the identity of those responsible.*" Thus there was a clear tension between

[48] Coco v. AN Clark (Engineers) Ltd [1969] RPC 41, 47.
[49] A v.B plc [2003] QB 195, para 4. (Lord Woolf MR).
[50] Thompson and Venables v Newsgroup Newspapers Ltd. [2001] 2 W.L.R 1038

the freedom of expression and the preservation of anonymity of Thompson and Venables.

The High Court Judge nonetheless regarded breach of confidence as an exception to the right of freedom of expression, thus placing a presumptive precedence on that right and thus, rather than engaging in a balancing exercise, adopted a construction of assessing whether the right to privacy, life and torture fell within the exception which would justify curtailment on the right to freedom of expression.

2.28. The same approach is evident from a number of other cases in England, which have moved the law in that jurisdiction firmly in the direction that the action for breach of confidence could be sustained solely on the basis of the nature of the information itself.[51] A good example is afforded by the decision of the House of Lords in Campbell v. MGN Ltd, where it was held that aspects of newspaper articles disclosing the drug addiction of a well known model were held to violate the Plaintiff's right to privacy and confidence. Lord Nicholls felt able to assert that the cause of action for breach of confidence *has now firmly shaken off the limiting constraint of the need for an initial confidential relationship*. This, and a series of other cases, has taken the law in England to the point where the duty of confidence is articulated in the traditional language of privacy, arising *whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected*. [52]

2.29. The second closely related point of discussion in England has been whether the Courts should themselves recognise a tort of wrongful interference with privacy. That debate has culminated in the recent refusal by the House of Lords to acknowledge such a common law cause of action in the case of Wainwright v Home Office [2003] 4 All ER 969. There, the mother and brother of a prison inmate who were strip searched before visiting the inmate, asserted that the search (which

[51] Theakston v. MGN Ltd [2002] EMLR 22.
[52] A v. B plc [2003] QB 195, 207.

was not carried out in accordance with prescribed procedures) constituted a wrongful and actionable interference with their rights of privacy. Considerable reliance was placed upon the theory that a common law cause of action could be derived from the provisions of the European Convention on Human Rights.

2.30. The House of Lords unanimously rejected the invitation to recognise a tort of invasion of privacy. Lord Hoffman suggested that Section 7 of the Human Rights Act 1998, in conjunction with Article 8 might only give rise to a cause of action if the interference with privacy was intentional; however the facts of the case pre-dated the coming into effect of the Human Rights Act in Britain, and accordingly no remedy could be provided by virtue of that legislation. Lord Hoffmann also seems to have been set against anything that "*distorts the principles of the common law*."(para 52) Baroness Hale suggested in *Campbell* at para 133 that had the Human Rights Act 1998 been in force at the time, it may have afforded the Wainwrights a remedy- *"as they had suffered at the hands of a public authority, the Human Rights Act would have given them a remedy, if it had been in force at the time, but it was not. That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy*".

2.31. As explained later in this Report, Courts in other jurisdictions have adopted a more flexible view of the common law, and have been prepared to acknowledge, as the House of Lords was not, a common law tort of invasion of privacy. However, even bearing the possibility of such a claim being acknowledged as a common law action in Ireland, the conclusion that the traditional law of torts leaves open a significant gap in the protection afforded to privacy rights, is difficult to avoid.

2.32. Clearly, the common law affords some protection to the various interests referred to above, through the mechanism of causes of action in trespass, nuisance, and the equitable action for breach of confidence. It is possible that the Irish Courts will expand the latter claim in the manner that has found favour in England, freeing it from the constraint of a prior

relationship of trust and confidence, and enabling it to capture any disclosure of information undertaken in breach of a person's reasonable expectation of privacy. It is, however, by no means clear that this will occur. It is also possible that the Irish Courts will acknowledge a common law claim for wrongful interference with privacy interests, although having regard to the decision in Wainwright, this must be less than likely. In reality, the general view is that such developments are most likely to take place in this jurisdiction within the rubric of constitutional jurisprudence, to which we will now turn.

C. Constitutional Protection:

2.33. As has been observed above, the constitutional protection of the right of privacy, is (or at least prior to the enactment of the European Convention on Human Rights Act, was) widely viewed as affording the most likely basis on which the Courts would derive a private law cause of action of the nature under consideration. It thus deserves particular attention.

2.34. There is no express constitutional provision relating to privacy *per se*. Article 40.3 of the Constitution, however, posits a guarantee by the State to defend and vindicate the personal rights of the citizen, and the Courts have determined that, implicit in that provision, are rights which are not expressly enumerated, but are nonetheless latent. In 1973, one of the rights so identified by the Supreme Court was the right to marital privacy,[53] which was applied to invalidate provisions of law prohibiting the importation into the State of contraceptive preparations. Following strong indications in the course of an (unsuccessful) challenge to criminal provisions prohibiting homosexual acts between males that there existed a general right to privacy,[54] the High Court in 1987 declared such a general right, which was held to have been violated by the State when tapping the telephones of two Plaintiffs before it.[55] By 1998, the Supreme Court was in a position to confirm that there was *no*

[53] McGee v. Attorney General [1974] IR 284
[54] Norris v. Attorney General [1984] IR 36
[55] Kennedy and Arnold v. Ireland [1987] IR 587.

doubt but that the Plaintiffs in a case before it *enjoy[ed] a constitutional right to privacy*.[56]

2.35. The cases to which reference has been made, recognised the right to privacy as protected by Article 40.3 as being engaged in the instances of State interference in the private sexual life of citizens of the nature, the unlawful interception of citizen's communications, and the public revelation of a citizen's financial affairs. Since then it has been recognised as operative in proceedings involving the publications of matters relating to a rape victim,[57] and the dissemination by the Gardai of information relating to a proposed search of premises.[58] It is probable that the dimensions of the right as it develops before the Irish Courts will be influenced by the approach of the European Court of Human Rights, which will be considered in the next section.

2.36. It follows that the law in Ireland by virtue of these constitutional protections, affords clear and established remedies against the State for intrusions on privacy interests. Legislation which interferes with those interests and which either does so other than for the purposes of securing a clear objective in the common good, or which seeks to secure such an objective in a manner that is not proportionate to the right of privacy infringed, is liable to invalidation. The activities of State agents who interfere with such privacy entitlements without due and lawful authority or justification may similarly present an actionable violation. A person who apprehends an interference with his or her privacy rights by the State may seek injunctive relief to prevent such interference, and a person who suffers damage as a consequence of such an interference, may seek to recover damages against the State.

2.37. That being said, important aspects of liability for breach of constitutional rights, remain unclear. In particular, it is not apparent whether such a cause of action would be confined to intentional interferences with a constitutional right of privacy, whether a bona fide belief on the part of a

[56] Haughey v. Moriarty [1999] 3 IR 1, 58.
[57] X. v. Flynn Unreported High Court 19 May 1994.
[58] Hanahoe v. Hussey [1998] 3 IR 69.

person that they were not acting unlawfully in intruding on another's private affairs would afford a defence or whether the claim would embrace negligent interferences with these interests.[59]

2.38. More importantly, unlike many other Bills of Rights, the Irish Constitution imposes obligations not merely upon the State and its emanations, but also upon other citizens. Therefore in theory, private persons can thus also be the subject of action for injunctive relief or damages at the suit of an individual who maintains that his or her constitutional rights have been violated by that person's actions.[60]

2.39. While there have been successful applications for interlocutory injunctions on the basis of such a cause of action arising from the privacy protections within the Constitution,[61] there is no reported case in which such an action has succeeded in either the High Court, or the Supreme Court. The precise principles according to which a cause of action for violation of privacy interests against private persons is liable to be defined, remain accordingly unclear. This is particularly important in the context of seeking to define the circumstances in which invasions of privacy may be found to be justified so as to preclude a claim in damages. To take one obvious example, it seems likely that reasonable actions undertaken in the legitimate pursuit of exposing iniquity or reporting on matters of public importance would be immune from claims for damages by persons claiming a violation of their privacy,[62] but this is not clear, and the precise constitutional route to that conclusion is a matter of some potential debate. Similarly, common-sense suggests that the privacy of a person who has projected themselves into the public sphere may, at least in connection with matters related to their public function or standing, be impaired with greater justification than that of a person who has not; again, the basis on which nuanced defences of this

[59] See the discussions of these difficulties in the context of the constitutional tort generally in McMahon and Binchy Law of Torts (3rd Ed.) paras. 1.66-1.71.
[60] Meskell v. CIE [1973] IR 121.
[61] X. v. Flynn Unreported High Court 19 May 1994, being one such case.
[62] See National Irish Bank v. RTE [1998] IR 465.

nature could be extrapolated from very general constitutional guarantees is not at all immediately evident.

2.40. Thus, and as observed, in the first section of this report, the calculation of the proper balance between the rights of citizens who assert breaches of their privacy against the State, and those who seek to recover damages for such breaches against other citizens, may involve quite different considerations. Presumably as the jurisprudence in this regard develops, it will be necessary for the Courts to develop principles which will distinguish those *prima facie* violations of privacy rights by private persons which do give rise to a cause of action, from those which do not, by reference to the objective justification for the actions of the Defendant. Thus, it seems likely that account would be taken of public interest in disclosure of certain types of information, of the right to freedom of expression and the particular position of organs of the media, of the type of information disclosed in given cases, of the constitutional rights of Defendants where they legitimately intrude, and of the extent to which the Plaintiff is disentitled from complaining of such disclosure if he or she is a public figure.

2.41. There is, however, no reliable guide by reference to which it can be predicted how these various considerations will apply in a given case. It might be questioned whether the uncertainty attendant upon the parameters of the cause of action is in this regard, desirable either from a perspective of a would be Plaintiff, who may legitimately desire more certainty before embarking upon litigation, or from that of a would be Defendant, who may feel that the law should with some greater particularity identify the circumstances in which actionable violations of privacy are liable to be found. Those uncertainties may deter persons from vindicating their rights, particularly in a context where it is likely that proceedings raising complex and novel issues of constitutional law are likely to require adjudication in the High Court, even though damages ultimately sought by Plaintiffs would be below the jurisdiction of that Court.

2.42. It is thus arguable that a cause of action based upon the constitutional right of privacy while undoubtedly having the capacity to address these issues in a manner that is coherent, fair and accommodating of the various interests involved, does not at least at present provide a reliable guide by reference to which citizens can predict in advance whether their actions will be found in breach of the law.

2.43. It should observed in this context that it is probable (but not certain) that such an action will not lie if there is an established cause of action available to the Plaintiff in respect of the wrong at common law or under statute.[63] This is an aspect of the constitutional protection which shall be returned to later.

D. Conclusion

2.44. The protection afforded to privacy interests by Irish law is characterised by two particular features. The first is the disparate nature of the statutory provisions, common law remedies and constitutional guarantees that may be engaged where a person claims that his or her privacy has been wrongfully assailed. The second is the uncertainty attendant upon many aspects of that protection. The Courts might expand the cause of action for breach of confidence, or they might not. They may recognise a self contained common law cause of action arising where there has been an unwarranted interference with a person's privacy, or they may adopt the approach taken by the House of Lords, and decline to create such a claim. The Courts will in all likelihood, facilitate a private cause of action based upon a combination of constitutional protection of privacy interests, and the theory of constitutional tort, but the precise contours of any such claim are, in many important respects, a matter for speculation. Absent a clear decision of the High Court or Supreme Court elucidating the nature and extent of such a claim, and explaining the relationship it enjoys with other important constitutional entitlements, the rights to privacy of individuals in

[63] Hanrahan v. Merck Sharpe and Dohme [1988] ILRM 629.

Ireland are of uncertain scope, and the ability to access, enforce and vindicate them, may be consequently hampered.

3. SECTION THREE – THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A . The effect in domestic law*:*

3.01. While the State has been a signatory to the European Convention on Human Rights since 1953, the Convention formed no part of domestic law until December 2003, when the European Convention on Human Rights Act 2003 came into force. The effect of that statute is to establish a procedure whereby the Courts are empowered to grant what are described as *declarations of incompatibility* where it is found that provisions of a domestic statute are in breach of the Convention. Unlike a declaration that a provision of an Act of the Oireachtas is invalid having regard to the provisions of the Constitution, a declaration of invalidity does not render legislation void; it merely sets in train a procedure which enables the Houses of the Oireachtas to consider the declaration, and provides a mechanism for the payment of compensation to persons who suffer loss as a result of the legislation so found to be in breach of the Convention.

3.02. However, the provisions of the Act also impose an obligation on the State to conduct itself in a manner which does not breach the rights of persons as guaranteed by the Convention. Section 3 of the 2003 Act states:

> ***3.****—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*
>
> *(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.*

3.03. A number of issues arise from this section, when viewed in the light of the provisions of the European Convention on Human Rights, itself. First, the section clearly envisages a cause of action sounding in damages where there has been a breach by *an organ of the State*, which is defined by section 1 of the Act in the following terms:

> *"organ of the State" includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised*

To that extent, it is evident that a cause of action is posited by the provision against State bodies, which would presumably include the Government and its constituent Ministers, An Garda Siochana, and possibly (but not certainly) State corporations.

3.04. Second, that cause of action is triggered where there is a breach of the Convention and there is no remedy provided by domestic law. To the extent, therefore, that a State body breaches the right of privacy in a manner prohibited by the Convention, a citizen who in consequence suffers loss, will be afforded a cause of action. In fact, as already observed above, such a cause of action in any event is almost certainly provided for by the Constitution itself.

3.05. Third, the section does not afford, on its face, a cause of action against private persons who infringe the right to privacy of another.

3.06. Fourth, however, there is an important and as yet unresolved issue as to whether a private citizen who suffers loss as a consequence of a violation of his privacy by another private citizen, can recover damages against the State for failing to provide a cause of action in law.

3.07. This is a very difficult legal issue, on which there is no definite authority. In principle, however, it is possible that were an infringement to take place of Article 8 by a private third party in circumstances where no

remedy was provided by way of domestic law for that violation, the State itself would be in breach of the Convention, and in particular Article 13 thereof which mandates the provision of an effective remedy for infringements of the rights secured by the Convention. This presents the unattractive prospect of the State, through its failure to legislate, being in breach of the Convention, and thus amenable to action for the loss caused by the third party to the complainant.

3.08. For this reason, it is important to consider in some detail the dimensions of the privacy right secured by the Convention, and from there to address the extent to which the State might be required, under the Convention, to introduce laws to redress violations of privacy.

B. The content of the Convention Right:

3.09. The protection of privacy is addressed in Article 8 of the Convention, which provides that:

> *1. Everyone has the right to respect for his family and private life, his home and his correspondence.*
>
> *2. 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 of morals, or for the protection of the rights and freedoms of others.*

3.10. From the very general terms of Article 8, the European Court of Human Rights has extrapolated a sophisticated series of protections for aspects of the privacy interests identified at the commencement of this Report. These extend beyond the parameters of the right to privacy as presently recognised in Irish law, an extension generated not as much by any necessary difference between the content of the right in Irish constitutional jurisprudence, and that recognised by the European Court (although such differences are certainly possible), as by reason of the

dimensions of the European Court of Human Rights' jurisdiction and the large and diverse number of privacy related cases to have come before it. Those cases, in turn, have presented one or all of three issues – is given conduct a violation of the right to privacy of another, if so is it justified by reference to the considerations identified in Article 8(2), and if so, has that impairment of the right been achieved in a manner that is lawful and proportionate.

3.11. The right has been afforded a generous scope, and been held to encompass the physical and moral integrity of the person.[64] It has been held to curtail surveillance and interception of communications by the State, so that unless regulated by law, interception of communications will infringe Article 8 of the Convention,[65] a requirement which in turn demands that restrictions be clear, precise and accessible.[66] Searches conducted by law enforcement agencies will similarly come within the scope of the guarantee, including where the premises is an office or place of work.[67] Private telephone communications enjoy particular protection; an employee, for example, may enjoy a reasonable expectation of privacy in calls from her place of work, which is violated if those calls are intercepted by a public employer where there are no domestic provisions regulating interception of calls made on telecommunications systems outside the public network.[68]

3.12. The collection, storage and use of personal data concerning an individual's private life amounts to an interference with the applicant's private life, and once again must be strictly justified in accordance with Article 8(2).[69] The systematic compilation of data on individuals and creation of a permanent record by the security services gave rise to an interference with a person's private life. Such an interference is in breach of Article 8 unless it is in accordance with the law, pursues one of the legitimate aims listed in Article 8 (2) and is necessary in a

[64] X and Y v. Netherlands (1985) 8 EHRR 235.
[65] Klass v Germany (1978) 2 EHRR 214
[66] Malone v United Kingdom (1984) 7 EHRR 14
[67] Niemietz v Germany (1992) 16 EHRR 97
[68] Halford v United Kingdom (1997) 24 EHRR 523
[69] Leander v Sweden (1987) 9 EHRR 433

democratic society to achieve those aims.[70] The law must be accessible to the person concerned and foreseeable as to its effect.

3.13. The taking, retention, use and publication of photographs and videos has also generated complex issues under the provision. For example, in one case[71] where a detained defendant was deliberately passed by police through a custody area (equipped with CCTV cameras) in order to obtain video footage of him for identification purposes, Article 8 was held to be infringed. The applicant previously refused to participate in an identity parade. As the Court noted "*publication of the material in a manner or degree beyond what was normally foreseeable may also bring security recordings within Article 8*" Similarly, the creation of a systematic or permanent record of closed circuit television pictures of a person,[72] will engage Article 8, as will the publication of a photo of a person *in her daily life*.[73]

3.14. This principle is not limited in its operation to circumstances where a person is in a private place. In one remarkable case,[74] an applicant who was suffering from depression attempted to commit suicide on the street. His actions were captured on local authority CCTV. Subsequently, in order to demonstrate the effectiveness of CCTV in the deterrence of crime, the local authority released footage to the media. In some cases the applicant was masked but he remained easily identifiable to those that knew him. The applicant subsequently lodged complaints with the BSC and the Independent Television Commission. Both organisations found that there had been an invasion of privacy but were impotent due to their inability to award damages.

3.15. The case affords a useful example of the methodology of the European Court of Human Rights when dealing with such controversies, and in particular in a context where the extent of protections for privacy rights

[70] Amann v Switzerland (2000) 30 EHRR 843
[71] Perry v United Kingdom 17th July 2003 application no 63737/00
[72] PG and JH v. United Kingdom 25 September 2001
[73] Van Hannover v. Germany 24 June 2004 para. 53.
[74] Peck v United Kingdom; 28th January 2003;application no 44647/98

in the domestic courts are in controversy. In particular, the Court focussed carefully on whether the Respondent State had provided an adequate remedy to the Applicant in respect of the matters of which he complained. It held that, as flexible as the action for breach of confidence was, it was incapable of providing a remedy in this instance. Thus, it could not act as a proxy for an all encompassing privacy law. The Court was not persuaded by the government's argument that as the Applicant had a "reasonable expectation of privacy", an action for breach of confidence would exist. There was also a question mark as to whether, in the absence of an injunction, damages would have been available. In passing the Court noted that it had not been referred to any case where an account of profits had been awarded in respect of a broadcast.

3.16. Although the incident in question took place on the public street, it was viewed to a degree surpassing what the applicant could have foreseen and disclosure by the local authority represented a serious interference with the applicant's right to private life. The Court said that Article 8 "*protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world…There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life*."

3.17. Similarly, sexuality and the information relating to it have been held to engage a particularly intimate aspect of private life requiring special protection by the national authorities.[75] It has been held by the Court that medical history and records will, in principle, come within the ambit of Article 8 and that disclosure can only be justified by reference to Article 8 (2).[76] Access to those records has similarly been held to be an

[75] Dudgeon v United Kingdom (1981) 4 EHRR 149; Lustig Prean v UK (1999) 29 EHRR 548 ; Norris v Ireland (1988)13 EHRR 186
[76] Z v Finland (1997) 25 EHRR 371

aspect of Article 8 ECHR.[77] Respect for private life has also been held to extend to professional or business activities.[78]

C. Exceptions to and limitations upon, the Convention right to privacy - Freedom of the Press:

3.18. Of course, and as indeed is evident from the terms of Article 8 itself, the rights secured by the provision are not absolute, and may be constrained by reference to a range of considerations, including the interests of the State and its security, and the protection of the rights of others. Where such constraints are imposed by a State, the European Court of Human Rights facilities a margin of appreciation to the relevant State, so that the primary decision as to whether to restrict the right is a matter for the State, subject to review by the European Court of Human Rights where there has been a failure to achieve a reasonable proportion between the restriction of the right and public interest to be served by that restriction, or where there has been a failure to achieve that restriction by law, a requirement which (as already alluded to) incorporates a test of precision and accessibility.

3.19. While a considerable body of the case law dealing with the Article has addressed the relationship between the Article 8 right and the general interests of the States, whether in law enforcement or in the protection of morals, the conflict between the right of privacy, and the freedom of others has been particularly acute in cases involving the media, and alleged intrusions by it upon personal privacy. While the striking of that balance is a matter of domestic law, and while due account must be taken in this regard of the provisions of Article 10 of the European Convention on Human Rights, the precise manner in which that balance has been struck within the Convention recently, requires some attention.

3.20. Article 10 of the Convention guarantees the right to freedom of expression. This is expressed to include the right to receive and impart

[77] McGinley and Egan v United Kingdom Application numbers 21825/93 and 23414/94 (1998) 27 EHRR 1

[78] Niemietz v. Germany (1993) 16 EHRR 97.

information and ideas without interference by public authority. This provision has been interpreted by the Court as attracting very considerable importance to the freedom of the press and media, upon whom it has been held there is an obligation to impart information and ideas in relation to political issues and on other areas of public interest.[79] This is a right not merely of communication by the media, but a right on the part of the public to receive that information.[80] In consequence, strict scrutiny is applied to measures which interfere with these functions or entitlements:

> *Where … measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for.*[81]

3.21. In consequence, there are cases which have resulted in conflicts between journalistic freedom and obligations of confidence being resolved in favour of the former, including the well known decision in Goodwin v. UK (1996) 22 EHRR 123 upholding a claim of privilege by a journalist in the teeth of an assertion of breach of confidence, and the decision in Fressoz v. France (1999) 5 BHRC 654 that the objective of protecting fiscal confidentiality did not justify convictions of journalists for handling documents obtained in breach of professional confidence. In Karhuvaara and Iltalehti v. Finland 16 November 2004, the Court ruled contrary to the Convention a conviction for publishing details of the criminal record of the husband of a member of Parliament, stating :

> *The public has the right to be informed, which is an essential right in a democratic society that, in certain special circumstances, may even extend to aspects of the private life of public figures, particularly where politicians are concerned*.

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79 See for example Lingens v. Austria (1986) 8 EHRR 103 paras. 41 and 42
80 Sunday Times v. United Kingdom (1979) 2 EHRR 245.
81 Bergens Tidenende v Norway application number 26132/95

3.22. However, developments within the jurisprudence of the European Court of Human Rights over the past four years, have resulted in at least in one respect, a significant shift in favour of privacy entitlements when in conflict with the freedom of the press. This has presented itself sharply in the particular context of public figures whose private information, and more particularly photographs of whom, have been disclosed in the press. In von Hannover the Court emphasised in this context the necessity for some relationship between an invasion of privacy (for it to be legitimate) and a *sphere of political and pubic debate*, manifesting a clear preference for personal privacy where such defined public interest was not evident.

3.23. The case merits some detailed consideration for this reason. Here, the complaints related to photographs taken of Princess Caroline of Monaco in public places, including photographs of the Applicant shopping, cycling, skiing, and canoeing with her daughter, depicting her son with a bunch of flowers in his arms and a depiction, taken covertly, of the Applicant in her swimsuit. There was also a photograph of Caroline, and her future husband Prince Ernst of Hannover visiting a horse show.

3.24. In respect of the first series of photographs (depicting her shopping, with her children), the German courts [82] had held that, by virtue of the Applicant's status as a public figure *par excellence***, (***absolute Person der Zeitgeschichte***)** and the exception stipulated in section 23 of the Kunsturhebergesetz which stipulated that a public figure had to tolerate publication of such kind, and in view of the public interest justification, she was forced to tolerate such pictures of her taken in a public place, even if the photos merely purported to show scenes of her mundane life, and had nothing to do with her exercising public functions. An appeal by the Applicant to the Constitutional Court was unsuccessful in respect of the photographs which did not feature her children, with the Court adopting a balancing exercise, between the public interest in being informed and the legitimate interest of the public figure. It held that entertainment was also covered under the freedom of expression,

[82] Caroline III BGH 19th December 1995

guaranteed by Article 5 of the Constitution. However, three photographs of the applicant demanded fresh consideration because the applicant's rights, in this case, were strengthened by Article 6 of the German Constitution regarding that person's intimate relations with their children.[83]

3.25. Appeals in relation to the second set of photographs (in respect to a skiing holiday, on a holiday in Paris and insights into her burgeoning relationship with Prince Ernst of Hannover at a horseshow/cycling) and the third set of photos, depicting the Applicant in a bathing suit at the Monte Carlo Beach Club, stumbling, were dismissed. In respect of the third set of photographs, the Constitutional Court held that Monte Carlo beach club was not a secluded space and the photographs of the applicant wearing a swimsuit and falling down were not capable of constituting an infringement of her right to private life.

3.26. Before the European Court of Human Rights the applicant alleged that German court decisions had infringed her right to respect for private life. The Court held that there had been an infringement of the applicant's right to private life, due to inadequate state protection of her private life and image. The Court re-iterated that the concept of private life included a "zone of interaction" of a person with others, even in a public context. The Court considered there was no doubt that the photographs of the applicant shopping came within the scope of private life as protected by Article 8. The photographs concerned purely private aspects of her daily life and could not be justified in the public interest.

3.27. The Court regarded free speech as having a hierarchical structure and drew a distinction between controversial facts capable of contributing to necessary debate in society and the photographs which are taken, in the sole interest of satisfying reader's prurient curiosity, generating profits that, it was said, could not be said to contribute to any debate of general interest to society. Where the latter conditions exist, freedom of

[83] This issue was remitted to the BGH and it was subsequently decided by a lower court that there had been an infringement of the right to privacy in respect of these photographs.

expression called for a narrow interpretation and on the facts of the case, commercial gain must yield to the applicant's Article 8 rights.

3.28. Not dissimilar considerations were reflected in the approach adopted by the House Lords in applying Article 8 in the course of its decision Campbell v. MGN, to which reference has been made earlier. There, the Court propounded a balancing exercise, based on the proportionality test not regarding one fundamental right as prevailing over the other. Lord Hoffmann at para 55 stated that:

> "*I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need.*"

3.29. Lord Hope stated at paragraph 113 that: "*Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life*" and furthermore, that

> "*The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of each case. Any restriction of the right to freedom of*

expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise. As Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998), para 11, pointed out, they are neither absolute not in any hierarchical order, since they are of equal value in a democratic society."

3.30. Baroness Hale adopted a similar approach stating:

"*The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it*."

3.31. It is thus obvious that the Convention attaches significant weight to the interests of the Press in gathering and imparting, and in the interests of the public in receiving, information including, in appropriate circumstances, information which might be viewed as *private*. This is reflected in such Irish case law as has considered the issue, albeit in the context of a provision in the Irish Constitution guaranteeing freedom of expression which, at least until recently, has been given a more diluted interpretation by the Courts here, than has traditionally been afforded to Article 10.[84] Any cause of action to protect personal privacy must, accordingly, reflect the legitimate interests of the press in gathering and disseminating such information. However, the case law of the Convention appears to envisage a distinction being drawn between matters of legitimate public debate which will justify impairments of

[84] See in particular Maguire v. Drury [1994] 2 IR 8; Cogley and Aherne v. RTE 8 June 2005 (Clarke J.).

rights to privacy, and matters relating to public figures which are both private, and in which the public has no legitimate interest. This appears to mandate a more privacy orientated view of the balance between individual confidence and freedom of the press, than has been hitherto understood.[85]

D. The obligations of the States to act*:*

3.32. It is an established principle that the Convention as interpreted by the European Court of Human Rights entails not only negative duties of non-interference on the part of Member States but also positive obligations to provide services, facilities or any other measures to ensure effective protection of the rights guaranteed in Article 8.

3.33. The Convention guarantees rights that are practical and effective, not rights that are theoretical and illusory.[86] Thus, the Court has recognised that if the rights declared in the Convention are to be protected effectively, certain provisions must be read as imposing positive obligations on the state. This brings into focus the question of whether Article 8 can be construed as imposing obligations on this State to legislate to prohibit infringements of the right to private life or whether the existing protection afforded by the Constitution and various statutory provisions can be construed as meeting the positive obligations of the State under Article 8 ECHR.

3.34. The case of Von Hannover v Germany,[87] is significant not merely in defining the relationship between privacy entitlements and the right to freedom of expression, but it also addresses the nature and extent of

[85] These developments have, of course, prompted some considerable dismay in some quarters and see in particular Rozenberg Privacy and the Press (2004) *'once trial Judges start to apply the Campbell and Caroline rulings, we may start down a slippery slope that will end when anyone photographed at a public event has the right to veto an unflattering shot'*.

[86] Artico v Italy (1980) 3 EHRR 1

[87] (2005) 40 EHRR 1.

the obligation of the States to introduce measures to protect the right to privacy.

3.35. Thus, the Court approached the positive obligation on the states to vindicate the rights under Article 8, asserting:

> "*The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, mutatis mutandis, X and Y v the Netherlands, judgment of 26 March 1985, Series A no. 91, p 11, ss 23; Stjerna v Finland, judgment of 25 November 1994, Series A no. 299-B, p61, ss38; and Verliere v Switzerland (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person's picture against abuse by others*."

3.36. The Court observed that the state enjoys a certain margin of appreciation and that a proper balance had to be struck between the competing interests of Articles 8 and 10 but considered, in light of the narrow interpretation of freedom of expression mandated on the facts of the case, that the appropriate balance was not struck by the German courts. The criteria laid down by the German courts, while perhaps appropriate in the case of politicians exercising official functions, were not justified for a private individual, in whom the interest of the public and general press is based solely on her membership of a royal family. It also considered the criteria laid down by German law as to what constitutes a protected private domain, to be too vague and lacking in legal certainty.

3.37. Tomlinson and Thomson conclude that Von Hannover represents a strong and clear warning from Strasbourg to the English courts that they have an obligation to protect privacy rights of individuals[88] Moreover they conclude that the Human Rights Act 1998 dictates that the courts must act to protect privacy rights in the sense which is understood in that and further state that:

> "*it is difficult to see how the UK could be argue that the margin of appreciation would allow it to say it is providing a sufficient protection for invasion of privacy to the extent required*."[89]

3.38. It is clear from the judgment in Von Hannover that the law of the Contracting States is required to make a fundamental distinction between the "*reporting of facts….capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details in the press for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public* interest' ([*Observer* and *Guardian v UK*, A.216 (1991)]) *it does not do so in the latter case."*[90]

3.39. Moreover, the Von Hannover case would seem to mandate the adoption of measures relating to image rights, similar to that of the appropriation of likeness second limb of the US tort of privacy (discussed in the next section of this Report. Thus the Von Hannover case strongly suggests a general obligation on the States to introduce measures to protect privacy.

3.40. In the case of Ireland, the probability is that protection would be derived from the constitutional guarantees referred to above. However, as observed in that connection, the precise scope of any private law cause of action on foot of those guarantees lack clarity, and this is particularly

[88] NLJ 9/7/2004 ;1040
[89] Bad news for the Paparazzi- Strasbourg has spoken- NLJ 9/07/2004; 1040, 1041
[90] Paragraph 63

the case where the cause of action is against a private individual, rather than the State.

3.41. Thus, it is by no means clear that an Irish Court applying the protections of Article 40.3 of the Constitution, would have granted the Applicant in Hannover relief as against those publishing the photographs, just as it is by no means clear that under Irish Constitutional Law, persons could complain of video footage or photographs taken of them in public places which, as already observed, the European Court of Human Rights in the circumstances that presented themselves in Peck, ruled as violating Article 8. Indeed, some of the older decided cases in Ireland suggest an approach to privacy guarantees that is less solicitous of the position of Plaintiffs, than the Strasbourg jurisprudence would appear to demand. For example, there are decided cases in Ireland suggest that once the individual is in the public gaze,[91] there is no protected privacy right, and aspects of the Irish jurisprudence suggest a broader approach to the public interest which over-rides privacy rights, than is suggested by the decision in Von Hannover.[92]

3.42. Indeed, that very lack of clear precedent could render the State in breach of the Convention which in requiring that remedies be effective, requires that they be clear and accessible. One commentator [93] has aptly observed that: "*a paucity of privacy cases taken on foot of Article 40.3.1 has left fog over the parameters of this unenumerated constitutional right. Bunreacht na hEireann may be a fountain of privacy rights but its interpretation is in the hands of an often shy judiciary*."

3.43. The European Court of Human Rights has, again perhaps surprisingly, already held Ireland to be in breach of the Convention where the State suggested that remedies required under the Convention might be derived from constitutional jurisprudence, the Court emphasizing the inability of the State to point to clear case law supporting the existence

[91] Nason v. Cork Corporation Unreported.High Court 12th April 1991
[92] Maguire v. Drury [1994] 2 IR 8.
[93] Hannigan; From Catwalk to courtroom – Privacy struts her stuff; (2004) 11 (8) Commercial Law Practitioner;194

of such a remedy.[94] This approach by the European Court can be criticized for failing to acknowledge the manner in which legal rules develop in a common law system and, indeed, the inevitable fact that in a small jurisdiction, remedies dependant upon case law are inevitably less likely to be demonstrable by precedent, particularly in areas of the law as affected by technological development. It is nonetheless a feature of the jurisprudence of which note must be taken.

3.44. If, however, a situation were to present itself in which it was held by an Irish Court that there was no constitutional, statutory or common law remedy available in circumstances where the European Convention demanded domestic protection of an Article 8 right, it is possible that the State would be liable pursuant to section 3 of the European Convention on Human Rights Act 2003 for damages to a person damaged in consequence. While we hasten to note that in our view, in reality, it is unlikely that a Court would read down the right of privacy as protected by Article 40.3 of the Constitution so that the content of that right was less than the right propounded by the European Court of Human Rights, the exemption of the State for liability to this end is dependant upon that (necessarily) pragmatic prediction. Such a view, of course, is necessarily based upon the parameters of the right to privacy as it has developed to date in Europe; further extension of that right (which is on occasion acutely controversial in its impact) by the European Court of Human Rights might not necessarily be accommodated.

3.45. Thus, in conclusion, the Irish position is simply uncertain. There is a risk that the uncertainty itself could jeopardise the State's compliance with the obligations arising under Article 8. While there is protection in Irish law for various facets of privacy, the protection assumes the form of a hotchpotch of measures. While most legal commentators would agree that the overwhelming likelihood is that the Courts here would fashion a private cause of action from, if not the common law of tort, the constitutional guarantees to which we have referred, this is not certain and, more importantly, it is not clear that such a claim would reflect

[94] Doran v. Ireland.[2003] ECHR 417

precisely the requirements of the Strasbourg jurisprudence. Certainly, the decisions of the Strasbourg Court afford a strong argument in favor of the provision by law in Ireland of a clear and identified cause of action to vindicate the rights identified in, and deduced from, Article 8 of the European Convention.

SECTION FOUR – THE APPROACHES ADOPTED IN OTHER JURISDICTIONS

4.01. The debate as to whether there should be introduced a dedicated cause of action to address wrongful interferences with privacy is usefully viewed in the light of the approaches that have been adopted in other jurisdictions. To this end, we have sought to identify a number of legal systems which either by reason of the extent and detail of the protection afforded by them to privacy interests, or because of a similarity of their legal systems to that in Ireland, provide assistance in understanding the type of regulation that might be considered in Ireland.

A. Australia

4.02. Following the case of Victoria Park Racing[95], it is generally accepted that there is no common law right to privacy in Australia. The Courts have adhered to an English ad hoc approach to privacy. The case of Donnelly v Amalgamated Television Services[96] is an example of the Australian courts using the guise of breach of confidence action to vindicate the privacy rights of the individual.

4.03. The Privacy Act (Commonwealth) 1988 (as amended) governs the handling of personal information/informational privacy by the federal government and establishes standards for the collection, storage, use and disclosure of personal information which are contained in 11 Information Privacy principles. By virtue of the Privacy Amendment (Private Sector) Act 2000, its ambit has now been extended to cover the activities of the private sector. However, the legislation provides for a media exemption. The Statute also creates the Office of the Privacy Commissioner whose functions include investigating complaints of

[95] Victoria Park Racing and Recreation Grounds Co Ltd v Taylor and others (1937) 58 C.L.R 479

[96] (1998) 45 NSWLR 570 regarding a police search, and the video taping of a suspect in his underwear which found its way into the hands of a TV Station. The Plaintiff sought an injunction to prevent the broadcasting of the tape. See also the case of Lincoln Hunt Australia Pty Ltd v Willesee (1986) 4 NSWLR 457 where it was held that equitable jurisdiction exists to restrain the publication of a videotape or photograph made by a trespasser.

breaches of the IPPS and of the 10 National Privacy principles which apply to the private sector and furthermore has the function of privacy advocate. Other miscellaneous federal statutes affording certain but incomplete protection to the privacy of the individual include, *inter alia*, Crimes Act 1914; Freedom of Information Act 1982; Telecommunications (Interception) Act 1979 (as amended). Individual states have also adopted legislation which provides protection for the privacy of the individual. It is noteworthy that legislation in New South Wales, namely the Privacy and Personal Information Protection Act 1998 established the Office of Privacy Commissioner in that state and that in the Northern Territory the Northern Territory Information Act of 2002 created the office of the Information Commissioner.

4.04. There is evidence that the courts are moving in the direction of developing a general tort of privacy. In Australian Broadcasting Commission v Lenah Games Meats Pty Ltd[97], the minority recognised the possible existence of a tort of privacy, stating that the decision in Victoria Park did not preclude the development of a tort of invasion of privacy.

4.05. Relying on the dicta of the Australian Broadcasting case, Skoien J in the Queensland case of Grosse v Purvis[98] recognised a common law tort of invasion of privacy and proposed the following essential elements of the tort:

- A willed act by an individual;
- Which intrudes on the privacy or seclusion of the individual;
- In a manner that could be considered highly offensive to a reasonable person of ordinary sensibilities; and
- Which causes the Plaintiff mental, psychological, or emotional harm and distress

[97] [2001] HCA 63 (15th November 2001)
[98] [2003] QDC 151

- Which prevents or hinders the Plaintiff from doing any lawful act. Furthermore he stated that the tort was unlikely to be actionable *per se.*

4.06. However, in the case of Kalaba v Commonwealth of Australia, it was recognised that, at this moment in time, there was no tort of privacy in Australia.[99] An authoritative High Court ruling in favour of a legal right to privacy is awaited.

B. Canada

(i) Federal and Common Law

4.07. The Common Law of Canada has not progressed to recognising a broad all encompassing tort of privacy and at common law the judiciary have been compelled to expand existing common law causes of action in order to vindicate the privacy interests of the individual**.** For example Motherwell v Motherwell[100], expanded the tort of nuisance**,** when it was recognised that the legal owner of the property and his wife, who had no interest in the property, could obtain an injunction to restrain persistent harassment by unwanted telephone calls on the grounds of invasion of privacy.

4.08. The Supreme Court of Canada has discovered a general public law right to a reasonable expectation of privacy anchored in the Canadian Charter of Fundamental Rights and Freedoms, namely a right to be let alone; and the right to be secure against encroachment upon the citizen's reasonable expectation of privacy in a free and democratic society.[101]

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[99] [2004] FCA 763; see also in a similar vein the Victorian case of Giller v Procopets [2004] VSC 113. However, the trial judge in Kalaba was not prepared to foreclose the possibility of an argument that Australian law should recognise a tort of privacy should an appropriate case arise (quoted by the Full Court in Kalaba [2004] FCAFC 326 when refusing leave to appeal Justice Heerey's decision. Also upheld by the High Court where leave to appeal Heerey J's decision was refused. Kalaba v Commonwealth of Australia and Anor [2005] HCA Trans 478; 4th of August 2005)

[100] (1976) 73 DLR (3d) 62, Alta CA

[101] Hunter v Southam (1984) 2 SCR 145

Federal statutes dealing with the protection of privacy include: Privacy Act 1983; Part VI Canada's Criminal Code; and Personal Information, Protection and Electronic Documents Act 2000.

(ii) Quebec

4.09. Section 5 of the Charter of Human Rights and Freedoms guarantees the right to respect for private life. It has been held that the purpose of the protection of the right to privacy is to guarantee individual autonomy for decisions relating to choices of an inherently personal nature[102] and thus, on this basis, encompasses the right to and control of one's image[103], and the right to choose where to establish one's home free from state interference.[104] In the case of Field v United Amusement Corporation[105] , in respect of unauthorised filming of the Plaintiff and his girlfriend in a state of undress at the Woodstock music festival, it was accepted that there was a public interest defence and the case may be authority for the proposition that there may be implied consent to publication if the Plaintiff is knowingly involved in an activity likely to attract attention of if the media is likely to be present.[106] Section 35 of the amended Civil Code provides that every person has the right to respect for his reputation and privacy and that no one may invade the privacy of a person without the consent of that individual. Section 36 stipulates acts that are considered to be particularly invasive of the privacy of the individual.

(iii) Manitoba, British Colombia, Newfoundland, Saskatchewan.

4.10. Four Canadian Provinces have legislated to create a tort of violation of privacy, namely: British Colombia; Manitoba; Newfoundland; and Saskatchewan, their purpose being to provide a remedial action in respect of the failings of the common law to develop a general tort of

[102] Gazette v Valiquette [1997] RJQ 30; This view was subsequently endorsed by the Supreme Court
[103] Les Editions Vice- Versa v Aubrey and the Canadian Broadcasting Corporation [1998] 1 S.C.R 591(Supreme Court); in that case artistic expression could not justify the infringement of A's right to privacy. See also Field v Amusement Corporation supra; and Rebeiro v Shawinigan Chemicals (1969) Ltd [1973] CS 389.
[104] Godbout v Longueil (City) [1997] 3 S.C.R 844; 1997 CanLII 335 (S.C.C) This right is an aspect of Section 7 (right to liberty) of the Canadian Charter.
[105] [1971] CS 283
[106] Osborne; Case Comment on Milton v Savinkoff (1994) 18 CCLT (2d) 292

infringement of privacy. All four statutes refer to the importance of the nature, incidence and occasion of the act and all of them make direct references to the reasonableness factor[107]. In British Colombia, Saskatchewan and Newfoundland the ingredients of the tort stipulate that privacy must be violated wilfully and without claim of right. The British Columbia Court of Appeal interpreted 'claim of right' to mean: "*an honest belief in a state of facts which, if it existed, would be a legal justification or excuse*." [108] The enactment in Manitoba provides that: "*any person who substantially or reasonably and without claim of right, violates the privacy of another, commits a tort against that other person.*" In each jurisdiction, the tort is actionable *per se.* British Colombia has also created a discrete tort of appropriation of name and likeness. The tort action in British Colombia, Newfoundland and Saskatchewan extinguishes on the death of the individual affected. Defences common to all include: consent; public interest[109]; lawful authority and privilege; and fair comment. Considerations to be taken account in determining whether privacy has been violated in Saskatchewan include: an assessment of the nature; incident and occasion of the act; publication or conduct; effect of the act; conduct and publication on the health and welfare or the social business or financial position of the individual's whose privacy has been violated or his family and any relationship between the parties and the conduct of the person both prior to and following the act, conduct or publication.

C. New Zealand

4.11. The courts in New Zealand are prepared to countenance the existence of a tort of invasion of privacy. This development can be traced back to the dicta of McGechan J at the interlocutory stage in Tucker v News

[107] See Milton v Savinkoff (1993) 18 CCLT (2d) 288 – the case where the Plaintiff inadvertently left photographs where she appeared topless in a male acquaintance's jacket pocket, which he subsequently passed on. It was not reasonable to find a breach of privacy in the circumstances- "all of the circumstances surrounding the alleged tortious conduct must be examined in determining whether the right to privacy had been violated."

[108] Trial decision : Hollinsworth v BCTV December 11th 1996; (1996) Can LII 2379 (BC S.C) – trial decision not disturbed on appeal: Hollinsworth v BCTV (1998) 59 BCLR (3d) 121 (CA); 1998 CanLII 6527 (BC C.A)

[109] defence of public interest was successful where a man was shown getting hair transplant surgery - Hollinsworth (trial decision) supra.

Media Ownership[110] where he stated that he supported the introduction of a tort of unwarranted publicity in respect of the disclosure of private facts. However, he did seem to envisage[111] that intervention by the legislation would be required to determine the exact correlation between privacy and freedom of expression. The Court of Appeal in that case also recognised that there was an arguable case made out for the recognition of tort of privacy. It was also recognised in Morgan v Television New Zealand[112] that the law of New Zealand recognised some right to privacy of the individual and a balancing test between privacy and the public interest/ freedom of expression was adopted. Subsequently in Bradley v Wingnut Films[113], Gallen J held that there was a common law tort of privacy in New Zealand, however, he stressed, at this early stage, that its extent should be regarded with caution and considered that three elements must be satisfied before a cause of action for a breach of privacy will arise:

i. The disclosure of private facts must be a public disclosure and not a private one;
ii. The facts disclosed to the public must be private facts and not public ones;
iii. The matter made public must be one which would be highly offensive and objectionable to a person of reasonable sensibilities.

4.12. Following on from this, in P v D[114] it was recognised that there was tort of privacy in New Zealand that encompassed the public disclosure of private facts. Nicholson J added a further criterion to the tort, requiring that the nature and extent of legitimate public interest in having the information disclosed be factored into any consideration of a breach of the tort. The case failed to give adequate consideration to the dilemma

[110] [1986] 2 N.Z.L.R 716
[111] He stated that "*the boundaries and exceptions [of the tort] will need much working out on a case by case basis so as to suit the conditions of this country. If the legislature intervenes during the process, so much the better.*"
[112] Unreported: Christchurch High Court; March 1990
[113] [1993] 1 N.Z.L.R 415 also known as the Brain Dead case.
[114] [2000] 2 N.Z.L.R 591

posed by the competing claims of freedom of expression nor did Nicholson J adequately discuss to what extent is the privacy of the individual abrogated by the mere fact that the P is a public figure.

4.13. In Hosking v Runting[115], the Court of Appeal confirmed the existence of an independent tort of breach of privacy in respect of giving publicity to private and personal information. The majority considered the elements of the successful breach of the tort to consist of:

- The existence of facts in respect of which, there is a reasonable expectation of privacy;
- Publicity is given to those private facts which would be considered highly offensive by the reasonable person;[116] A defence of legitimate public interest would also be available.

4.14. The Privacy Act 1993 (as amended) provides that any person may complain to the Privacy Commissioner about any action that appears to be an interference with the individual's privacy. An interference with privacy of the individual involves, *inter alia,* a breach of the Information Privacy Principles. The legislation provides that the Commissioner may investigate any such action and ultimately may refer the matter to the Director of Human Rights Proceedings, appointed under the Human Rights Act 1993 as amended by the Human Rights Amendment Act 2001 who may decide to bring the case before the Human Rights Review Tribunal. The Tribunal has the power to grant enforcement orders and award damages and compensation in the event of a finding of a breach. The Commissioner has the power to enquire generally into any matter, if it appears that the privacy of the individual has been compromised. It is also incumbent upon the Privacy Commissioner to assess the need or desirability for legislation or administrative action to further concretise the privacy rights of the individual. Moreover the Commissioner is required to examine any proposed legislation or

[115] Court of Appeal 25th of March 2004
[116] Tipping J differed in respect of the second requirement, requiring a substantial rather than a high degree of offence.

proposed policy of the Government which may affect the privacy of the individual.

4.15. Section 4(1)(c) of the Broadcasting Act 1989 provides that a radio or television broadcaster is responsible for maintaining standards in its programmes and presentation standards which is consistent with the privacy of the individual. The standards that are to be applied by the Commission in assessing a breach are formulated along the lines of the US tort of privacy. This reliance on US case law by the Commission was upheld by the High Court.[117] Other miscellaneous instances of legislation that feature privacy protection provisions include : Section 21 Bill of Rights Act 1990; New Zealand Crimes Act and Misuse of Drugs Amendment Act 1978 (as amended); and Protected Disclosures Act 2000.

D. England and Wales

4.16. As noted earlier, there is no all embracing tort of invasion of privacy in the UK.[118] Furthermore there are no plans for legislative action on the issue.[119] Actions for infringements of privacy have been accorded incidental protection and subsumed other heads of action including; defamation; nuisance; and breach of copyright**.** The main vehicle used by the courts to champion the privacy rights of the individual is the tort of breach of confidence. In artificially straining the tort of breach of confidence to safeguard the privacy of the individual,[120] the courts have had cognisance of Articles 8 and 10 ECHR[121] and of Section 2 of the Human Rights Act 1998. In balancing the competing values, a legitimate public interest defence will apply.[122]

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[117] TV3 Network Services Ltd v Broadcasting Standards Authority [1995] 2 NZLR 720

[118] Kaye v Robertson [1991] F.S.R 62 : Wainwright v Home Office [2004] 2 A.C 406 (House of Lords); See also the ECHR case of Peck v United Kingdom

[119] See the Government's Response to the 5th Report of the Culture, Media and Sport Select Committee on Privacy and Media Intrusion. (HC 458-1)

[120] See the case of Thompson and Venables v Newsgroup Newspapers Ltd [2001] 2 W.L.R 1038

[121] See H (a Healthcare Worker) v Associated Newspaper Limited [2002] EWCA Civ 195 [40]; Douglas and Others v Hello! [2001] 2 WLR 992

[122] Hellewell v Chief Constable for Derbyshire [1995] 1 WLR 804

4.17. The case of Campbell v MGN [123] established that there is a right to the protection of private information in English law: the sole requirement for success pertaining to whether the defendant should have or ought to have known that "a *reasonable expectation of privacy*" existed in respect of the nature of the information published and/ or how it was obtained.[124] The House of Lords propounded a balancing test in respect of the competing values of Article 8 and 10.[125] As pointed out by Gault and Blanchard JJ in Hosking v Runting, this approach comes close to the recognition of legal protection from publicity of private information.[126] In the Naomi Campbell case it was evident that there is a clear need to approach the public interest test by reference to the values underpinning Article 10 and in particular that different categories of speech have different levels of importance under that article.

4.18. The Court of Appeal case of Douglas v Hello (Nos 5 and 6)[127] is authority for the proposition that the English courts are prepared to recognise a free standing right to (informational) privacy in domestic law. The Court of Appeal was of the opinion that there was a duty on the courts, in so far as private information is concerned to comply with the Convention and (reluctantly) adopted the vehicle of breach of confidence in order to secure compliance and to vindicate individual privacy rights. Photographs were to be placed in a special category, owing to the fact that as a means of invading privacy, a photograph was particularly intrusive.[128]

4.19. Of course the effect of these decisions, while not acknowledging a tort of privacy *per se*, has been to create a right to the protection of private information in English common law. As one commentator has

[123] [2004] 2 W.L.R 1232

[124] proposed by Baroness Hale and Lord Nicholls in Campbell; by Lord Woolf in A v B plc and Lord Phillips MR in Douglas (No5 and 6)

[125] See S (A Child) (Identification: Restrictions on Publication), Re [2004] UKHL 47, [2005] 1 A.C. 593.

[126] [2005] 1 N.Z.L.R 1 at 26 ; see also "Breach of Confidence or Breach of Privacy: The Way Forward"; Delany; 2005 DULJ 151 at 167

[127] [2005] EWCA Civ 595; 18th May 2005

[128] see also Theakston v MGN [2002] EWHC 137- public interest defence , the balancing of the competing values of Articles 8 and 10 and the recognition that photographs can be particularly intrusive.

observed,[129] *[t]he focus of the privacy debate has therefore shifted: instead of asking whether privacy should be protected, judges and commentators must now address the new question of how that protection should be provided*.

4.20. However, as demonstrated by the Wainwright v Home Office[130] case and as recognised by Lord Nicholls in Campbell case, a cause of action for breach of confidence cannot be regarded as a panacea. It appears to be geared towards the collection and use of private information as opposed to non informational privacy and it must be recognised that an individual's privacy can be invaded in many ways not involving publication of information.[131] Victims of non informational intrusion are left with the piecemeal protection afforded by trespass[132], Article 8 of the Human Rights Act 1998, which applies only to public authorities, the tort of nuisance and the Protection of Harassment Act 1997. In light of the obligations under the European Convention on Human Rights and in light of the positive obligations to develop the law consistently to vindicate Article 8 rights, an obligation recognised by the Court of Appeal, the courts in England and Wales may be forced to contort existing torts such as infliction of emotional distress, in the absence of legislative action.

E. Hong Kong

4.21. The substantive law on privacy in Hong Kong is based on the common law. Thus, actions for breach of confidence make an appearance and incidental protection based on existing torts is afforded to breaches of privacy. The Hong Kong Bill of Rights Ordinance protects solely against infringements of privacy by the State. The Privacy Data Ordinance protects privacy of individuals in relation to personal data and regulates the data use in both private and public sectors. It is not directed

[129] See Moreham ; Privacy in the Common Law (2005) 121 LQR 628.
[130] supra
[131] [2004] 2 A.C 457 at 465
[132] However, observation from a reasonable height of a property from a reasonable height does not constitute a trespass. ; Bernstein v Skyviews & General Limited [1978] QB 479. It should be noted that the purpose of the incursion was relatively benign, taking photographs of stately homes in the hope of selling them on.

towards protecting against unwarranted infringements of privacy per se. The case of Kam Sea Hang Osmaan v Privacy Commissioner for Personal Data (Administrative Appeal No. 29 of 2001, unreported decision of the Admin. Appeals Board 28/02/2002) illustrates the shortcomings of the Ordinance as far as the protection of privacy is concerned. An individual alleged that a magazine had published fabrications about him. It was held that a lie or fabrication fell outside the definition of personal data contained in the Ordinance. As was pointed out in the Eastweek[133]case the Ordinance simply seeks to protect 'informational privacy' as opposed to 'personal privacy'. The Privacy Commissioner has opined that the existing law in Hong Kong was inadequate to protect against unwarranted intrusions into privacy and insufficient to guard against unwarranted publicity.

4.22. It is to be noted that the Law Reform Commission of Hong Kong recommended the creation of the tort of intrusion into privacy and a tort of public disclosure of private facts. Significantly, the Commission considered that self regulation of the Press and the adoption of a Press Code would be inadequate by itself to protect privacy interests. On balance, it decided against the creation of a tort of appropriation of name or likeness or the portrayal of an individual in a false light. The main features to note in regard to the tort relating to an unwarranted invasion of privacy are: the requirements of intention or recklessness; and that the invasion of privacy must be seriously objectionable to a person of ordinary sensibility. As regards intrusion into privacy, the crux of the tort relates to the assessment as to whether a reasonable expectation of privacy existed at the time of the intrusion.

4.23. It was recommended that the legislature should provide guidelines to the courts in respect of the constituents of a reasonable expectation of privacy and furthermore the Commission stated that the fact that a place is public does not mean that the individuals had ceded their reasonable expectation to privacy. Defences would include: consent; (the failure to take a precautionary and simple measure such as drawing one's curtains

[133] [2000] 1 HKC 692

may be held to constitute implied consent) lawful authority; and public order.

4.24. The Commission also recommended the adoption of a tort of unwarranted publicity, based on the notion that truth can be more damaging than lies. It recognised that the law of confidence might suffice in this instant but noted that it was a hit and miss affair. The tort is aimed at the public disclosure of private facts; note the use of the term 'publicity' which connotes that the average gossiper is excluded from the tort's ambit; the publication must be seriously offensive or objectionable to the average person; and the tort also imports an element of intent or recklessness as regards the offensiveness/objectionable element. Again, the Commission wished to cut down on the leeway accorded to the Courts, recommending that the proposed legislation should list factors that the Courts should take into account when determining whether the publicity would be seriously offensive to the reasonable person. The tort would also require proof that: the complaint related to a matter concerning the private life of the Plaintiff; and that the Defendant had given publicity to the matter.

4.25. Defences to the action would include: the defence of public interest; consent; qualified privilege; and lawful authority. As regards the public interest defence, the Commission stated that there must be a logical nexus between the Plaintiff and the matter of public interest and a logical relationship between the events or activities that brought the individual into the public eye and the private facts disclosed. The matter disclosed must be of genuine concern to the public and it advocated the insertion of a rebuttable presumption as to what constitutes a matter of legitimate public concern. The proportionality principle should be expressly incorporated in the new tort to guard against excessive disclosure. The Commission rejected calls for a defence of facts previously in the public domain citing ECHR, Spanish, French, English and American decisions

F. United States

4.26. The US Constitution does not expressly recognise a right to privacy. However the Fourth, Fifth, Ninth and Fourteenth Amendments have been invoked to guard against incursions into privacy. These rights have to be balanced against the right of freedom of expression guaranteed by the First Amendment and operate as a control on government action. The constitutional right to privacy encompasses, *inter alia*, abortion and the woman's right to choose[134], and the right of sexual privacy.[135] In Katz v US[136], the Supreme Court held that the recording of a conversation in a telephone booth by the police violated the Fourth Amendment because there existed a reasonable expectation of privacy in the phone booth for the speaker. However, the Supreme Court denied a right of privacy in respect of rifling through rubbish. California v Greenwood 486 US 35 (1988)

4.27. A common law tort of invasion of privacy has developed in most jurisdictions and owes its inception to an article written by Warren and Brandeis in the Harvard Law Review in 1890. The tort of privacy is traditionally divided into 4 categories:

- The offensive disclosure of private facts;[137]
- Offensive intrusion into seclusion;[138]
- Placing the Plaintiff in a false light in the public eye;[139]

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[134] Roe v Wade 410 US 113 (1973)

[135] Lawrence v Texas 26th June 2003 US SC; 539 US 558 (2003) see also a right to martial privacy- Griswold v Connecticut 381 US 479 (1965)

[136] 389 U.S 347, 350 (1967)

[137] §652 d provides tort liability involving a judgment for damages for publicity given to true statements of fact.

[138] Restatement § 652 B defines intrusion as follows : " One who intentionally intrudes, physically or otherwise upon the solitude or seclusion of another in his private affairs or concerns is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person." This tort may be characterised as an information gathering tort and applies to methods of newsgathering, relating to the manner in which information was obtained and does not require publication. Examples of intrusion can include peering into windows; eavesdropping by electronic means. The essence of the tort is that there is a reasonable expectation of privacy. It does not generally extend to the taking of photographs in public places. Such an action may lie, however, if the conduct is persistent and harassing and if the photograph is especially embarrassing. See the case of Galella v Onassis 487 F.2d 986 (2nd Circuit 1973) where an injunction was granted preventing the Plaintiff, a paparazzi photographer from coming within a certain distance of Jackie O. Thus a public figure has a right to physical private space.

[139] gives publicity to a matter concerning another that places the other before the public in a false light if (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." It includes embellishment, distortion and fictionalisation.

- The wrongful appropriation of the Plaintiff's name or personality. [140]

4.28. The courts in at least 28 states have expressly or by implication accepted the four sub-torts. Some states only recognise some of them. For example, North Carolina only recognises the appropriation and intrusion torts. Texas and Minnesota do not recognise the "false light" tort. It should be noted that only natural persons can bring actions in respect of invasion of privacy as the tort relates to injury to feelings which presumably a company cannot suffer.

4.29. Generally, there are concerns that the false light tort bears too great a resemblance to a defamation action and the risk of the chilling effect on the press is too great.[141] In Time Inc v Hill,[142] the Supreme Court determined that to succeed in a cause of action for 'false light' the applicants would have to prove actual malice.

4.30. Some states recognise a right of publicity as an aspect of the tort of wrongful appropriation of the Plaintiff's name or personality.[143] The right to publicity has been balanced with the competing values of freedom of expression. In some states, for example Oklahoma, the right to publicity can be bartered and inherited[144]. The right of publicity will apply primarily to celebrities who could reasonably profit from exposure to the public. For example, in 1988 the US Court of Appeal awarded Bette Midler US$400,000 damages after an advertising agency for Ford used a lookalike to perform "Do You Want to Dance" to "sound as much as possible like the Bette Midler record."

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[140] identified and classified by Prosser; Restatement (Second) of Torts § 625 A (1976)

[141] see the case of Lake v Walmart Stores Inc – 582 NW 2d- 231 (1998) WL. 429904

[142] 385 US 374 (1967)

[143] Pavesich v New England Life Insurance Co (1905); 122 Ga 190, 50 S.E 68,71 Georgia - first state court to recognise the common law tort of appropriation. See the case of Zacchini v Scripps Broadcasting 433 US 562 (1977) which provides a precedent for the right to publicity and recognises it as endowing the performer with a right of property in his performance. The Supreme Court also determined that the recognition of this aspect of the tort of wrongful appropriation was not inconsistent with the First Amendment. 16 states have enacted 'special rights' legislation which seek to prevent the unauthorised commercial use of an individual's name, likeness or other recognisable aspects of the individual's persona.. It can extend to a recognisable catchphrase hence Johnny Carson's "here's Johnny" - Carson v Here's Johnny Portable Toilets Inc 698 F.2d 831 (6th Circuit 1983). The right of publicity is best protected in New York which affords statutory protection only. Section 50 of the New York State Civil Rights Law.

[144] The right can also be inherited in Texas; California (Celebrities Rights Act which extends 70 years after death); Nevada; Washington; Tennessee.

4.31. Publication of truthful information in respect of private facts which is calculated to bring humiliation or shame to a person of ordinary sensibilities and does not concern a matter of legitimate public concern is a tort in some states. If the information is a matter of public record/part of an official court document, the media will not be held liable for publishing it. As the Hong Kong Law Reform Commission point out the case of Florida Star[145] case, has thrown the viability of the tort of offensive disclosure of public facts into doubt. The Supreme Court held that a Florida statute which made it unlawful to publish in any instrument of mass communication the names of the victims of sexual offences violated the First Amendment. Thus, "*only a state interest of the highest order*" will permit a state to penalise the publication of truthful information and a rape victim's right to privacy was not subsumed as a state interest of the highest order. A joined dissenting judgment issued by the late Rehnquist CJ and O'Connor J stated that the Court had accepted the appellant's invitation to obliterate one of the most noteworthy legal inventions of the 20th Century- the tort of the publication of private facts.

4.32. Newsworthiness (existence of a legitimate public interest) is a strong defence to the tort of offensive disclosure of private facts; to the tort of wrongful appropriation; and to the tort of false light; however it is no defence to the tort of intrusion. However, there must not be gratuitous publication of private facts. Whether the defence of newsworthiness is to apply depends on the totality of circumstances in the case. Factors that may be considered in respect of the tort of offensive disclosure of public facts include: the social value of the facts published; the extent to which the article ostensibly intruded into private affairs and the idea of voluntary assumption of public notoriety. Consent is a defence common to all of the torts. Truth/absence of malice will also be a defence to the tort of 'false light'. The right of publicity cannot be utilised to stifle commentary

[145] Florida Star v BJF 491 US 524 (1989); see also Cox Broadcasting Corporation v Cohen; 420 US 469 (1975)

on the lives of public people. Reproductions of past events and biographies fall within the scope of the First Amendment defence.[146]

4.33. Federal legislation provides incidental protection[147]. Most notable is the recent Video Voyeurism Prevention Act 2004 which makes it an offence to surreptitiously capture images of people in situations where they have a reasonable expectation of privacy on federal land. 35 states already have some form of protection against video voyeurism. It should also be noted that in addition to the four privacy torts, a Plaintiff might recover under trespass or intentional infliction of emotional distress.

4.34. It is uncertain whether a common law invasion of privacy action exists in Massachusetts.[148] Thus, in that state, actions relating to infringements of privacy are governed exclusively by statute. C.L.c Chapter 214, § 1 B provides that: "Section 1B. "*A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages*." It falls to be determined on a case by case basis by the courts as to what actions are encompassed by the Statute. It has been held that the publication of private facts[149] and the misappropriation of a person's name and likeness[150] come within its remit. The statutory right to privacy in Massachusetts is not absolute and may be outweighed by a legitimate interest.

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[146] Taylor v NBC No BC 110922 (Cal. Super. Ct. Sept 29 1994) regarding a mini series concerning Elisabeth Taylor's life.

[147] See also Federal Family Educational Rights and Privacy Act 1974, dated July 17th 1976 (20 U.S.C Section 1232g; Federal Privacy Act 1974 Public Law 93-579 (5 U.S.C §552 a); Freedom of Information Act 1966 5 USC §552); Electronic Communication Privacy Act 1986 (18 USC 2510)

[148] Alberts v Devine 395 Mass 59; see Chapter 7 : *Invasion Of Privacy*; Newman Massachusetts Superior Court Civil Practice Jury Instructions (1997)

[149] Bratt v International Business Machines Corp., 392 Mass 508, 518-524; 467 NE2d 126 (1984)

[150] Shepard's Pharmacy , Inc v Stop & Shop Co., 37 Mass. App Ct. 516, 523-524. It should be noted that Mass. already has a statutory cause of action for the authorised use of a person's name , portrait or picture within the commonwealth for advertising purposes or for the purposes of trade. M.G.L 214, section 3A

5 SECTION FIVE – INVASIONS OF PRIVACY

5.01. Our Terms of Reference request that we identify what are described as '*specific offensive'* forms of invasion of privacy and prescribe remedies and sanctions in respect of such specific conduct, taking into account the recommendations contained in the Law Reform Commission Report on Privacy: Surveillance and the Interception of Communications (LRC 57/1998).

5.02. The Law Reform Commission Report, as its title suggests, focussed on one particular aspect of the legal protection of privacy, namely the invasion of privacy through surveillance and interception, and was prompted in turn by the growing nature of the problem of surveillance in contemporary society, the inadequacy of the existing law and a trend towards the adoption of legislative solutions. The core recommendation of the report was for the enactment of a civil tort directed against acts of privacy invasive surveillance in circumstances where a reasonable expectation of privacy exists, a conclusion arrived at by reference to the combination of the opportunity for privacy invasion afforded by new technology, and perceived inadequacies in the existing legal structures. The Commission also recommended the enactment of new statutory criminal offences directed towards the most egregious abuse of privacy-invasive surveillance technologies involving surveillance of private dwellings, surveillance of private conversations, trespass on property with a view to obtaining personal information and the enactment of supplementary offences of disclosure of information obtained in contravention of these provisions.

5.03. A consideration of the Report of the Commission, together with an analysis of the large body of case law that has developed in and around privacy interests throughout the world, suggests a range of behaviour which, absent the most unusual circumstances, is in breach of fundamental aspects of the values protected by privacy, and which at the same time are not amenable to justification on public interest or

other grounds. Such a survey suggests that in fact the range of conduct that has been consistently identified as justifying legislative intervention, or which has prompted determinations by the Courts of violations of privacy interests, can be identified relatively briefly. These have as their unifying features infringements of privacy which are undertaken deliberately and consciously, which impact upon an acute sphere of personal privacy, and (often) are undertaken for purposes of private gain, or malice. They fall to be sharply distinguished from infringements which are either inadvertent, or which have been undertaken to advance a legitimate and identifiable public interest.

5.04. The recurrent themes are:

1. The surveillance or recording of a person within their own home or personal *space*, or the dissemination of photographs of video recordings of a person in that context.[151]

2. The surveillance or recording of a person in a place or context to which members of the public do not have access, and in which an individual might reasonably believe he or she is free from the risk of intrusion.[152]

3. The obtaining by deception and subsequent dissemination of private photographic or video images, or recordings of a person's voice.

4. The interception and/or dissemination without lawful authority, of private communications in circumstances in which a person would neither know nor have cause to believe that their communications were being monitored.[153]

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[151] See the Australian case of Giller v. Procopets [2004] VSC 113, 17 April 2004, where the Plaintiff sought damages against the Defendant by showing a video of the Plaintiff and Defendant engaging in sexual activities.

[152] The best example, of course, being the facts giving rise to the decision in Kaye v. Robertson [1992] FSR 62.

[153] Kennedy and Arnold v. Ireland [1987] IR 587; Halford v. United Kingdom 25 June 1997.

5. The dissemination of sensitive personal information of an individual without their consent, such as information relating to a person's private medical history or information in evidently private documents such as diaries or letters.

6. The use without a person's consent of their name, likeness or voice for commercial purposes.[154]

7. Recording or photographing of persons of diminished capacity, including children, in circumstances or contexts in which they might reasonably believe that they are immune from public view.

8. Watching, besetting, and harassing of individuals.[155]

5.05. The range of penalties to be applied to such behaviour can also be shortly stated, and has tended to focus upon criminal sanction, damages (including in appropriate circumstances exemplary and punitive damages), and account of profits.

[154] A good example is afforded by the Circuit Court decision in Murray v. Falcon Holidays Irish Times 8 April 2004 and 7 May 2005 where the Plaintiff (unsuccessfully) sued when a photograph taken of her while on holidays was used by the Defendants in a promotional brochure. The decision is very difficult to reconcile with the conclusions of the European Court of Human Rights in Von Hannover.

[155] X v. Flynn and others Unreported High Court 19 May 1994. The notable facts of DPP v. Ronayne afford an example. There, an individual who threatened to distribute explicit photographs of a former partner was found guilty of harassment by a jury, see Irish Times 23 January 2004.

6 SECTION SIX - THE ARGUMENTS FOR AND AGAINST THE CREATION OF A DEDICATED TORT OF PRIVACY

6.01. The question of whether or not a distinct cause of action in respect of invasions of privacy should be created by legislation, has occasioned considerable debate both in the academic commentaries, and in advisory bodies in other jurisdictions. The Group having regard to such debates and to its terms of reference examined the arguments both for and against the creation of a tort of privacy by legislation.

A. The arguments against legislative intervention:

6.02. The contention that such a dedicated cause of action should not be introduced by legislation can be referenced to the following considerations:

(i) the various statutory provisions, common law causes of action considered above and the remedies afforded by the Constitution, combine to create a level of protection for the essential interests reflected in the concept of privacy which is adequate. It is to be expected that the Courts will, as they have done in England, utilise established legal remedies to give effect to the developments in the European Court of Human Rights jurisprudence. The introduction of a statutory cause of action, it might be said, will only serve to complicate the task which the Courts have to date adequately performed, to encourage speculative or frivolous litigation and to impose a chilling effect on investigative reporting and inquiry;

(ii) the flexibility required to fashion a remedy which is effective and responsive to developing needs, is best left with the Courts, who are well equipped to develop the law as required. There is no evidence that they have failed to respond to such need as may exist for remedies in the area of personal privacy;

(iii) it is not possible to define a cause of action to protect personal privacy which will both adequately protect the interests referenced above, and at the same time allow citizens who might be subject to such a claim to predict in advance whether their conduct is lawful or unlawful. If it is not possible to do this by statute, then the Courts are best left to develop the remedies on a case by case basis;

(iv) the facilitating of such a cause of action would inhibit proper investigative reporting and the Press in the dissemination of information about persons with consequent implications for the freedom of the press;

(v) there is no demonstrated need for privacy legislation; the media in Ireland have not generally violated individual privacy in a manner which suggests the need for legislative intervention and, insofar as regulation of the media is required in this regard, this is best achieved through self-regulation.

B. The arguments in favour of a tort of privacy:

6.03. While there may exist persuasive arguments in favour of the introduction of a tort of privacy, the Group is conscious that these arguments suffer from the difficulty that in Ireland, at present, the overwhelming probability is that the Constitution does afford a cause of action to provide protection for infringements of privacy. If that assumption is incorrect, a cause of action is very probably required, not least of all because of the State's obligations pursuant to the European Convention on Human Rights.

6.04. If the assumption, that the Constitution does afford a cause of action to provide protection for infringements of privacy, is correct, the net question that presents itself is whether it is more desirable to have that cause of action specifically identified in legislation, or whether the protection of the citizen's interests are better served by allowing the Courts to develop the constitutional cause of action as required. In

concluding that legislation is indeed desirable, the Group took into account the following considerations.

(i) In principle, the primary function in the identification of causes of action which are to be enjoyed by citizens falls upon the legislature, not upon the Courts. The primary source of regulation of the interaction between citizens and the State, and between citizens and other citizens is legislation; judicially recognised causes of action to give effect to constitutional guarantees are properly viewed as a default mechanism, rather than as a primary or free standing regime of remedies. They only arise where the legislature has failed to act, and where the legislature has acted to provide a cause of action that addresses a constitutional guarantee, the effect appears to be to extinguish any free-standing cause of action.

(ii) It is not desirable that persons who may wish to have recourse to the law to vindicate their constitutional rights, should have to do so against an uncertain legal landscape. Insofar as the law presently affords a protection for the privacy rights of individuals, and insofar as it affords a cause of action for interference with those rights, it is infected with undesirable uncertainty. There has been no case in which the High Court or Supreme Court has ever awarded damages against a private person based upon the interference with the privacy rights of another. While, as observed earlier in this Report, there have been cases in which damages have been awarded against the State, the precise contours of the cause of action (where only private individuals are involved) are unclear. It is not apparent exactly what conduct will trigger such a cause of action, the level of intention required to activate the tort is unclear, there is no guidance as to what factors will be taken into account in determining whether what might otherwise be an interference with privacy rights, should be exempt from the tort.

(iii) This leads to the third point of importance. Clarity in the law is necessary not merely to allow citizens decide whether they have or have not been victims of an illegality, but also to enable persons who

know in advance of any course of conduct, whether they will be interfering with another's entitlements and exposing themselves to civil liability. It is, for example, reasonable to assume that the exposure of information about a person which discloses an iniquity in which there is a legitimate public interest, will not afford a cause of action. It is also reasonable to assume that the Courts will conduct a calculation in this regard by reference to a proportionality test, balancing the public interest in disclosure with the right of the citizen to the protection of his private information. Presumably, the application of that proportionality test will take account of the extent to which a Plaintiff contributed to the disclosure of information about him or her both specifically (in relation to the particular information) and generally (by reason of his or her position or public profile). However, there is no reliable or authoritative statement of these issues. The position was well explained by the Law Reform Commission in its Report, as follows: [156]

Although … the Constitution as interpreted by the Supreme Court recognises a right of privacy, the content and boundaries of that right remain unclear and in the absence of legislation are dependent for their future development on the fortunes of case law. Among other things, case law depends to a considerable extent on the involvement of persons who can afford to bring (or defend) cases. This cannot meet the immediate need for a clear statement of the rights and obligations of citizens as a whole in circumstances where, in our view, the right of privacy is under an actual and present threat.

(iv) Again following from this, the encapsulation of a statutory cause of action for breach of privacy will allow the legislature to calibrate the tort in a manner that protects the citizen's rights, while at the same time accommodating countervailing considerations. For example, and as elaborated upon in the next section of this Report, we believe that there are strong arguments for limiting a tort of privacy to conduct which is deliberate and intentional. We think that there are compelling arguments in favour of introducing a very short limitation period for

[156] LRC 57-1998 paragraph 1.31.

such claims, thereby ensuring that those involved in the distribution of information can know rapidly whether it is alleged that their conduct in particular respects is unlawful. We also feel that it should be possible for persons to litigate issues relating to their personal privacy without having to disclose their private affairs in open Court. Clearly, it is also important to carefully define and delimit the specific considerations to which the Courts will have regard in determining what otherwise might be an infringement of privacy, is justified. The only reliable way of ensuring that these factors are reflected in the cause of action for violation of privacy, is to provide for them in legislation. We consider these issues further in the Section Seven of this Report.

(v) The Group fully acknowledges the force to the often articulated claim that the courts should be allowed to "organically" develop breach of privacy as a cause of action. This undoubtedly facilitates the emergence of a cause of action which is responsive to developing social or technological requirements. This is, indeed, the approach that has been taken in England and Wales. However, this approach suffers from a number of defects. Although the House of Lords recognised the existence of a cause of action of sorts for breach of privacy in Campbell v MGN, this recognition has only come following a long line of cases dating back over a number of decades. Even then, what has been recognised by the UK Courts is not necessarily an explicit cause of action for breach of privacy, but rather a variant or adaptation of the pre-existing equitable right of confidentiality interpreted in the light of the ECHR. In the UK, the courts have attempted to cover the burgeoning development of privacy rights through an application of common law and equitable remedies that were never intended to address such rights. Undoubtedly, further caselaw will lead to the further judicial analysis of the definition and bases of this cause of action. However, reading and comprehending the extensive caselaw that sets out the English right to privacy is a task that, simply by its length, will challenge even an experienced lawyer. And, this is a task that will be far beyond the capabilities of the average layman. Setting

out a statutory cause of action for breach of privacy would clarify the existing law and ensure that it could be easily understood by all.

Further, it may well be said that the caselaw has failed to keep pace with the constant and continuing development of new technologies. The best possible way of countering the harm caused by misuse of technology to invade privacy is to provide a general remedy for that misuse, in the form of a statutorily created cause of action for breach of privacy. Sectoral legislation dealing with the different and myriad forms of abuse of technology cannot be constantly renewed by the legislature to keep up with advances in the technology. But a general remedy with a statutory base, which can be developed by the courts through caselaw where the need arises, will provide protection to the citizen.

(vi) Irish law at present does not safeguard privacy in a methodically harmonised way. The protections in Irish law for the different aspects of privacy is a miscellaneous patchwork of measures. These existing laws have failed to keep pace with new technologies. Even if laws could be passed to cater for each new form of invasion of privacy enabled by new technology on a sectoral basis, advancement in technology would outstrip such laws.

(vii) There is a risk that the failure to provide a clear statutory cause of action for infringement of privacy interests, places the State in breach of Article 8 of the European Convention on Human Rights, for the reasons discussed in Section Three of this Report.

(viii) Arguments noting the absence of any need for privacy regulation by reference to proven media responsibility (even if factually well placed) do not in truth resolve the issue of whether legislation to provide for a cause of action of the nature suggested should be introduced. Even if a satisfactory code of behaviour amongst media outlets could be agreed and implemented, this does not address infringements of privacy by other bodies not party to such codes, nor will it necessarily provide citizens with the established remedies of damages or

injunctions that are generally available where a violation of their constitutional rights occurs, or is threatened.

(ix) While the importance of the pursuit of legitimate reporting and journalism, and the public interest in the dissemination of certain types of information, are clearly established, these interests in and of themselves do not provide a basis for not introducing a privacy guarantee. What they do mandate is the introduction of qualifications on any such cause of action that reflect these entitlements. Once again, this is most reliably achieved through legislation.

(x) While acknowledging the force to the complaint that a privacy guarantee cannot be satisfactorily drafted in a manner that both accommodates the various interests inherent in the concept, while at the same time affording certainty to those liable to be sued for such infringements, the Group considers that, on balance, this does not provide a basis in itself for not introducing legislation providing for the tort of privacy. While it may not be possible to comprehensively define the constituents of privacy in legislation, there is at present a probable cause of action based upon a violation of privacy (generally so termed) and legislation provides the opportunity to provide some indication of the scope of that tort, as well as to provide for defences and limitations upon it. Thus while privacy may not be amenable to a legislative definition which is comprehensive and complete, legislation should at least afford more definite guidance than is presently available. The essential constituents of a privacy claim – the reasonable expectation entertained by a person that they will not be intruded upon nor information of a private nature about them disclosed without their consent, may elude comprehensive abstract formulation but in the greater number of cases, certainly that have come before the Courts, it has not been difficult for reasonable persons to identify a violation of such interests, when it happens.

C. Conclusion of the Group:

6.05. It is the view of the Group that the considerations outlined in Section Six of this Report supporting a cause of action through the introduction of a tort of privacy, outweigh those against it. Ultimately, it is a critical constitutional duty of the Oireachtas to legislate for the protection of the constitutional rights of the citizen. The Courts have now made it clear that one of the constitutional rights protected by Bunreacht na hEireann, is the right to privacy. Yet it is a constitutional right which is unsupported by any clear and comprehensive legislative protection. If the citizens of the State enjoy (as they do) a constitutional right to privacy, they are entitled to expect that the legislature will provide them with a clear mechanism for enforcing that right; it is not satisfactory that they should have to await the happenstance of case law or judicial determination before they can do so.

6.06. The Group does not believe that uncertainty in relation to definitions provides a justification for taking no steps to enshrine in statute a clear remedy for violation of the constitutional right to which we have referred. Not merely, for the reason to which we have alluded, will such a cause of action sharpen, the law as it presently stands, but the proposition that the State should abdicate the responsibility to legislate in relation to such interests merely because of unproven difficulties of interpretation, seems difficult to accept.

7. SECTION SEVEN – STATUTORY DEFINITION AND LIMITATIONS

7.01. In line with the Group's conclusion, following examination of all of the factors involved that a tort of privacy be introduced by legislation, it has prepared draft Heads of a Privacy Bill which it believes meets the requirements of a statutory cause of action to protect personal privacy. These are attached at Appendix I. These draft Heads are, of course, provisional and indicative, and are tendered by way of guidance alone. They do not purport to be legislative provisions in themselves and will require to be developed by Parliamentary Counsel.

In the course of this section of the Report, we explain the principal features of such proposed legislation and the rationale and considerations behind it.

A. Rationale and difficulties with the law at present

7.02. In Section Six, compelling arguments against the introduction of a cause of action facilitating private law remedies for violation of personal privacy were set out. Those arguments essentially revolve around the uncertain content of privacy, and the constraints upon personal and media freedom that the introduction of such a cause of action might entail. However, it is the view of the Group that these arguments are undermined in Ireland because of the existence of a cause of action at present derived from the Constitution which is, itself, ill defined. The introduction of a statutory cause of action affords an opportunity to remove some of those uncertainties and introduce some clarity in the law, while at the same time regulating the cause of action having regard to the various interests that will weigh against the individual right to privacy in certain circumstances.

7.03. In this regard, it is important to underline the relationship between legislation, and the causes of action derived by the Courts from the Constitution. While, as previously observed, the precise parameters of the constitutional cause of action in Irish law remain underdeveloped in

a number of important respects, the better view is that the right to claim damages or indeed other relief such as injunctive or declaratory remedies consequent upon a violation of constitutional rights is a default mechanism. Thus, '*[t]he implementation of … constitutional rights is primarily a matter for the State, and the courts are entitled to intervene only where there has been a failure to implement or, where the implementation relied upon is plainly inadequate to effectuate the constitutional guarantee in question'*.[157]

7.04. At present, of course, there is no unified cause of action for violation of privacy interests in Ireland, and having regard to the constitutional status of the right of personal privacy, the obligation of the Courts to intervene so as to facilitate such a claim, seems clear. By introducing a specific cause of action, a Plaintiff will be constrained to invoke that cause of action; provided the restrictions imposed upon the right are proportionate to specific objectives, and provided that the legislation does not so restrict the right to a point where the remedy is *plainly inadequate* or *ineffective*, the legislation should present the sole remedy. For this reason**,** the Group would envisage the proposed legislation as affording the sole mechanism for the recovery of damages for violation of privacy interests for persons who may avail of it.

B. Principal elements of proposed legislation:

7.05. It is in the light of the foregoing considerations that the Group introduces what it considers might be the principal components of the proposed legislation set out in Appendix I. These are as follows:

[157] Per Henchy J. in Hanrahan v. Merck Sharpe and Dohme [1988] ILRM 629 at 636. This is the analysis adopted by the Supreme Court in McDonnell v. Ireland [1998] 1 IR 134, and see especially the judgment of Keane J. (as he then was) at page 158.

(i) The cause of action:

(1) It is a tort, actionable without proof of damage, for a person wilfully and without lawful authority or reasonable excuse to violate the privacy of another person.

(2) It is a tort, actionable without proof of damage, for a person wilfully and without lawful authority or reasonable excuse, to harass another person as provided for in Head 5.

(3) The cause of action provided for by this section may not be availed of by a body corporate.

7.06. The cause of action so defined has a number of significant components. First, we have determined to limit the scope of the cause of action to natural persons, and to exclude from the scope of the claim bodies corporate. While, undoubtedly, bodies corporate enjoy rights of confidence and, in the broadest of senses, privacy in connection with their affairs, the considerations which lead us to conclude that legislation is required to protect privacy derive from the need for a claim to protect *personal* privacy as that is generally understood. The extension of the cause of action to bodies corporate would present the prospect that a cause of action intended to protect the autonomy, dignity and sensibilities of individuals, would be utilised as a means of protecting commercial confidence, which is adequately protected by the law at present, and would generate the risk of the cause of action being used as a mechanism for stifling legitimate reporting by well resourced Plaintiffs. It is our view that the interests of artificial persons insofar as they present issues relating to privacy, can be adequately addressed via the law on breach of commercial confidence.

7.07. For similar reasons, we have adopted the view that a right of action for violation of privacy or harassment should be extinguished by the death of the person whose privacy is alleged to have been violated or who is

alleged to have been harassed. This is more likely than not, the law at present,[158] but is nonetheless expressly provided for in Head 12.

7.08. Second, we believe it important to ensure that the cause of action is triggered only where there has been a deliberate violation of personal privacy. There is very considerable uncertainty as to whether the cause of action for violation of constitutional rights generally extends to negligent acts and/or whether in crafting such a claim in the specific context of privacy, the Courts would determine that the legitimate countervailing factors operative in the sphere of personal privacy violations justify so restricting the cause of action. However, we see no reason of policy which would require the extension of a right of action for violation of privacy interests to include negligent or inadvertent actions.

7.09. Third, the cause of action is operative without proof of special damage. This is clearly a necessary feature of a cause of action which arises where there will frequently, if not usually, be a lack of clear provable loss following a violation and in a context where the legislation is directed towards the vindication of a constitutional right. This probably represents the legal position at present,[159] although this is not entirely clear.[160]

7.10. Fourth, the phrase "*without lawful authority or reasonable excuse*" is included with a view to accommodating the various defences identified later in the draft Heads of the Bill, while at the same time facilitating some further legitimate basis for infringement in the particular circumstances of a given case. A formulation of this kind is also common in privacy legislation ("without claim of legal right" is another formulation). Instances of lawful authority for a violation of privacy are contained in Heads 6 and 7 discussed below.

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158 Murray v. Commission to Inquire into Child Abuse [2004] 2 IR 222.
159 Kearney v. Minister for Justice [1986] IR 116
160 McMahon and Binchy Irish Law of Torts (3rd Ed.) paras. 1.61-1.65.

7.11. Finally, we have recommended the introduction of a specific cause of action operative where a person is harassed. This is defined in Head 5, as follows:

(1) Provide that for the purposes of Head 2 there is harassment where any person by any means, including by use of any communicating device, harasses another by persistently following, watching, pestering, besetting or communicating with him or her.

(2) For the purposes of subhead (1) a person harasses another where-

(i) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

(ii) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

These definitions are taken from the definition of "Harassment" in the Non-Fatal Offences against the Person Act 1997, which, *inter alia*, created an offence of harassment. The Law Reform Commission also proposed to use this definition in their proposed offence of harassment. It seems sensible that, a criminal offence having already been established in these terms, persons who are the subject of conduct coming within these terms are in a position to litigate by way of private action, the same conduct. Unlike the definition of privacy, we propose that harassment be exhaustively defined.

(ii) *The Problem of Definition:*

7.12. The settling of a workable definition which both meets the requirements we have identified, will enable the Courts to operate flexibly the remedy and at the same time not operate in an unduly uncertain manner, is clearly the most challenging aspect of the preparation of legislation of

the nature in issue. It appears to us that the best way of achieving these objectives is a provision which utilises the general description privacy while at the same time specifically identifying actions which will give rise to a claim. These, however, comprise a non-exhaustive list of invasions of privacy. Having regard to the fact, as already explained above, that the term privacy is one that both appears in the Statute Book already, and which is familiar within constitutional jurisprudence and the case law of the European Court of Human Rights, we do not believe that the proper interpretation of this term will ultimately introduce unnecessary uncertainty.

7.13. We have sought to achieve this by two separate provisions in the draft legislation. The first is in Head 3. This provides:

(1) For the purposes of this Act the nature and degree of privacy to which an individual is reasonably entitled to expect is that which is reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public morality and the common good.

(2) The court in determining whether an act by, or conduct of, a person constitutes a violation of privacy of another person or harassment of another person under this Act, shall have regard to the nature of the act or the conduct allegedly constituting the violation or harassment, its incidence and all the relevant circumstances, including

- *the place where such alleged violation or harassment occurred;*
- *the object and occasion of such alleged violation or harassment;*
- *the status or function of the person the subject of the alleged violation or harassment;*
- *the purpose for which material, if any, obtained as a result of the alleged violation or harassment was intended to be used, including but not confined to subsequent disclosure thereof; and the use which was made of any such material shall be evidence of the purpose for which it was intended to be used.*

Subhead (1) is a statement on the right to privacy in this jurisdiction drawn from constitutional case law and from other jurisdictions, including the European Convention on Human Rights. Different phrases have been used in the Strasbourg case law as to the nature and degree of privacy to which an individual is entitled; both the terms "reasonable expectation of privacy" and "legitimate expectation of privacy" have been used. In New Zealand case law (Hosking v. Runting [2005] 1 NZLR 1) a person who sues for invasion of privacy must show a reasonable expectation of privacy and publicity that is highly offensive to the reasonable person. This followed American case law, in which jurisdiction (as we have noted above) there has been longstanding recognition of invasion of privacy torts. What is required to be established by reference to the American case law is intentional intrusion, physically or otherwise, upon the solitude or seclusion of another or his or her private affairs or concerns, if the intrusion would be highly offensive to a reasonable person. (Restatement of the Law of Torts, 2nd Edition, para 652).

7.14. The phrase used in the Head viz. " *the nature and degree of privacy to which an individual is entitled is that which is reasonable in all the circumstances*" is used in Canadian provincial legislation and has, we believe, many advantages. It is simple, it fits in with Irish jurisprudence and it is an objective test which can be tailored to the individual situation of the individual “in all the circumstances". The words referring to reasonableness of expectation were employed in the drafts prepared by the Law Reform Commission.

7.15. This draft Scheme of the Bill directs the proposed tort of violation of privacy to those incidences of invasion - see Head 4 following, but does not purport to do so exhaustively. The phrase "*having regard to the rights of others and to the requirements of public order, public morality and the common good*" reflects the decision of the High Court in the case of Cogley v. RTE, referred to earlier.

7.16. Subhead (2) offers some guidance to the courts as to the matters it might take into account when seeking to decide if a violation of privacy has occurred. This is not an exhaustive list, nor could it be. It is generally accepted that it is not possible to postulate in advance the myriad situations where a violation of privacy (or harassment for that matter) could take place and that each case will have to be decided on its own merits subject to some very general principles. The situation will change depending on the place where the alleged violation takes place (first indent) the occasion on which it took place (second indent), whether the person affected was a public person and whether he or she was performing an official function (third indent), and the destination of the end product, if any, arising from the alleged violation (fourth indent). The Law Reform Commission's Scheme include *inter alia* these examples.

7.17. The second definition appears in Head 4. This states:

Without prejudice to the generality of Head 2, a person's privacy will be violated where it is proved, on the balance of probability, that there has been

(a) surveillance of that person, irrespective of the means employed and whether or not accomplished by trespass,

(b) disclosure of the purport or substance of information or material obtained by surveillance or as a result of harassment, whether such was carried out by or on behalf of the person disclosing such information or material, or not

(c) use of the name or likeness or voice of a person for the purpose of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, the person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person, or,

(d) use of letters, diaries or other personal documents of that person,

without the consent express or implied of that person or some other person who has the lawful authority to give the consent.

7.18. This Head is intended to afford non-exhaustive guidance as to the constituents of the new tort of violation of privacy being established. Essentially it is violation of privacy by surveillance, irrespective of the means employed; by the disclosure of any material (e.g. photographs, personal information) obtained as a result of surveillance or harassment; by the use of the name or likeness of a person for commercial exploitation without that person's permission; and by the use of letters, documents or other personal documents of a person again without that person's permission. Headings (c) and (d) derive from Canadian legislation.

(iii) Defences:

7.19. The cause of action in privacy must yield in certain circumstances to competing public interests. The following specific exemptions are, in our view, required in order to render the cause of action workable, reasonable, and proportionate.

7.20. First, there should be a specific exemption in respect of actions undertaken pursuant to lawful authority. This is important, obviously, to ensure that law enforcement agencies can continue to conduct surveillance and gather information without risking civil liability.

7.21. Second, a public interest defence is necessary to ensure that the tort is not used to inhibit legitimate disclosure of wrongdoing. The Law Reform Commission in its Report on Privacy: Surveillance and the Interception of Communications identified four critical aspects of the public interest liable to be defeated by a blanket privacy tort – the public interest in the detection and prevention of crime, the exposure of

serious illegality or wrongdoing, the need to inform the public on a matter of public importance, and the need to prevent the public from being misled.

7.22. The defences which appear to us to follow in this regard, and which we believe present reasonable and proportionate responses to the cause of action are identified in two provisions of the Bill. The first is Head 6, which reads as follows:

(1) An act or conduct is not a violation of privacy in accordance with Heads 2 or 4 or harassment in accordance with Head 5 if

(a) the act or conduct was incidental to the exercise of a lawful right of defence of person or property,

(b) the act or conduct was authorised or required under the law of the State, or by a court or process of a court in the State,

(c) the act or conduct was that of

(i) a member of An Garda Síochána, acting and/or reasonably believing himself or herself to be acting in the course of his or her duty, including his or her duties in connection with the prevention or investigation of crime or of the discovery or apprehension of the perpetrators of crime, or

(ii) a public official acting and/or reasonably believing himself or herself to be acting in the course of his or her duty under the law of the State,

(d) it was that of a person engaged in newsgathering for any newspaper or broadcaster and such act or conduct was reasonable in the circumstances and was necessary for or incidental to ordinary newsgathering activities provided any disclosure of material following such act or conduct (including disclosure to which Head 4 (b) relates) was or would be of public interest or was or would be fair and

reasonable comment on a matter of public interest but the disclosure of material is not of public interest or fair and reasonable comment on a matter of public interest merely because such material is or would be newsworthy.

7.23. Subparagraph (a) is taken from Canadian legislation, and has had added to it the facility for surveillance in connection with evidence required for legal proceedings. Subparagraphs (b) and (c) are self-explanatory. The situation comprehended by (c) (ii) is where, for example, a Commission of Investigation is established or where there is an investigation being carried out by another lawful authority.

7.24. Subparagraph (d) is of course significant because it (along with Head 7(1)(a) hereinafter) provides the balance between the freedom of the press as protected by Article 10 of the ECHR and the right to privacy protected by Article 8. The first part of the provision (ending with "newsgathering activities") is taken from Canadian provincial legislation. The second part incorporates a public interest defence. The paragraph is intended to protect bona fide journalists whose acts or conduct (which may include surveillance) are reasonable in the circumstances of the particular newsgathering in question provided the public interest defence would apply to the material they gather.

7.25. The second suggested provision, Head 7, addresses the disclosure of information, and defines the circumstances in which such disclosure will not constitute an actionable wrong.

Disclosure of any matter is not a violation of privacy where

(a) there were reasonable grounds for belief that the material disclosed was of public interest or was fair and reasonable comment on a matter of public interest but the disclosure of material is not of public interest or fair and reasonable comment on a matter of public interest merely because such material is or would be newsworthy,

(b) the disclosure was made in good faith and the person making the disclosure had no reasonable grounds to believe that the material was obtained in violation of privacy or as a result of harassment,

(c) the disclosure was, under the rules of law relating to defamation, absolutely privileged,

(d) the disclosure was by a member of An Garda Síochána acting and/or reasonably believing himself or herself to be acting in the course of his or her duties including his or her duty for the prevention or investigation of crime or of the discovery or apprehension of the perpetrators of crime, or

(e) the disclosure was by a public official acting and/or reasonably believing himself or herself to be acting in the course of his or her duty under the law of the State,

(f) the disclosure constituted the processing of personal data and that such processing was permitted under the Data Protection Acts.

(2) The provisions in subsection (1) do not extend to any other act or conduct whereby the matter disclosed was obtained if such other act or conduct was itself a violation of privacy or constituted harassment.

7.26. Subparagraph (a) is the public interest defence. “fair and reasonable comment" in this Head and in Head 6(d) reflects the "fair and reasonable publication" defence in the scheme of the Defamation Bill. The latter part referring to "mere newsworthiness" is taken from the Law Reform Commission Report, and also appears in Head 6(d).

Subparagraph (b) contains a "good faith" defence, dependant upon demonstrating the reasonableness of the Defendant’s conduct.

Subparagraph (c) is a normal provision in privacy legislation. Subparagraphs (d) and (e) reflect the defences at Head 6(c).

Subparagraph (f) ensures compliance with Article 1(2) of the Data Protection Directive.

7.27. However a successful defence to an action for violation of privacy on grounds of "disclosure" will not operate to refute a claim based on a violation in relation to an "act or conduct" unless there is a defence under Head 6 to that claim.

(iv) Limitation Periods:

7.28. At present, a constitutional tort action based upon a violation of privacy can be brought within six years after the acts giving rise to the claim.[161] This, in our view, is an undesirably long limitation period in the context of a claim which, by definition, is intended to address conduct the illegality of which arises from the immediate distress and anxiety it induces. For this reason, we propose a generally operative limitation period of one year from discovery or reasonable discoverability of the wrong, with facility for the extension of that limitation period to two years at the discretion of the Court.

7.29. Furthermore, we believe that there are sound reasons for requiring a person who alleges that their privacy has been thus unlawfully violated to provide immediate notification of a claim. We propose in this regard a notification period of three months, again with the facility for this to be dispensed with. We have included provisions to this effect in Head 10.

[161] Section 11(2) of the Statute of Limitations 1957. The Supreme Court has made it clear that an action for damages for violation of constitutional rights is captured by the provision, McDonnell v. Ireland [1998] IR 134.

(v) In Camera Hearings:

7.30. The Law Reform Commission recommended that it should be possible to have proceedings under the legislation proposed by it, heard in camera a facility which, under Irish law, most probably requires to be expressly stated in legislation.[162] While, clearly, there is a compelling public interest in the open administration of justice, it nonetheless appears to us that cases may present themselves in which the very fact of seeking relief in open Court may negate the purpose of the remedy in the first place, requiring as it might the revelation of information, the publication and dissemination of which a Plaintiff is seeking to prevent. We have drafted the provision facilitating such private hearings (Head 11) in such a manner as to make it clear that the hearing of actions in private should be exceptional and should only be permitted where necessary to preserve the privacy rights of a party to a suit. There is no reason to believe that the Courts, which have traditionally shown themselves extremely protective of the principle of open administration of justice, would apply such a facility in anything but a careful manner.

(vi) *Remedies:*

7.31. We have suggested, in Head 9, the following remedies where the cause of action suggested is made out.

In an action for violation of privacy or harassment the court may do any one or more of the following

(a) grant an injunction

(b) award damages (including exemplary or punitive damages)

(c) order 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 or harassment

[162] Re R Ltd [1989] IR 126.

(d) order 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 or harassment

(e) grant any other relief to the plaintiff that appears to the court proper in the circumstances.

These are self-explanatory. Once again, the express facility for exemplary and punitive damages, reflects the law as present.

APPENDIX I

Draft PRIVACY Bill 2006

Arrangement of Heads

Head 1	**Short Title and Definitions**
Head 2	**Cause of action for violation of privacy**
Head 3	**Definition of privacy**
Head 4	**Violation of privacy**
Head 5	**Harassment**
Head 6	**Defences**
Head 7	**Disclosure not a violation**
Head 8	**Jurisdiction of courts**
Head 9	**Remedies**
Head 10	**Limitation of action**
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Head 1 Short Title and Definitions

Provide that:

(1): This Act may be cited as the [Privacy Act 2006.]

(2): In this Act,

"disclose" means disclose to any person other than a person aggrieved or claiming to be aggrieved under this Act by such disclosure and includes broadcast, communicate, convey and publish, and cognate words shall be construed accordingly.

"harass" shall be construed in accordance with head 5 and cognate words shall be construed accordingly

"surveillance" includes aural and visual surveillance by any means including eavesdropping, watching, spying, besetting or following and whether or not accompanied by trespass and the interception or recording of communications, whether such communications are effected by electronic or other means, and, without prejudice to the generality of this definition, includes

(a) the recording by means of any electronic or technical device of a conversation where such recording is carried out by a person who is not a party to that conversation without the knowledge of a person who is such a party but with the knowledge of another person who is such a party; and

(b) the recording by means of any electronic or technical device of a conversation where such recording is carried out by a person who is a party to that conversation without the knowledge of another person who is such a party.

Head 2 Cause of action for violation of privacy

Provide that:

(1): It is a tort, actionable without proof of damage, for a person wilfully and without lawful authority or reasonable excuse to violate the privacy of another person.

(2): It is a tort, actionable without proof of damage, for a person wilfully and without lawful authority or reasonable excuse, to harass another person as provided for in Head 5.

(3): The cause of action of action provided for by this section may not be availed of by a body corporate.

Head 3 Definition of privacy

Provide that:

(1): For the purposes of this Act the nature and degree of privacy to which an individual is reasonably entitled to expect is that which is reasonable in all the circumstances having regard to the rights of others and to the requirements of public order, public morality and the common good.

(2): The court in determining whether an act by, or conduct of, a person constitutes a violation of privacy of another person or harassment of another person under this Act, shall have regard to the nature of the act or the conduct allegedly constituting the violation or harassment, its incidence and all the relevant circumstances, including

- the place where such alleged violation or harassment occurred;
- the object and occasion of such alleged violation or harassment;
- the status or function of the person the subject of the alleged violation or harassment;
- the purpose for which material, if any, obtained as a result of the alleged violation or harassment was intended to be used, including but not confined to subsequent disclosure thereof; and the use which was made of any such material shall be evidence of the purpose for which it was intended to be used.

Head 4 Violation of privacy

Provide that:

(1): Without prejudice to the generality of Head 2 that a person's privacy will be violated where it is proved, on the balance of probability, that there has been

(a) surveillance of that person, irrespective of the means employed and whether or not accomplished by trespass,

(b) disclosure of the purport or substance of information or material obtained by surveillance or as a result of harassment, whether such was carried out by or on behalf of the person disclosing such information or material, or not

(c) use of the name or likeness or voice of a person for the purpose of advertising or promoting the sale of, or any other trading in, any property or services, or for any other purposes of gain to the user if, in the course of the use, the person is identified or identifiable and the user intended to exploit the name or likeness or voice of that person, or,

(d) use of letters, diaries or other personal documents of that person,

without the consent express or implied of that person or some other person who has the lawful authority to give the consent.

Head 5 Harassment

Provide that:

(1): For the purposes of Head 2, there is harassment where any person by any means, including by use of any communicating device, harasses another by persistently following, watching, pestering, besetting or communicating with him or her.

(2): For the purposes of subhead (1) a person harasses another where-

(i) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

(ii) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

Head 6 Defences

Provide that:

(1): An act or conduct is not a violation of privacy in accordance with Heads 2 or 4 or harassment in accordance with Head 5 if

(a) the act or conduct was incidental to the exercise of a lawful right of defence of person or property,

(b) the act or conduct was authorised or required under the law of the State, or by a court or process of a court in the State,

(c) the act or conduct was that of
(i) a member of An Garda Síochána, acting and/or reasonably believing himself or herself to be acting in the course of his or her duty, including his or her duties in connection with the prevention or investigation of crime or of the discovery or apprehension of the perpetrators of crime, or
(ii) a public official acting and/or reasonably believing himself or herself to be acting in the course of his or her duty under the law of the State,

(d) it was that of a person engaged in newsgathering for any newspaper or broadcaster and such act or conduct was reasonable in the circumstances and was necessary for or incidental to ordinary newsgathering activities provided any disclosure of material following such act or conduct (including disclosure to which head 4 (2) relates) was or would be of public interest or was or would be fair and reasonable comment on a matter of public interest but the disclosure of material is not of public interest or fair and reasonable comment on a matter of public interest merely because such material is or would be newsworthy.

Head 7 Disclosure not a violation

Provide that:

(1): Disclosure of any matter is not a violation of privacy where;

(a) there were reasonable grounds for belief that the material disclosed was of public interest or was fair and reasonable comment on a matter of public interest, but the disclosure of material is not of public interest or fair and reasonable comment on a matter of public interest merely because such material is or would be newsworthy,

(b) the disclosure was made in good faith and the person making the disclosure had no reasonable grounds to believe that the material was obtained in violation of privacy or as a result of harassment,

(c) the disclosure was, under the rules of law relating to defamation, absolutely privileged,

(d) the disclosure was by a member of An Garda Síochána acting and/or reasonably believing himself or herself to be acting in the course of his or her duties including his or her duty for the prevention or investigation of crime or of the discovery or apprehension of the perpetrators of crime, or

(e) the disclosure was by a public official acting and/or reasonably believing himself or herself to be acting in the course of his or her duty under the law of the State,

(f) the disclosure constituted the processing of personal data and that such processing was permitted under the Data Protection Acts.

(2): The provisions in subsection (1) do not extend to any other act or conduct whereby the matter disclosed was obtained if such other act or conduct was itself a violation of privacy or constituted harassment.

Head 8 Jurisdiction of courts

Provide that:

(1): An action claiming damages for violation of privacy or harassment or other relief under this Act may be commenced in the High Court or in the Circuit Court.

(2): Notwithstanding the provisions contained in the Third Schedule to the Courts (Supplemental Provisions) Act 1961, as amended, the Circuit Court has jurisdiction in any action claiming damages for violation of privacy or harassment under this Act where the amount of the claim does not exceed €50,000.

Head 9 Remedies

Provide that:

In an action for violation of privacy or harassment the court may do any one or more of the following

(a) grant an injunction

(b) award damages (including exemplary or punitive damages)

(c) order 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 or harassment

(d) order 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 or harassment

(e) grant any other relief to the plaintiff that appears to the court proper in the circumstances.

Head 10 Limitation of action

Provide that:

(1): Subject to subsection (3), an action pursuant to Head 2 of this Act shall not be brought after one year from the date on which the acts alleged to constitute a violation of privacy occurred.

(2): Subject to subsection (4), an action pursuant to Head 2 of this Act shall not be brought unless the Plaintiff has, within three months of the acts alleged to constitute a violation of Head 2, notified the Defendant of his or her intention to institute an action as aforesaid.

(3): The Court may extend the period identified in subsection (1) hereof, and may permit an action to be brought within two years of the date of the acts alleged to constitute a violation of privacy as provided for therein where satisfied that there is good and sufficient reason for extending the said period.

(4): The Court may dispense with the necessity to have served a notice as provided for in subsection (2) hereof where satisfied that there was good and sufficient reason for non service of same.

Head 11 Hearing of action other than in public

Provide that:

(1): This Head is without prejudice to any power of any court under statute or otherwise in any civil or criminal proceedings to order that proceedings shall be heard otherwise than in public or providing for the anonymity of any person before the court or prohibiting the publication or broadcasting of information likely to lead members of the public to identify any person.

(2): Provide that at any stage of any civil proceedings in tort under this Act, the court on the application of any person who claims that his or her rights under this Act have been or are about to be infringed where the court considers it necessary for the purpose of either preventing such infringement or of protecting the rights of privacy of such person from the consequences of such infringement and in light of all the circumstances including in particular the public interest in the administration of justice in public, make all or any of the following orders:-

> (a) An order that the proceedings or any part of the proceedings including any interlocutory application should be heard otherwise than in public;
> (b) An order that members of the public (excluding the parties to the proceedings and bona fide members of the press) should be excluded from attendance at the hearing;
> (c) An order providing for the anonymity of any person in connection with the proceedings;
> (d) An order providing for the prohibition of the publication or broadcasting of matter likely to lead members of the public to identify any particular person in connection with the proceedings.

Head 12 Extinguishment of cause of action on death

Provide that:

A right of action for violation of privacy or harassment is extinguished by the death of the person whose privacy is alleged to have been violated or who is alleged to have been harassed.