**We need a Privacy Bill, just not this one**

By Eoin O’Dell

Last Friday, the French magazine *Closer* published topless photographs of the Duchess of Cambridge. The following day, the *Irish Daily Star* published some of those photographs.

Yesterday, a French court held that this constituted an invasion of the Duchess’s privacy, and blocked any further publication of the intimate photographs. If she were now to sue the *Star* in an Irish court, the result would be the same.

On Monday, the Minister for Justice, Alan Shatter, announced his intention to revisit a Privacy Bill which was first published in 2006, but which has been allowed to languish until now. However, the Bill is unnecessary to cover the publication of the topless photographs, as Irish law already provides a remedy here. Worse, the Bill goes too far in dealing with press invasions of privacy; and it fails to deal with many other important aspects of privacy.

Irish law already contains strong protections of privacy, which would easily cover the *Star*’s republication of the French photographs. To take only one example, the Irish courts have held that the publication by a local newspaper of a photograph of a GAA player whose shorts suffered a wardrobe malfunction constituted an invasion of his privacy. The same reasoning would plainly cover the *Star*’s publication of the photographs of the Duchess.

Moreover, many cases have held that the publication of secretly made audio and video recordings can constitute an invasion of privacy; and the same reasoning would plainly cover the surreptitious means by which the photographs of the Duchess were taken.

Of course, it is true that the Courts have also held that invasions of privacy can be justified if there is a clear public interest involved. For example, the High Court has held that the broadcast of a documentary about the failings of a nursing home was in the public interest, even though the programme included footage taken with a concealed camera. However much the public may be interested in the surreptitiously-taken photographs of the Duchess, there is plainly no similar public interest in their publication by the *Star*.

On the other hand, the High Court has also held that there was no public interest in the publication of the intimate details of an affair between a priest and a married, albeit separated, parishioner. The same reasoning would plainly cover the *Star*’s publication of the photographs of the Duchess.

For all of these reasons, it is clear that Irish law already provides a full and appropriate legal remedy to those whose privacy is unjustifiably invaded. A Privacy Bill is not necessary for this purpose.

Worse, the Privacy Bill which the Minister intends to revive, trenches greatly upon freedom of expression and legitimate investigative reporting. Indeed, the Minister himself recognised as much last March. When Senator David Norris sought to introduce a version of the 2006 Bill into the Seanad, the Minister objected, on the grounds that the 2006 Bill would “need repair” and “further work” to ensure it prevents unwarranted invasions of privacy whilst striking a proper balance with the public interest in freedom of expression.

Apart from the furore over the *Star*’s publication of the topless photographs of the Duchess of Cambridge, nothing has changed in the interim. The Bill is still as flawed now as it was last March and as it was in 2006. In particular, although the Bill provides that an act of “newsgathering” in the “public interest” does not constitute an invasion of privacy, the definition of these terms in the Bill simply states too many hurdles.

It is almost unworkably narrow, and it will be very difficult to rely upon in practice. Certainly, it is a far narrower conception of the public interest than the one used by the Court in the nursing home case.

This is not the only flaw in the Bill. It is predominantly about media invasion of privacy, and does not cover other areas where privacy protection is at least as crucial. For example, there is little or no focus on any of the other modern challenges to privacy posed by the power of the State, by the culture of private surveillance, and by the rise of the internet.

The modern State holds a great deal of information about many aspects of our daily lives. Indeed, the amounts of information which we give to the State or which the State takes from us – whether it is for reasons of tax, social welfare, education, or law enforcement – are increasing all the time.

The Data Protection Commissioner provides some reassurance that this information is properly stored and used. However, the Commissioner’s powers are limited and his office is under-resourced. A Bill serious about protecting privacy would enhance the powers of the Commissioner and increase his resources accordingly.

In fact, the Bill should go further, and transform the Commissioner’s role from one concerned solely with Data Protection to one concerned with privacy generally.

Such a Privacy Commissioner would have strong powers to protect privacy even as society succumbs to a culture of privacy surveillance. Closed-circuit television is common and spreading. But there is little proper regulation. A Bill serious about protecting privacy would ensure that the Privacy Commissioner would be able to protect the privacy of those unnecessarily caught on CCTV.

The biggest threat of all to privacy, though, is not posed by the media, or the State, or CCTV. It is posed by the internet. It is an elephant which never forgets. Everything we put online is there to be found. Increasingly, we pay for so-called “free” online services by providing private information.

The Data Protection Commissioner has some powers to regulate the uses to which such information can be put. But a Bill serious about protecting privacy would substantially enhance these powers to ensure that the Privacy Commissioner would be able to protect our privacy online.

A Privacy Bill is necessary. However, the one being proposed by the Minister is not it. It will need a lot of work if it is to protect our privacy properly.

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