TUGENDHAT AND CHRISTIE

THE LAW OF PRIVACY AND THE MEDIA

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CONTEXT AND BACKGROUND

Adam Wolanski and Victoria Shore

A. Introduction

The law of privacy has come a long way since the Human Rights Act 1998 (HRA) came into force in October 2000. Before then, the prevailing view was that there was no right to privacy at common law[1] and that it had 'so long been disregarded here that it can be recognised only by the legislature'.[2] Instead, indirect, piecemeal protection of privacy was afforded through existing causes of action where the facts **1.01**

[1] *Kaye v Robertson* [1991] FSR 62, CA; applied in *Khorasandjian v Bush* [1993] QB 727, CA.

[2] *Kaye* (n 1) 71 (Legatt LJ). Similar remarks were made by Buxton LJ in *Secretary of State for the Home Dept v Wainwright* [2001] EWCA Civ 2081, [2002] QB 1334 [94]: 'It is thus for Parliament to remove, if it thinks fit, the barrier to the recognition of a tort of breach of privacy that is at present erected by *Kaye v Robertson* and *Khorasandjian*.'

of individual cases permitted it.[3] Despite judicial dicta leaving the question open,[4] this appears to have remained the position at least until the HRA came into force.[5]

1.02 At the time of entry into force of the HRA, the House of Lords confirmed in *Wainwright v Home Office*[6] that English law does not recognize a general tort of invasion of privacy. Some gaps in the existing law could be filled by judicious development of an existing principle,[7] others only by legislation.

1.03 The HRA itself was a substantial gap-filler in that it provided (via the operation of ss 6 and 7) a statutory remedy against public authorities for breaches of Convention rights, including an infringement of rights under Article 8 of the European Convention on Human Rights (ECHR).[8] In two important cases following the implementation of the HRA the courts considered the extent to which Convention rights indirectly affected the traditional causes of action with respect to the protection of privacy between individuals: that is, whether the Act had 'horizontal effect'. By virtue of s 6(3) HRA, courts and tribunals are public authorities for the purposes of the HRA. Even in the absence of facts giving rise to a direct claim under one or more of the ECHR Articles, there is an obligation on the courts to develop the common law in conformity with the protection afforded by the ECHR. In *Campbell v MGN Ltd*, [9] the House of Lords recognized that while the HRA could not create new causes of action between individuals 'if there is a relevant cause of action, the court as a public authority must act compatibly with both parties' Convention rights'. Further, the House held in *Campbell* that where the invasion is occasioned by wrongful disclosure of personal information, 'the essence of the tort is better encapsulated now as misuse of private information'.[10] In *Douglas v Hello! Ltd*, Sedley LJ observed at [133] that subsection (4) of Article 12 HRA 'puts beyond

[3] The Court of Appeal in *Kaye* (n 1) itself contemplated that flashlight photography of an unwilling subject could in certain circumstances constitute a battery: 68 (Glidewell LJ). In *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, Laws J stated at 807 that 'the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence'.

[4] See *eg R v Khan (Sultan)* [1997] AC 558, 571 (Lord Browne-Wilkinson) and 582–83 (where Lord Nolan left open 'the important question whether the present, piecemeal protection of privacy has now developed to the extent that a more comprehensive principle can be seen to exist').

[5] On 2 October 2000. The remarks of Buxton LJ cited at n 2, although expressed to be a view of the 'present' state of the law must be read subject to his Lordship's comment at [74] that the current case was not the place in which to resolve the issue of whether the HRA is itself the legislation which arguably creates a private law right to privacy. However, in *Douglas v Hello! Ltd* [2001] QB 967, Sedley LJ observed at [111] that, even without the impact of the HRA, equity and the common law had reached a point where the courts were 'in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space'.

[6] [2003] UKHL 53, [2004] 2 AC 406. The facts of the case pre-dated entry into force of the HRA but Lord Hoffmann's remarks are of general application.

[7] *Wainwright* (n 6) [18].

[8] Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

[9] [2004] UKHL 22, [2004] 2 AC 457.

[10] *Campbell* (n 9) [14] (Lord Nicholls).

question the direct applicability' of Article 10 ECHR 'as between one private party to litigation and another—in the jargon, its horizontal effect'. At a later stage in the same case, it was explicitly recognized that confidence and misuse of private information had become separate and distinct wrongs.[11]

1.04 The position now arrived at, therefore, is that insofar as informational privacy is concerned English law has an established and rapidly developing law of privacy under which it is able to give effect to its obligations under the Convention. As this aspect of privacy is the one that most concerns the media it is the primary focus of this book.

1.05 This chapter first briefly explains the wider context in which developments in the law of privacy have taken place. Section B introduces the various common-law causes of action which have historically been used to protect privacy in English law and considers their limitations. Section C contains an account of pre-HRA protections of privacy in common law and equity, with Section D assessing the impact of the HRA on media cases involving Articles 8 and 10. Section E considers the broader statutory framework for the protection of privacy and Section F briefly considers the Media Codes. The chapter concludes in Section G by reference to the position of 'new media'.

B. Privacy Controversy and Reform

1.06 The absence of any general right to privacy in English common law or statute has been the subject of much debate over the years and, in spite of recent developments in informational privacy protection, that debate continues. From time to time the government has established specific bodies to consider whether the law in this area should be reformed by the implementation of a statutory right to privacy. For example, the question was considered in detail following the publication in 1990 of the Calcutt Report and again in 1993 after the publication of Sir David Calcutt's Review of Press Self Regulation. In the Review, Sir David concluded that the existing self-regulation regime had failed and recommended, amongst other things, that the government give further consideration to the implementation of a new tort of infringement of privacy. Some limited reforms of the Press Complaints Commission followed. The Culture Media and Sports Select Committee also published a review in 2008 which again highlighted shortcomings in the self-regulation regime, but did not recommend the introduction of a new statutory tort.

1.07 A full analysis of the various reviews and the proposals they put forward and the political impetus behind such reforms can be found in the previous editions of this work. Since publication of the last edition, these issues have come to the fore once

[11] [2007] UKHL 21, [2008] 1 AC 1 [255] (Lord Nicholls).

again thanks to the phone-hacking scandal involving the now defunct *News of the World* and other British newspapers published by News International. Employees of the newspaper were revealed to have engaged in phone hacking, police bribery, and exercising improper influence in the pursuit of publishing stories. As a result, in July 2011, Prime Minister David Cameron announced a public inquiry to investigate the culture, practices and ethics of the press chaired by Lord Justice Leveson. The Leveson Inquiry published its *Report on Part 1 of the Inquiry* on 29 November 2012.

1.08 The Inquiry and its specific recommendations are discussed in detail in Chapter 14. Despite the trenchant criticisms made in the Report of the activities of certain sectors of the media, the Inquiry was not asked to consider whether there was a need for a statutory law of privacy, and there appears to be no prospect that such legislation will be enacted in the near future. However, as a consequence of the Report a new press watchdog was established by Royal Charter on 3 November 2014, 'the Recognition Panel'. This fully independent body was incorporated to consider whether any newly-established self-regulators of the press meet the recognition criteria recommended by the Leveson Report and subsequently included within the Royal Charter. At the time of writing it seems unlikely that most UK media publishers will sign up to any regulator approved by the Panel. Instead several media organizations have stated their intention to subscribe to the new independent regulator, the Independent Press Standards Organisation (IPSO). Several of the broadsheet newspapers, including the *Financial Times, The Independent* and *The Guardian* have indicated they will not take part in IPSO. The *Financial Times* joins *The Guardian* in establishing its own independent complaints system. The decision by the press not to sign up to an approved regulator could have significant implications for those media organizations which choose not to participate in the approved regulatory scheme: under the Crime and Courts Act 2013 such organizations may be liable to pay aggravated and exemplary damages in litigation resulting from the publication of news-related material.[12]

C. Pre-HRA Protections of Privacy in Common Law and Equity

(1) Introduction

1.09 The misuse of private information action, which was first recognized in *Campbell v MGN Ltd* and *Douglas v Hello! Ltd*,[13] is the closest thing English law has to

[12] ss 39–42. Some industry lawyers have argued that these provisions are incompatible with Art 10. See *eg* <inforrm.wordpress.com/2013/03/22/briefing-note-on-exemplary-damages-and-costs-gill-phillips>.

[13] See nn 9–11, and text thereto.

a free-standing right to privacy. The decision in *Campbell* makes it clear that, despite courts' attempts to shoe-horn Convention requirements into the traditional action for breach of confidence, the traditional three-part *Coco v Clark* analysis is no longer apposite in cases where personal information is concerned. The HRA requires a different approach. Those developments are discussed in Chapter 5. The focus of this section is on those causes of action which provided piecemeal protection to the right to privacy before enactment of the HRA and which continue to provide incidental protection in areas where misuse of private information does not apply.

(2) Trespass and Wrongful Interference with Goods

1.10 Before the invention of photography and telegraphy individuals could usually control the dissemination of information about themselves by controlling access to their home and correspondence. These have always been protected by the law of trespass. The right to own property, protected in England by the tort of trespass, is so fundamental to Western traditions of human dignity that dignity is rarely referred to. But 'the common law has always recognised a man's house as his castle',[14] and the connotation of the word 'castle' speaks for itself: property in land and papers promotes autonomy.

1.11 The tort of trespass to land will provide a right of action for invasion of privacy but, as discussed at 10.47 *et seq*, the action has considerable limitations. The main limitation on the protection afforded to privacy by the tort of trespass is the requirement that there be physical interference with land or property. Observation from a neighbouring property or public place will not give rise to a cause of action; nor will observation from a reasonable height above a property. In *Bernstein v Skyviews and General Ltd*,[15] Griffiths J held that the rights of an owner in the air space above his land are restricted to such height as is necessary for the ordinary use and enjoyment of his land and that 'there is no law against taking a photograph, and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's air space into one that is a trespass'.[16]

1.12 Further, liability for trespass can only arise if the victim is the legal occupier whose property is physically interfered with.[17] And unless there is actual damage to the

[14] S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 Harvard L Rev 193, 220; *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 680; and see the *Report of the Committee on Privacy* (Cmnd 5012, 1972) (Chairman: Kenneth Younger) (Younger Report) para 289.

[15] [1978] QB 479. Baron Bernstein of Leigh objected to an offer to sell him an aerial photograph of his estate taken by the defendant without his knowledge or consent.

[16] *Bernstein* (n 15) 483.

[17] *Hickman v Maisey* [1900] 1 QB 752. The owner of papers, including the recipient of a letter, has sufficient property in it to sue for wrongful interference with goods and obtain substantial damages: *Oliver v Oliver* (1861) 142 ER 748; *Thurston v Charles* (1905) 21 TLR 659; *R v IRC, ex p Rossminster* [1980] AC 952.

land, damages are likely to be unsatisfactory unless exemplary or aggravated, and the remedy is an empty one where no injunction can be obtained.[18]

1.13 An attempt to merge the requirements of the torts of trespass to the person with those of the tort of intentional infliction of emotional harm[19] and privacy was rejected by the House of Lords in *Secretary of State for the Home Dept v Wainwright*.[20] Under the *Wilkinson v Downton* principle, a person may sue where he or she has been caused physical harm (including psychiatric injury) by a wilfully committed act or statement calculated to cause physical harm. The claimants, a mother and son, were invasively strip-searched for drugs on a prison visit in 1997 in breach of the Prison Rules. Both were humiliated and distressed and the son developed post-traumatic stress disorder. At first instance it had been held that trespass to the person, consisting of wilfully causing a person to do something to him or herself that infringed his or her right to privacy, had been committed against both claimants. In addition, trespass to the person, consisting of wilfully causing a person to do something calculated to cause him or her harm, had been committed against the second claimant (as well as a battery).

1.14 The Court of Appeal allowed the Home Office's appeal against the finding of trespass, dismissed the first claimant's claim and limited the second claimant's award to recovery for damages for battery. Lord Hoffmann later expressed complete agreement with Buxton LJ's observations in the Court of Appeal[21] that *Wilkinson v Downton* has nothing to do with trespass to the person.

(3) Nuisance

1.15 In certain circumstances an action in nuisance will lie in respect of interference with a person's enjoyment of his or her land where trespass would not. As Griffiths J said in *Bernstein v Skyviews*:[22]

> If a plaintiff were subject to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief.

The taking of a single photograph would not, however, constitute an actionable nuisance.

1.16 Persistent watching and besetting may also be a nuisance[23] as may persistent telephoning, if it amounts to a substantial and unreasonable interference with a

[18] Younger Report (n 14) para 85.

[19] Established in English law by the case of *Wilkinson v Downton* [1897] 2 QB 57. See further *Rhodes v OPO* [2015] UKSC 32, [2015] 2 WLR 1373. For further discussion of the *Wilkinson v Downton* tort, see 10.56 *et seq*.

[20] *Wainwright*, HL (n 6).

[21] *Wainwright*, CA (n 2) [67]–[72].

[22] *Bernstein* (n 15) 484.

[23] *Lyons & Sons v Wilkins* [1899] 1 Ch 255.

person's use and enjoyment of land.[24] But the scope of the protection afforded to privacy by the tort of nuisance is restricted by the fact that an action only lies at the suit of a person with a right to the land affected. Although this category includes persons in actual possession, whatever their legal right to be there, a mere licensee on the land (for example, a person using a gym or dining in a restaurant) has no right to sue.[25]

(4) Breach of Confidence

1.17 Prior to the recognition of the new cause of action for 'misuse of personal information' an action for breach of confidence was the closest in substance to an action for invasion of privacy through the disclosure of personal information.[26] The relationship between the two interests was expressly recognized in judicial dicta prior to the enactment of the HRA. For example, in *Hellewell v Chief Constable of Derbyshire*[27] Laws J stated:

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence.

1.18 Many years earlier, the leading case of *Prince Albert v Strange* was argued and decided on the basis of protecting a property right in etchings of the Queen and Prince Albert, as well as on the basis of a breach of confidence, even though the motive for the proceedings was obviously the protection of their privacy.[28] Privacy was essential to the decision whether or not to grant an injunction. Lord Cottenham said: 'In the present case, where privacy is the right invaded, the postponing of the injunction would be equivalent of denying it altogether.'[29] Lord Cottenham did not comment on the reasons for valuing privacy, but Vice-Chancellor Knight Bruce had explained why he regarded it as important. He noted that 'pain inflicted in point of

[24] It may also be an offence under the Telecommunications Act 1984, s 43(1)(b). See 1.80 and 10.07–10.20 for the effect of the Protection from Harassment Act 1997.

[25] *Hunter v Canary Wharf Ltd* [1997] UKHL 14, [1997] AC 655. For further discussion of nuisance in the context of physical privacy, see 10.60.

[26] The Younger Committee on Privacy described it as offering 'the most effective protection of privacy in the whole of our existing law': (n 14) [87]. See also, *Campbell v MGN Ltd* [2002] EWCA Civ 1373, [2003] QB 633 [70] and, in the House of Lords decision in the same case (n 9), Lord Nicholls [14], Lord Hope [125] and Lord Carswell [171]. See also the observations of the Court of Appeal in *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [2006] QB 125 [82].

[27] *Hellewell* (n 3) 807.

[28] *Prince Albert v Strange* (1849) 2 De G & Sm 652, 668–9, 695, 698; 64 ER 293, 300, 312–13; 1 H & TW 1, 12–14, 23.

[29] *Prince Albert* (n 28) 1 H & TW 1, 26; 47 ER 1312.

sentiment or imagination is not always disregarded in Courts of Justice' and gave as examples 'calumny' and 'trespass accompanied by…oppression or…affront'.[30]

1.19 The ability of the law of confidence to protect private information has been enhanced in recent years by a willingness of the courts to find that the second of the action's three requirements—that the information was 'imparted in circumstances importing an obligation of confidence'[31]—may be inferred where the information is obviously confidential. In other words where it is clear that information has the necessary quality of confidence about it (which means the first requirement is satisfied), it will be easier to conclude that a person in receipt of such information, even a third party, is bound by a duty of confidence. The limitation of the breach of confidence action is therefore that it does not cover information which is private but not obviously confidential nor information which is already in the public domain. The third requirement for an action for breach of confidence to succeed, that there must be an unauthorized use (or, on an application for an injunction, threatened use) of the information, has traditionally emphasized that the right relates to disclosure of information and not the obtaining of it. This again restricts the action's utility in the privacy domain. However, the Court of Appeal held in *Imerman v Tchenguiz* that a breach of confidence is committed when a defendant, without the authority of the claimant, 'examines, makes, retains or supplies to a third party' copies of documents whose contents are (or ought to have been) appreciated by the defendant to be confidential.[32] The significance of this change and the extent to which the traditional action for breach of confidence may still be relied on to protect privacy are discussed in Chapters 10 and 4 respectively.

(5) Defamation and Malicious Falsehood

1.20 Libel protects a person against humiliation and unjust discrimination. It protects the individual and society from the making of choices on a factual basis which is false. Privacy also protects the individual against humiliation and unjust discrimination. It protects the individual and society from the making of choices on a factual basis which is true but irrelevant. If libel is necessary to protect the reputation that a person has in the minds of *right*-thinking members of society generally, then privacy is necessary to protect the reputation a person has in the minds of *wrong*-thinking members of society.[33]

[30] *Prince Albert* (n 28) 1 H & TW 1, 26; 47 ER 1312.

[31] *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J).

[32] [2010] EWCA Civ 908, [2011] Fam 116 [69]. The case is considered controversial for its encroachment into the Hildebrand principle long-established in family law.

[33] See 2.83–2.87. Examples of discrimination, and even injury, suffered by persons about whom disclosures had been made are given in the Younger Report (n 14) paras 161–5] and 171 (a woman had her property vandalized and was subject to harassment after a newspaper reported that she practised witchcraft in private; and a county council could not arrange foster care for a child after publicity). Feldman includes honour and reputation amongst the list of interests at the core of privacy: D Feldman, 'Privacy-related Rights and Their Social Value' in P Birks (ed), *Privacy and Loyalty* (Clarendon Press 1997) 21.

1.21 The link between protection of privacy and of reputation is made by the two interests being included together in Article 12 of the Universal Declaration of Human Rights.[34] The link can also be seen from the principles which justify protection of reputation, as expressed by Lord Nicholls:

> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for . . . it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.[35]

Many of these reasons for protecting against the dissemination of false information apply equally to protection against the dissemination of true, but private, information.

1.22 As long ago as 1930 the Court of Appeal recognized that the law of defamation could provide a remedy for interests which are now more closely associated with a right to privacy. In *Tolley v JS Fry & Sons Ltd*[36] the claimant, a well-known amateur golfer, complained about a newspaper advertisement which appeared without his consent for a brand of chocolate which contained a caricature of him and a verse implying that he endorsed the product. Greer LJ said that the defendants had 'acted in a manner inconsistent with the decencies of life and in doing so they were guilty of an act for which there ought to be a legal remedy'.[37] The remedy was afforded in defamation by holding that readers would have understood Tolley to have allowed his portrait to be used for advertising purposes for gain and reward, and thereby to have engaged in conduct unworthy of his status as an amateur golfer.[38]

1.23 A similar contrivance was relied on to provide a partial remedy in *Kaye v Robertson*,[39] where the claimant complained of being photographed and

[34] See also 2.83–2.87.

[35] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201. Fleming also notes that '[p]erhaps the closest affinity to some aspects of the right of privacy is found in the law of libel. Though libel and slander are primarily concerned with reputation—an interest in relations with others—they incidentally also safeguard the individual's sense of honour and self-respect': J Fleming, *The Law of Torts* (9th edn, Thomson Reuters 1998) 664 and see generally ch 8.

[36] [1931] AC 333.

[37] [1930] 1 KB 467, CA, 478.

[38] This case was described by the Younger Committee on Privacy as 'the nearest the law of defamation ever came to protecting 'privacy' as such': (n 14) app 1, para 5. It is also an early example of the Court providing a remedy for use of a celebrity's image or likeness placing him in a false light, which is a recognized aspect of the law of privacy in the US. See further 2.40–2.46 and 3.73–3.79.

[39] *Kaye* (n 1).

interviewed by a tabloid journalist as he lay in hospital recovering from head injuries. The Court accepted that the claimant had not been fit to give informed consent to the interview or the photography. The Court of Appeal upheld an interlocutory injunction to prevent the newspaper publishing any article suggesting that the claimant had so consented, on the basis that to do so would amount to a malicious falsehood.[40] This was not, however, an effective remedy, as publication of the article went ahead without implying that the claimant had consented, which arguably only served to draw attention to the harm done.

1.24 *Kaye v Robertson*[41] is a case in which more than one privacy right was involved. There was the intrusion into the hospital, and there was a publication of information. To grant a remedy for the former would have required development of the laws of trespass or harassment. The publication of information about the claimant was only partly remedied by reliance on the tort of malicious falsehood and could, perhaps, have been better protected by recognition that the law of confidentiality did not require personal information to have been imparted to the defendant.

1.25 Reviewing the development of privacy law in *Douglas v Hello! Ltd*, the Court of Appeal described *Kaye v Robertson* as a case in which the potential for the law of confidence to protect private information that was not recorded in a document was not appreciated.[42] The analysis of the modern law in *Douglas*[43] lends strong support to the view which others have expressed: if the facts of *Kaye v Robertson* were to recur today, relief would be granted in the law of confidence, or misuse of private information, and the relief would be more extensive and effective than that which was granted in *Kaye*.[44]

1.26 It is now firmly established that Article 8 protects the right to reputation, as part of the right to respect for private life.[45] However, there are two major limitations in

[40] The requirements for which are that the defendant maliciously published false words about the claimant calculated to cause him pecuniary damage. In respect of damage the Court said in *Kaye* (n 1) 68: 'Mr Kaye . . . has a potentially valuable right to sell the story of his accident and his recovery when he is fit enough to tell it. If the defendants are able to publish the article they proposed, or anything like it, the value of this right would in my view be seriously lessened . . .' Thus, although the case is notorious for asserting the absence of a right to privacy in English law, the Court recognized that control of publicity is a right which the law should protect.

[41] *Kaye* (n 1).

[42] *Douglas* (n 26) [62].

[43] *Douglas* (n 26) [118].

[44] Note, however, that absent publication the invasion suffered in *Kaye* (n 1) was of the type experienced in *Wainwright* (n 6), namely a physical interference with private space and dignity and, as it was occasioned by a news organization and not a public authority, there would be no direct action under the HRA.

[45] See *Radio France v France* (2005) 40 EHRR 706; *Cumpana v Romania* (2005) 41 EHRR 41; *Pfeifer v Austria* (2007) 48 EHRR 175; *Petrina v Romania* App no 78060/01 (ECtHR, 14 October 2008); *Karakó v Hungary* (2011) 52 EHRR 36; *Europapress Holding DOO v Croatia* App no 25333/06 (ECtHR, 22 October 2009), [2010] EMLR 10; *Petrenco v Moldova* App no 20928/05 (ECtHR, 20 March 2010), [2011] EMLR 5; *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] QB 972; *Axel Springer AG v Germany* (2012) 55 EHRR 6; *Re Guardian News & Media Ltd, HM Treasury v Ahmed* [2010] UKSC 1, [2010] 2 AC 697.

the protection of privacy afforded by the tort of defamation.[46] The first is that justification is a complete defence, so that the publication of true but private facts about an individual is not actionable. In *Charleston v News Group Newspapers Ltd*,[47] for example, an unsuccessful attempt was made to use defamation to protect a portrait image after the defendants published, without consent, a false image of the plaintiffs' faces on a pornographic image of other people's bodies. The claim failed because the text made clear that the image was false.[48]

1.27 The second is that the words complained of must be defamatory of the claimant, so that publication of them is likely to lower his or her reputation in the estimation of right-thinking members of society.[49] This is not always the case with publication of private personal information, though in some circumstances the effect might be to make others shun and avoid the claimant.[50] These issues are explored in further detail in Chapter 8.

(6) Privilege of Witnesses

1.28 At common law nobody can be compelled to give any information except as a witness in court. Even witnesses are protected by privileges which are regarded as protecting privacy. Lord Mustill explained the motives underpinning various forms of the right to silence, including the privilege against self-incrimination, to become embedded in English law, emphasizing the link between privacy and liberty, in the sense of autonomy:

> The first is a simple reflection of the common view that one person should so far as possible be entitled to tell another person to mind his own business. All civilised states recognise this assertion of personal liberty and privacy. Equally, . . . few would dispute that some curtailment of liberty is indispensable to the stability of society; and indeed in the United Kingdom today our lives are permeated by enforceable duties to provide information on demand, created by Parliament and tolerated by the majority, albeit in some cases with reluctance. Secondly, there is a long history of reaction against abuses of judicial interrogation. The Star Chamber and the Council had the power to administer the oath and to punish recusants;[51]

[46] See ch 8 for further discussion of privacy and false facts.

[47] [1995] UKHL 6, [1995] 2 AC 65.

[48] *Charleston* (n 47) 74.

[49] In addition, since the enactment of the Defamation Act 2013, an imputation is only defamatory if it has caused, or is likely to cause, serious harm to the reputation of the claimant, an additional hurdle

[50] This latter element is not required in an action for malicious falsehood. In neither cause of action will the court grant an injunction unless satisfied that the claimant will succeed at trial: *Bonnard v Perryman* [1891] 2 Ch 269, CA; *William Coulson and Sons v James Coulson and Co* [1887] 3 TLR 46; *Herbage v Times Newspapers Ltd* (CA, 30 April 1981). Thus, although the Court of Appeal in *Kaye* (n 1) also held that if the proposed publication was arguably libellous, that was not enough. The Court concluded, however, that a malicious falsehood would inevitably occur if the original publication had gone ahead.

[51] For the development of the right to silence from the struggles for freedom, including freedom of thought, conscience, and religion in the sixteenth and seventeenth centuries see *Bishopsgate Investment v Maxwell* [1993] Ch 1, 17.

> and literally to press confessions out of those under interrogation . . . although the misuse of judicial interrogation is now only a distant history, it seems to have left its mark on public perceptions of the entire subject: and indeed not just public perceptions, for in the recent past there have been several authoritative and eloquent judicial reminders of the abuses of our former inquisitorial system and of the need to guard against their revival.[52]

1.29 A separate protection of witnesses was to be found in the rule that husband and wife were not competent to give evidence against each other. One of the considerations supporting that rule was recognized to be 'to guard the security and confidence of private life, even at the risk of an occasional failure of justice'.[53] This rule was an important influence upon the development in *Duchess of Argyll v Duke of Argyll* of the law of confidentiality in relation to communications between spouses.[54] This is an example of the transfer of a policy of public law into the development of a private law cause of action.[55]

(7) Privacy and Necessity

1.30 Other circumstances in which a right of control over the dissemination of information has been given by the common law for reasons of necessity include matters relating to a person's health. In a case involving infectious disease, Rose J expressed the principle as follows:

> Confidentiality is of paramount importance to such patients, including doctors . . . If it is breached, or if the patients have grounds for believing that it may be or has been breached they will be reluctant to come forward for and to continue with treatment . . . If the actual or apprehended breach is to the press that reluctance is likely to be very great. If treatment is not provided or continued the individual will be deprived of its benefit and the public are likely to suffer from an increase in the rate of the spread of the disease. The preservation of confidentiality is therefore in the public interest.[56]

1.31 Legal professional privilege is similarly justified. Lord Taylor CJ summarized it:

> The principle . . . is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.[57]

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[52] *R v Director of Serious Fraud Office, ex p Smith* [1993] 1 AC 1, 31.

[53] *Rumpling v DPP* [1964] AC 814, HL, 841, 857. See also *Russell v Russell* [1924] AC 687, 725 for the justification of this rule in family proceedings on grounds of decency and 'invasion of the privacy of the marriage chamber'.

[54] *Argyll (Duchess) v Argyll (Duke)* [1967] Ch 302, 322–30.

[55] 'For the need to preserve confidential communications between husband and wife to be a reason for a rule of the law necessarily establishes to my mind that the preservation of those communications inviolate is an objective of public policy': *Argyll* (n 54) 324.

[56] *X v Y* [1988] 2 All ER 648, 656.

[57] *R v Derby Magistrates' Court, ex p B* [1996] AC 487, 507.

1.32 The necessity principle is applied to disclosure of the correspondence between informants and the police and other bodies for the purpose of preventing or exposing crime and other wrongdoing: 'Unless this immunity exists many persons, reputable or disreputable, would be discouraged from communicating all they know.'[58] It is also extended, although with greater qualification, to a journalist's sources and other materials, for the purpose of promoting freedom of expression. Bingham LJ has adopted the description a 'gross invasion of privacy' for orders compelling a journalist to disclose documents.[59] Judge LJ has emphasized the link between privacy rights of journalists (in their communications with their sources) and their rights of freedom of expression and later explained:

> Legal proceedings directed towards the seizure of the working papers of an individual journalist, or the premises of the newspaper or television programme publishing his or her reports, or the threat of such proceedings, tends to inhibit discussion. When a genuine investigation into possibly corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence is normally needed to demonstrate that the public interest would be served by such proceedings. Otherwise, to the public disadvantage, legitimate inquiry and discussion and 'the safety valve of effective investigative journalism'—the phrase used in a different context by Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms*[60]—would be discouraged, perhaps stifled.[61]

1.33 The necessity principle is also implicit in the rule (applied mainly in the public law context) that information given for one purpose should not be used for another purpose.[62] Prior to entry into force of the Human Rights Act 1998, the adequacy of public law protection of private information was questioned, because the court in judicial review proceedings did not start with a presumption that an interference with Article 8(1) is illegitimate and in need of powerful justification.[63] With the development of new technology it came to be appreciated that the necessity principle should be extended to data stored by computer.[64] Abuse of personal data has commonly been practised in totalitarian states. Data protection gives to individuals a statutory right to control the circulation of data about themselves.[65] As

[58] *R v Lewes Justices, ex p Home Secretary* [1973] AC 388, 413; *D v NSPCC* [1978] AC 171, 219.

[59] *R v Lewes Crown Court, ex p Hill* (1991) 93 Cr App R 60, 66–7.

[60] [2000] 2 AC 115, 131.

[61] *Bright* (n 14) 681. For other examples of privacy promoting freedom of expression see Feldman, 'Privacy-related Rights and Their Social Value' (n 33) 24 and E Berendt, 'Privacy and freedom of speech' in A Kenyon and A Richardson (eds), *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press 2006) 11.

[62] *R v Chief Constable of North Wales Police, ex p Thorpe* [1999] QB 396; *Elliott v Chief Constable of Wiltshire* (1996) TLR 693; *Harman v Secretary of State for the Home Dept* [1983] AC 280, 308 (where Lord Keith said: 'Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs'), 311 (Lord Scarman refers to 'the individual citizen's right to privacy'), and 323 (Lord Roskill); *Marcel v Commissioner of Police for the Metropolis* [1992] Ch 225, CA, 262.

[63] D Feldman, 'Information and Privacy' in J Beatson and Y Cripps (ed), *Freedom of Information and Freedom of Expression* (Oxford University Press 2000) 322.

[64] The Younger Report (n 14) paras 54 and 619, and see generally ch 7.

[65] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement

such it has been seen as a right recognized in the ECHR at Article 8 and in the International Covenant on Civil and Political Rights (ICCPR) at Article 17. In this context the right has been described as 'a fundamental democratic ideal'.[66]

(8) The Family Court's Jurisdiction in Respect of Children and Vulnerable Adults

1.34 The Family Court has long exercised power to restrict publicity about children who are under its protective jurisdiction. Following cases such as *Bensaid v UK*[67] the Family Court has also shown itself prepared to make orders protecting the private and family lives of vulnerable relatives of such children. In *A Local Authority v A*[68] an application for reporting restrictions was made by a mother for an order preventing reports of her arrest on suspicion of murdering two of her children. While the application was rejected, the Court accepted it had jurisdiction to make such an order on the basis not just of the potentially damaging effects of such reports on the surviving child, but also because of the vulnerable state of the mother.

1.35 The House of Lords has confirmed that in cases where a child's private life is concerned this power now extends in principle to making orders restricting the reporting of criminal proceedings in open court which might harm the child, even if the child is not a party or a witness, or the subject of the publication.[69] In *In re S* the House of Lords stated that such orders would be exceptional in practice. However, such orders have been made. [70]

(9) Criminal Law

1.36 Criminal offences relating to intrusion into physical privacy are discussed in Chapter 10. While the vast majority of criminal offences relevant to privacy are now prescribed by statute, a common law offence of relevance to the media is illustrated by *Attorney General's Reference (No 5 of 2002)*.[71] A police officer was prosecuted for conspiracy to commit the common-law offence of misconduct in public office, by supplying confidential information to persons not entitled to receive it, who were alleged to include journalists.[72] The offence featured in many prosecutions of

of such data [1995] OJ L281/31, Recital (10); *Thorpe* (n 62) 429 ('although the convictions of the applicants had been in the public domain, the police, as a public authority, could only publish that information if it was in the public interest to do so'); UK *Report of the Committee on Data Protection* (Cmnd 7341, 1978) (Chairman: Sir Norman Lindop) para 2.04.

[66] R Wacks, 'Privacy in Cyberspace: Personal Information, Free Speech, and the Internet' in Birks (ed) (n 33) 109.

[67] [2001] 33 EHRR 10.

[68] [2011] EWHC 1764 (Fam), [2012] 1 FLR 239.

[69] *In Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593.

[70] See *eg A Local Authority v W, L, W, T and R (by the Children's Guardian)* [2005] EWHC 1564 (Fam), [2006] 1 FLR 1.

[71] [2004] UKHL 40, [2005] 1 AC 167.

[72] In certain of the criminal trials arising out of phone hacking at the *News of the World* the defendants were charged with conspiracy offences under the Criminal Law Act 1977.

journalists in the second decade of the twenty-first century, where the allegation was that public officials had been bribed to misuse the powers of their office.

D. The Impact of the Human Rights Act 1998

1.37 The enactment of the HRA was probably the most significant development in the history of privacy protection in England and Wales. The HRA came into force in the United Kingdom in October 2000. Its aim was to 'give further effect' under English law to the rights contained in the ECHR. The Act provides a remedy for breach of a Convention right under domestic law, thereby obviating the need to seek redress before the European Court of Human Rights (ECtHR).

1.38 In particular, the Act makes it unlawful for any public body to act in a way which is incompatible with the Convention, unless the wording of any other primary legislation provides no other choice. It thereby requires courts and tribunals to interpret legislation, as far as possible, in a way which is compatible with Convention rights and also imposes upon the same judicial bodies a requirement to take account of any decision, judgment or opinion of the Strasbourg Court.

1.39 Among the rights 'incorporated'[73] into English law by the HRA is the qualified right to respect for private and family life, one's home, and correspondence.[74] Article 8 provides:

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

The significance of this development should not be underestimated: for the first time a general positive right to privacy was enshrined in an English Act of Parliament.

1.40 The oft-competing, qualified right to receive opinions and information and the right to express them are also enshrined within the Act under s 10, which provides:

> **Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without

[73] The word is used advisedly. The rights set out in sch 1 to the HRA are not made part of English law: rather the HRA provides a mechanism for enforcing those rights in English courts and for obtaining remedies for their violation.

[74] Art 8 ECHR. The full text of Art 8 is set out in Appendix B (available at <http://www.5rb.com/publication/the-law-of-privacy-and-the-media>).

interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

1.41 The impact of this legislation is still being felt fifteen years later and continues to be a matter of some controversy.[75] The entry into force of the Act was cited soon afterwards by one judge of the Court of Appeal in *Douglas v Hello! Ltd*[76] as giving 'the final impetus to the recognition of a right of privacy in English law'.[77]

1.42 However, the House of Lords subsequently held that English law does not recognize any general principle of 'invasion of privacy' from which the conditions of liability in a particular case can be deduced.[78] Furthermore, the enactment of the HRA has been said to weaken the argument in favour of a general tort of invasion of privacy to fill gaps in the existing remedies.[79] The absence of a general tort of invasion of privacy should be distinguished, however, from the extension and renaming of the old action for breach of confidence. Certain types of breach of confidence, where an invasion of privacy is occasioned by wrongful disclosure of personal information, are now more accurately and indeed are commonly described as actions for 'misuse of private information'.[80]

1.43 Like most rights, a right to privacy is not absolute. Under the Convention, limitations on its enjoyment may be imposed providing they are in accordance with the law and necessary in a democratic society in pursuit of one of a number of legitimate aims, which include the protection of the rights and freedoms of others. The right most frequently invoked to justify an invasion of privacy in the media context is the right to freedom of expression which is itself recognized as a positive right in Article 10 ECHR. More significantly, the main purpose of Article 8 is to prevent arbitrary interference with the exercise of the right

[75] At the time of writing, the Conservative Party is proposing to repeal the HRA as promised in its 2015 election manifesto.

[76] [2001] QB 967, CA.

[77] *Douglas* (n 76) [111] (Sedley LJ). However, in *Wainwright* (n 2) [78]–[79], Buxton LJ described Sedley LJ's view of the process as one of 'judicial development of the common law, with the Convention acting as, at most, a catalyst for that development'. This, he said, was an attractive prospect but one that would be contrary to authority and about which there were 'serious difficulties of principle'.

[78] *Wainwright* (n 6) [19].

[79] *Attorney General's Reference* (n 71) [34].

[80] *Campbell* (n 9) [14] (Lord Nicholls).

to respect for private life by a public authority.[81] With the possible exception of some public service broadcasters,[82] media organizations are not themselves 'public authorities' which owe a direct duty to act compatibly with Convention rights. However, by virtue of the court's position as a public authority within the meaning of s 6 of the Act, together with the positive obligations inherent in the notion of 'respect' in Article 8,[83] the right to respect for private life must be given effect even in actions between private individuals.[84]

Under s 2 HRA the court is required to take into account any relevant Strasbourg jurisprudence[85] in determining a question that has arisen in connection with a Convention right.[86] For a detailed account of guidance given by Strasbourg institutions on the application of Article 8 in cases of alleged media intrusion into private life, see Chapter 3. **1.44**

(1) Margin of Appreciation

The various decisions of the ECtHR are not always easy to reconcile and largely turn on their own facts. In each case the court will have regard to the reasons given by the national courts for granting or refusing relief, as the case may be, and make **1.45**

[81] *Botta v Italy* (1998) 26 EHRR 241, para 33. For a fuller discussion of the scope of Art 8 see 3.13–3.39.

[82] Whose position is considered at 1.57–1.65.

[83] See *eg X and Y v Netherlands* (1985) 8 EHRR 235 and 3.20.

[84] Although this has been said not to give rise to a new cause of action of invasion of privacy: *Venables* (n 32). Brooke LJ in *Douglas* (n 5) [91] questioned whether the absence of Art 1 ECHR from the list of Convention rights in sch 1 to the Human Rights Act 1998 affects the extent of the positive duty under English law. Article 1 provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention' and has occasionally been relied on by the European Court to support the notion of positive obligation. All these remarks must now be seen in the light of the developments in *Campbell* (n 9). See further 3.37–3.39 and 5.02–5.13.

[85] This includes judgments, decisions, declarations, and advisory opinions of the Court, opinions and decisions of the (now defunct) Commission, and decisions of the Committee of Ministers.

[86] The House of Lords has indicated that Strasbourg jurisprudence should normally be followed: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [26] per Lord Slynn: 'In the absence of some special circumstances it seems to me that the courts should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary course to follow its own constant jurisprudence.' In *Boyd v Army Prosecuting Authority* [2002] UKHL 31, [2003] 1 AC 734, however, the House of Lords declined to follow Strasbourg jurisprudence (*Morris v UK* (2002) 34 EHRR 1253) which it considered had been wrongly decided because of a lack of awareness of the full facts: see Lord Bingham at [12]. Where there is conflicting House of Lords and Strasbourg authority, the lower courts are bound by the rule of precedent to follow the House of Lords authority: *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465. The effect of this is that lower courts have to follow authorities that have already been declared to breach the Convention by the European Court: see *R (GC) v Commissioner of Police of the Metropolis* (DC, 16 July 2010) following House of Lords authority on retention of biometric samples which was found to be in breach of Art 8 by the European Court in *S v UK* (2009) 48 EHRR 50, granting permission for a leapfrog appeal to the Supreme Court.

its own assessment of whether those reasons were relevant and sufficient to justify the interference concerned. In assessing the proportionality of any measures taken it will have regard to the totality of the sanctions imposed and the effect of any invasion of privacy on the victim. In cases concerning the balancing of rights between private entities (as is the case with most, if not all, media invasions of privacy) the court will also stress the significance of the doctrine of margin of appreciation. This doctrine allows the court to take into account the fact that the Convention will be interpreted differently in different Member States. Judges are obliged to take into account the cultural, historic and philosophical differences between Strasbourg and the nation in question. The doctrine is applied at its widest when the court is considering a state's positive obligations.

1.46 Thus, in *Tammer v Estonia*[87] the ECtHR had regard to the margin of appreciation in finding that the conviction of a journalist for insulting a former political aide and the imposition of a fine equivalent to ten days' income did not amount to a disproportionate interference with his right to freedom of expression under Article 10. The applicant had published an interview with the former aide's would-be biographer in which he described her as a marriage wrecker and child-deserter because of an affair she had had some seven years previously with the former prime minister of Estonia whom she subsequently married. The court noted[88] that the impugned remarks related to the former aide's private life and could not be justified by considerations of public interest, despite evidence of her continued political involvement. The fact that she herself intended to put these details into the public domain in her forthcoming memoirs did not justify the use of the actual words chosen.

1.47 Similarly, in *Hachette Filipacchi Associates v France*[89] the ECtHR found that the national courts had not strayed outside their margin of appreciation by ordering the publishers of *Paris-Match* to publish an apology to the family of Claude Erignac, the Prefect of Corsica, for publishing a two-page colour photograph of the scene showing his dead body taken moments after his assassination. Although it was a matter on which opinions could reasonably differ (as shown by the dissenting opinions of Judge Louciades and Judge Vajic), the majority held that the measure taken, being the least possible sanction that could have been imposed, was not a disproportionate interference with the publisher's right to freedom of expression, given the distress the publication caused to the victim's family, coming so soon after his murder and funeral. The Court also took into account the fact that the family had expressly objected to use of the photograph.[90]

[87] (2003) 37 EHRR 43.
[88] *Tammer* (n 87) [66]–[68].
[89] (2009) 49 EHRR 23.
[90] *Standard Verlags GmbH v Austria (No 2)* App no 21277/05 (ECtHR, 4 September 2009) is a further example of the Strasbourg Court finding in favour of the national authorities on the basis of the margin of appreciation. A newspaper owner complained of a violation of his Art 10 rights in

1.48 In *Mosley v UK*[91] the ECtHR concluded that, largely as a consequence of the 'wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention', Article 8 does not require a legally binding requirement of pre-notification of publication in the press of private information. The Court emphasized 'the importance of a prudent approach to the State's positive obligations to protect private life in general and of the need to recognise the diversity of possible methods to secure its respect'.[92] It went on: 'the notion of "respect" in Article 8 is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: bearing in mind the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case'.[93]

1.49 The concept of margin of appreciation has developed at the international level in order to give Member States a certain latitude in the way they give effect to their obligations under the Convention. The dangers of directly transferring this principle to the application of Convention rights under the HRA in the domestic context has been pointed out by several commentators.[94] Nevertheless, a similar concept of a 'discretionary area of judgment' has developed under the Act, at least as far as review of decisions by public authorities is concerned, where the degree of scrutiny of an administrative decision is dependent on the context.[95]

1.50 The difference with a right to privacy in respect of an individual's relations with the media is that this essentially concerns an aspect of private law where the only act of a public authority (save that of the court making the decision) is the failure of Parliament to legislate.[96] In fulfilling their duty under the HRA to develop the common law compatibly with the Convention right to respect for private life, however, the English courts are guided by the decisions of the ECtHR.[97] It remains the case that a general right to privacy in the private law sphere is neither required nor prohibited by the Convention. In striking the proper balance, therefore, the courts

respect of an article which speculated on the state of the federal president's marriage and alleged extra-marital relations of his wife (a high-ranking public official) with another leading politician. The Strasbourg Court concluded that the rumours speculated about the private and family lives of those involved and did not contribute to a debate of public interest.

91 (2011) 53 EHRR 30, [2012] EMLR 1.

92 *Mosley* (n 91) [107].

93 *Mosley* (n 91) [108].

94 See *eg* R Singh, M Hunt, and M Demetriou, 'Is there a role for the "Margin of Appreciation" in national law after the Human Rights Act?' [1999] EHRL Rev 15.

95 *R (Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 2 AC 532; *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45. See also *R (Mahmood) v Secretary of State for the Home Dept* [2001] 1 WLR 840; *R (Samaroo) v Secretary of State for the Home Dept* [2001] UKHRR 1150.

96 A challenge on these grounds under the HRA is expressly prohibited under s 6(3) and (6).

97 To the extent that a court is required to interpret any applicable primary or secondary legislation in this field it must read and give effect to it, so far as it is possible to do so, in a way which is compatible with Convention rights: s 3 HRA. If that cannot be done then the higher courts are empowered to declare such legislation incompatible with a Convention right: s 4 HRA. On the distinction between 'interpreting' and 'legislating' see *R v A (No 2)* (n 101) [44]–[45] (Lord Steyn).

are likely to be guided by decisions of the European Court.[98] Domestic courts will also continue to look to comparative jurisprudence from jurisdictions with more developed laws of privacy and the principles on which such laws are based. These aspects are considered in Chapters 3, 4 and 5.

1.51 The increasing involvement of the European Court in the detailed balancing between Articles 8 and 10 (and consequent weakening of the doctrine of margin of appreciation) owed itself largely to a new approach first enunciated in *Hatton v UK*.[99] In a now familiar passage subsequently adopted in media cases the Court there held for the first time:

> Whatever analytical approach is adopted—the positive duty or an interference—the applicable principles regarding justification under Article 8(2) are broadly similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from Article 8(1), in striking the required balance the aims mentioned in Article 8(2) may be of a certain relevance.[100]

1.52 It is important to remember that this case concerned the very different context of the failure of the UK authorities to prevent night flights which disturbed the sleep of local residents during take-off and landing at Heathrow airport (which is a private enterprise). It can be seen that in that context the precise status of the airport authority as a public or private body was not that significant. By adopting the same approach in the context of the media, however, the traditional distinction between a state's negative duty not to interfere arbitrarily with private life and its positive obligation[101] to ensure respect for it has broken down still further, both as a matter of domestic and European law.

1.53 The significance of this development should not be underestimated. In his dissenting opinion in *Hatton* at first instance, Sir Brian Kerr described the approach laid out by the majority as 'a wholly new test'.[102] It is now, however, accepted in all cases concerning the balancing of rights between private individuals, including the disclosure of personal information by the media. In *von Hannover v Germany*,[103]

[98] The Court has stated, in the context of Art 10, that it 'does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals per se': *Vgt Verein Gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4, para 46.

[99] App no 36022/97, both by the Chamber Judgment (2002) 34 EHRR 1 and the Grand Chamber Judgment (2003) 36 EHRR 51.

[100] *Hatton* (n 99), para 96 in the Chamber Judgment and para 98 in the Grand Chamber.

[101] A positive obligation under human rights law denotes a State's obligation to engage in an activity to secure the effective enjoyment of a right, as opposed to a negative obligation merely to abstain from human rights violations.

[102] The development was even more remarkable given the Court's remarks in *Vgt Verein Gegen Tierfabriken* (n 98) [46].

[103] *von Hannover v Germany (No 1)* (2005) 40 EHRR 1, [2004] EMLR 21 [57].

where the photographs complained of were all published by private enterprises, the Court reiterated that the positive obligation under Article 8 involved the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves and stated:

> The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance which has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

1.54 The same approach was followed in *Karhuvaara and Iltalehti v Finland*[104] and in *Craxi (No 2) v Italy*[105] and became firmly accepted in the Court's jurisprudence. In the latter case, the European Court held that the state was under a positive obligation to prevent disclosure to the press of private information contained in court records. The documents concerned were transcripts of private telephone conversations which had been intercepted by the police for the purposes of the prosecution of the applicant, a former prime minister of Italy, for corruption. That duty extended to a requirement to carry out effective inquiries into the causes of the leak after it had occurred.[106]

1.55 There are difficulties in importing this approach into the private law sphere. In *Craxi* for example, in a partly dissenting opinion, Judge Zagrebelsky noted that this was the first occasion on which the Court had extended the positive obligation under Article 8 to include a requirement to carry out an effective investigation into its possible breach, a duty which had previously been restricted to alleged breaches of Articles 2 and 3. He pointed out that where that investigation might require, as here, disclosure of a journalist's source, it was difficult to see how it could be effective without breaching Article 10.

1.56 For a period of time the decisions of the Court in this field appeared to be increasingly proscriptive.[107] However, the decisions of the Grand Chamber in *Axel Springer v Germany* and *Von Hannover v Germany (No 2)*,[108] concerning the balancing of privacy of public figures and freedom of expression, suggest that the Court may have tilted the balance back in favour of national authorities' own careful weighing of the relevant facts 'with the advantage of their knowledge and their continuous contact with the social and cultural reality of their country'.[109] In *Animal Defenders International v UK*,[110] a case concerning the prohibition on political advertising,

[104] (2005) 41 EHRR 51, para 42.
[105] (2004) 38 EHRR 995.
[106] *Craxi* (n 105), paras 74–5.
[107] *eg, von Hannover (No 1)* (n 103).
[108] *Axel Springer* (n 45); *Von Hannover (No 2)* (2012) 55 EHRR 15.
[109] *Axel Springer* (n 45), minority judgment of Judge Lopez Guerra, on behalf of five dissenting judges.
[110] (2013) 57 EHRR 21, [2013] EMLR 28.

the Court noted that '[t]here is a risk that by developing the notion of positive obligations to protect the rights under articles 8–11 . . . one can lose sight of the fundamental negative obligation of the state to abstain from interfering'.[111]

(2) Media Organizations as Public Authorities

1.57 During the passage of the Human Rights Bill through Parliament public service broadcasters such as the BBC and Channel 4 were cited as examples of bodies which were or would be likely to be considered public authorities within the meaning of s 6 HRA.[112] If that were the case then such media organizations would be susceptible to actions brought under s 7 HRA and would owe direct duties to individuals to respect their right to private life under Article 8, interference with which could only be justified in accordance with the strict necessity test under Article 8(2). This would put them in a markedly different position to other private media organizations (such as the print media) which are entitled to rely on their own right to freedom of expression in any claim brought against them, which would have to be under an existing cause of action other than the HRA.

1.58 There are arguments based on public funding and statutory obligations which support this government's view. There are, however, contrary indications. The focus is the issue of whether a body is sufficiently public to engage the responsibility of the State.[113] Convention rights can only be relied on in any legal proceedings (or proceedings under the Act against a public authority can only be brought) by persons, non-governmental organizations, or groups of individuals who would qualify as 'victims' within the meaning of the Convention.[114] In Strasbourg the

[111] *Animal Defenders International* (n 110), para 12, joint dissenting judgment of Judges Ziemele, Sajo, Kalaydjiyeva, Vucinic, and De Gaetano.

[112] See Lord Williams, Minister of State at the Home Office, *Hansard*, HL (series 6) vol 583, col 1309 (3 November 1997) and Jack Straw, Home Secretary, *Hansard*, HC (series 6), vol 314, col 411 (17 June 1998). The former contrasted the position of 'other commercial organisations, such as private television stations, [which] might well not be public authorities'. See also *BKM Ltd v BBC* [2009] EWHC 3151 (Ch) in which the judge simply says that 'BKM brought this application to restrain broadcast [of residents of a care home for the elderly] . . . in order to protect the right of the home's residents to privacy and family life under the Human Rights Act' ([7]). No mention is made of a claim for breach of confidence or misuse of private information but it is unclear whether the judge was applying Art 8 directly or simply applying the requirements of the misuse of private information action (*ie* the need to balance privacy and freedom of expression interests) without making explicit mention of the cause of action.

[113] As the Home Secretary said, *Hansard*, HC (series 6) vol 314, col 433 (17 June 1998). See also the remarks of the Lord Chancellor in *Hansard*, HL (series 6) vol 583, col 808: 'In developing our proposals in [s] 6 we have opted for a wide-ranging definition of public authority. We have created a correspondingly wide liability. That is because we want to provide as much protection as possible for the rights of individuals *against the misuse of power by the state* within the framework of a Bill which preserves parliamentary sovereignty' (emphasis added). Note, however, that the Court of Appeal has rejected the notion that the term 'public authority' in s 6 is so ambiguous or obscure as to allow reference to *Hansard* as an aid to construction: *Aston Cantlow and Wilmcote with Billesly Parochial Church Council v Wallbank* [2001] EWCA Civ 713, [2002] Ch 51 [29].

[114] s 7(1) and (7) HRA and Art 34 ECHR. In arriving at the conclusion that s 6 HRA was intended to replicate, as far as possible, the test that Strasbourg would apply in determining whether

two categories are mutually exclusive: the same organization cannot both be liable for a violation of the Convention and have standing to bring a complaint.[115] Both Channel 4 and the BBC have lodged applications in Strasbourg.[116] In the BBC cases the Commission expressly left open the question of whether it had standing, assuming that it did for the purposes of declaring the applications inadmissible on other grounds. In the Channel 4 case the issue was addressed in respect of the National Union of Journalists which had brought a complaint based on the same facts[117] but the point was not taken against Channel 4. It might be supposed that in any of these cases the Commission would have declared that the applicants were themselves public authorities and therefore lacking status to bring proceedings if the matter was as clear as it seemed to the promoters of the Human Rights Bill.

1.59 No cases involving the BBC or Channel 4 since entry into force of the HRA have conclusively decided the point but there are some indications in the way those cases have been handled that would appear to confirm that the broadcasters are not to be treated as core public authorities within the meaning of s 6. In various cases where applications have been made to prevent the broadcast of programmes which would allegedly interfere with the right to privacy of the applicants, the broadcasters have been permitted to rely on Convention rights of their own under Article 10. In

the responsibility of the state was engaged, the House of Lords in *Aston Cantlow* [2003] UKHL 37, [2004] 1 AC 546 adopted precisely the analysis set out in this paragraph. Relying on s 7 HRA, Art 34 ECHR, and the Strasbourg authorities cited in the next footnote, the Court endorsed the view that, as far as 'core' or 'standard' public authorities are concerned, a body cannot both be under a duty to act compatibly with Convention rights under the HRA and seek to invoke them against others: see Lord Nicholls [6]–[8], Lord Hope [44]–[52], Lord Hobhouse [87], and Lord Roger [158]–[160].

[115] *Ayuntamiento de M v Spain* (1991) 68 DR 209, 215: Any 'authority which exercises public functions' will be excluded from the definition of victim. See also *Rothenthurm Commune v Switzerland* (1988) 59 DR 251. The position under the HRA may be different. In *London Regional Transport Ltd v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 4 [60] (a case where all four parties to the proceedings were public authorities) Sedley LJ was of the view that the status of the defendants (who were relying on Art 10) may not matter 'since private individuals will in principle enjoy the same protection'. The argument that the defendants could not rely on Convention rights precisely because they were not private individuals would, in any event, have been met by Sedley LJ's view that 'the illegality created by s 6 seems to me to be independent of the individualised provision for bringing or defending proceedings contained in s 7, and to carry one straight to the judicial obligation created by s 8(1) to make such order as the court considers just and appropriate in relation to any unlawful act of a public authority'. In other words, the proceedings were treated as if they were brought by the Mayor of London and Transport for London on behalf of the people of London and the status of the defendants as public authorities was merely incidental. In *Aston Cantlow* (n 113) [33], however, the Court of Appeal (of which Sedley LJ was a member) noted that it was in order to locate the state 'which stands distinct from persons, groups and nongovernmental organisations' (*ie* those that can claim to be a victim under s 7) that the concept of 'public authority' is used in s 6.

[116] *BBC v UK* (1996) 21 EHRR CD 93; *BBC Scotland, McDonald, Rodgers and Donald v UK* (1997) 25 EHRR CD 179; *Channel 4 Television Ltd v UK* (1988) 10 EHRR 503.

[117] *Hodgson, Woolf Productions and National Union of Journalists v UK* (1988) 10 EHRR 503. The applications were joined for the admissibility decision. The NUJ was found not to satisfy the victim test. That position was reversed in respect of the NUJ, in *Wilson and NUJ v UK* App no 30668/96 (ECtHR, 2 July 2002), in which the European Court found a violation of Art 11 in respect of the applicant union and individual.

Leeds City Council v Channel Four Television Corp[118] the Court founded its authority under its inherent jurisdiction and did not rule out the possibility of a cause of action for breach of confidence, then proceeded to weigh up the respective rights of the parties as required by *Re S*.[119] In *T (by her litigation friend the Official Solicitor) v BBC*[120] the precise nature of the Court's jurisdiction was not made clear but may be assumed to be the same. Had either case been brought under s 7 HRA it is to be assumed that the broadcaster would not have been able to rely on Convention rights but merely be required to justify its interference with the applicant's rights under Article 8(2).[121]

1.60 The closest a court has come to treating a broadcaster like a public authority is in the Court of Appeal's judgment in *R (ProLife Alliance) v BBC*.[122] In that case a political party challenged the refusal by the BBC and the other terrestrial broadcasters[123] to broadcast a graphic anti-abortion party election broadcast. The broadcasters defended their actions on the grounds of taste, decency, and offensiveness to which they had to have regard under their respective codes of practice.[124] The proceedings were brought against the BBC only by way of judicial review to which the BBC accepted it was amenable. It would appear, however, that the Court was also treating the BBC as a public authority within the meaning of s 6 HRA. Thus, in the context of political speech at election time, the Court considered that its duty was 'to decide for itself whether this censorship was justified'[125] and concluded that it was not. The broadcaster's margin of discretion was reduced almost to vanishing point and a strict necessity test applied.

1.61 As it did before the Court of Appeal, the BBC accepted for the purposes of its appeal to the House of Lords in *ProLife*[126] that it was a public authority, without making any wider concession as to its status in different contexts. However, the House of Lords took a view of its role on judicial review of the BBC's decision not to broadcast the party election broadcast that was quite different from that of the Court of Appeal. In according to the broadcaster a much greater degree of deference than the Court below, it appears that the direct application of s 6 HRA to the BBC did not add much of substance to the review.

[118] (2007) 1 FLR 678. Curiously the applicant in this case, which is definitely a core public authority, was allowed to rely on Convention rights under Art 8. It did so, however, on the same basis as *London Regional Transport* (n 122), namely on behalf of others whom it represented.

[119] *In re S (A child)* (n 69).

[120] [2007] EWHC 1683 (QB), (2008) 1 FLR 281.

[121] In *Sugar v BBC* [2012] UKSC 4, [2012] 1 WLR 439, Lord Brown at [94] appeared to presume that the BBC was a 'public authority' capable of interfering in the claimant's Art 10 rights.

[122] [2002] EWCA Civ 297, [2002] 3 WLR 1080.

[123] ITV, Channel 4, and Channel 5.

[124] BBC Producer's Guidelines, ch 6; and ITV Programme Code, s 1, respectively.

[125] *ProLife* (n 122) [37] (Laws LJ).

[126] *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185.

1.62 It is debatable whether this case is authority for the proposition that the BBC is a public authority for all purposes under the HRA. Where the proceedings are brought by way of judicial review it may not matter much for most practical purposes whether the body also owes a direct duty to act compatibly with Convention rights. But it should be noted that in this case there was a general requirement for the broadcasters to transmit party election broadcasts.[127] In this specific context, therefore, they were carrying out a public service function where there would be good reason for treating all of them as public authorities. The position could well be different where the broadcast relates to journalistic, artistic, or literary material.[128]

1.63 If state broadcasters are found to be public authorities for the purpose of HRA, then useful guidance on the degree of latitude to be afforded to them as decision-makers might be found in in Laws LJ's dissenting judgment in *International Transport Roth GmbH v Secretary of State for the Home Department*[129] which was cited with apparent approval by Lord Walker in *ProLife* (although *International Transport* did not involve a media organization). His judgment sets out the principles governing the approach that will be adopted, with particular focus on the varying degree of deference that is due to the various sources of powers to which the broadcasters must have regard.[130]

1.64 However, these principles still leave a great deal of uncertainty which can only be resolved on the facts of a particular case. Perhaps the most that can be said is, as Lord Walker concluded in *ProLife*,[131] that the Court's task is 'to review the decision with an intensity appropriate to all the circumstances of the case'.[132]

1.65 There would be much merit in an approach under the HRA whereby all media organizations (whether print or broadcast) owed the same duty to respect the right to private and family life of those about whom they disclose personal information in their publications or broadcasts and were, in turn, able to rely to the same extent on Convention rights, such as the right to freedom of expression.[133] In any event,

[127] Deriving from the Broadcasting Act 1990, s 36 in the case of ITV, Channel 4, and Channel 5; and Art 12(4) proviso (i) of the *Royal Charter for the Continuance of the British Broadcasting Corporation* (Cm 3284, 1996) in the case of the BBC.

[128] The Freedom of Information Act 2000 gives the BBC special status in pt IV of sch 1, in that it is a public authority for some purposes but not for others.

[129] [2002] EWCA Civ 158, [2003] QB 728 [376]–[378].

[130] *International Transport Roth GmbH* (n 145) [136].

[131] *ProLife* (n 126) [139].

[132] For an example of the application of these principles in the context of a restriction on the exercise of freedom of expression, see *British American Tobacco v Secretary of State for Health* [2004] EWHC 2493 (Admin).

[133] One possible solution would be to adopt the approach taken in the Freedom of Information Act 2000. The list of 'public authorities' to which the obligations under that Act apply are set out in sch 1. The same formulation appears in respect of the BBC and Channel 4: both are defined as public authorities but only 'in respect of information held for purposes other than journalism, art or literature'. This has the effect of putting the public service broadcasters in the same position in

it would seem that the traditional distinction between the public and private law aspects of rights under Articles 8 and 10 is breaking down.[134] The position of the media regulators as public authorities (which led directly to the introduction of s 12 HRA) is considered in Chapter 14.

E. Other Legislative Protections for Privacy and Confidentiality

1.66 Privacy interests in personal information have received an increasing degree of protection through legislation, most of it potentially applicable to media activities. For a long while the development of this protection was piecemeal, sometimes resulting from particular narrow issues catching the popular or political imagination.[135] The result is that there now exists a miscellany of statutory provisions which confer a degree of privacy on specific classes of personal information. There are provisions applying to the full range of media activities, from news gathering to internal processing of information to publication. But these provisions fall into no overall pattern, and in some instances there is overlap.[136]

1.67 Equally, there is no discernible pattern to the remedies provided for. Most statutes make breach of their restrictions a criminal offence or a contempt of court, but do not provide for any civil right of action.[137] Relatively few provide for rights of action enforceable in the courts. To a large extent it is still fair to say, as the Younger Committee observed over forty years ago, that 'a number of statutory provisions

respect of these categories of information as the independent broadcasters and press which are not listed as public authorities. Pre-HRA cases have been decided on the assumption that the BBC does enjoy rights under Art 10: *R v BSC, ex p BBC* [2001] QB 885 [18]; *Kelly v BBC* [2001] Fam 59, 79–89. In *R v BBC, ex p Referendum Party* [1997] EMLR 605, 623 the Court left open the question whether a party election broadcast was a governmental function, while recording at 622 that 'the traditional view of it is that [the BBC] does not exercise a governmental function'. In *West v BBC* (QBD, 10 June 2002) the Court was invited to restrain a broadcast identifying a paedophile on the ground that the BBC, as a public authority, was bound by Art 3. It declined to do so, on the basis that the claimant would be less likely to succeed on that basis than on the alternative claim in confidentiality.

[134] See the cases following the European Court's decision in *Hatton v UK* (2003) EHRR 28 (Grand Chamber) referred to 1.53 *et seq*.

[135] An example is the Protection from Harassment Act 1997, introduced primarily to deal with concerns about 'stalking'. For discussion of legislative protection against intrusion into physical privacy see 10.04–10.45.

[136] See *eg* the overlap between the Protection from Harassment Act 1997, s 1 and the Criminal Justice and Police Act 2001, s 42 (discussed at 1.80 and 10.21–10.24), and N A Moreham, 'Protection Against Intrusion in English Legislation' in N Witzleb, D Lindsay, M Paterson and S Rodrick (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (Cambridge University Press 2014).

[137] The question of whether civil claims might in some instances be fashioned on the basis of criminal statutes is considered at 1.91–1.94. A notable case in point is *Rickless v United Artists* [1988] QB 40 where the Dramatic and Musical Performers' Protection Act 1958 was construed to give a private right to performers to prevent the use of film images of their performances without their consent.

give some protection to privacy but since few of them are designed for that purpose they rarely provide a satisfactory remedy'.[138]

1.68 There is, however, more recent legislation which gives some general protection to privacy. The impact of Article 8 ECHR has already been discussed (and is the subject of further analysis in Chapter 5). Other major modern statutes which provide protection to privacy interests generally, and are of particular importance to the media, are the Data Protection Act 1998 (DPA)[139] and the Freedom of Information Act 2000 (FIA). Most of these legislative measures are discussed in greater detail in the chapters which follow. The aim of this section is to provide an overview of the scope of these overlapping statutes as well as to touch upon certain legislative provisions relevant to media activities. The section concludes with a brief discussion of the extent to which it may be argued that civil remedies should be granted to enforce statutory prohibitions even where no civil remedy is expressly provided for.

(1) The Copyright, Designs and Patents Act 1988

1.69 Copyright is capable of conferring a measure of privacy on private documents. The relationship between the two concepts was recognized in *Williams v Settle*,[140] where the plaintiff recovered damages for the unauthorized publication of private photographs, the copyright of which was vested in him. Upholding the award of £1,000 punitive damages by the Court at first instance, Sellers LJ commented that the publication was:

> A flagrant infringement of the right of the plaintiff, and it was scandalous conduct and in total disregard not only of the legal rights of the plaintiff regarding copyright but of his feelings and his sense of family dignity and pride. It was an intrusion into his life, deeper and graver than an intrusion into a man's property.

1.70 Although copyright protects only the form and not the substance of, or ideas contained in, a copyright work, the newsworthy element of a literary, artistic or, more often, photographic work may indeed lie in its particular form. What is more, in the case of photographs and films commissioned for private and domestic purposes the law provides an explicit privacy right,[141] which lasts so long as copyright subsists in the work.[142] Infringement of these rights may be restrained by injunction, and remedied by damages (which may include 'additional' damages) or an account of profits.

1.71 *Rocknroll v News Group Newspapers Ltd*[143] was a case in which an individual sought to enforce privacy rights through a claim in copyright. The claimant successfully

[138] Younger Report (n 14) app I, para 34.
[139] Extending and enhancing privacy protection initially given under the Data Protection Act 1984.
[140] [1960] 1 WLR 1072, CA, decided under the Copyright Act 1956.
[141] Copyright Designs and Patents Act 1988, s 85.
[142] Copyright Designs and Patents Act 1988, s 86(1).
[143] [2013] EWHC 24 (Ch).

obtained an interim injunction to restrain the republication of private information contained within photographs taken of him on the grounds of a threatened breach of privacy. His application for the injunction on the basis of an alleged breach of copyright was not separately analysed in detail; Briggs J was willing to grant the injunction solely on the basis of breach of privacy but indicated that an injunction to restrain republication of the photographs themselves (as opposed to a description of the information contained within them) would also have been justified on the basis of the threatened breach of copyright. The topic of privacy, copyright, and moral rights is considered in detail in Chapter 9.

(2) The Data Protection Act 1998

1.72 This Act contains the most comprehensive privacy provisions now affecting the media. It is of general application to those who 'process' 'personal data' outside the purely domestic sphere. It imposes controls on such processing, and sanctions for breach of those controls. There is little doubt that the media's dealings with information are affected by the Act.[144] 'Process' encompasses virtually anything which can be done with data, including publication; 'personal data' includes any information relating to an identifiable living person provided only that it is, or is intended to be, processed on a computer or part of a 'relevant filing system'. This includes a manual system, provided that it is structured so that specific information relating to a particular individual is readily accessible.[145]

1.73 The processing of eight categories of 'sensitive personal data' is subject to additional controls under the Act. This is one of a number of statutory 'checklists' to which resort may be had to identify those types of information to be regarded as private in nature and those which may be deserving of protection from disclosure.[146] The Act includes, in s 32, a specific but limited exemption for the media. The sanctions available under the Act include compensation, which can include compensation for distress whether or not actual damage has been suffered.[147] In addition, orders are available for rectifying, blocking, erasure, or destruction of records. An action may be brought before the court for such remedies and (subject to restrictions) for

[144] In *Campbell* (n 26) the Court of Appeal confirmed at [97]–[107] that 'where the data controller is responsible for the publication of hard copies that reproduce data that has previously been processed by means of equipment operating automatically, the publication forms part of the processing and falls within the scope of the [Data Protection] Act'. There was no appeal against this finding when the case went to the House of Lords.

[145] The Act was extended to cover all unstructured data held by a public authority on 1 January 2005, when s 1(1) of the 1998 Act was amended by the FIA. The term 'personal data' was considered by the Court of Appeal in *Durant v Financial Services Authority* [2003] EWCA Civ 1746, [2004] FSR 28, and given a narrow interpretation. But see now *Edem v Information Commissioner* [2014] EWCA Civ 92 [18]–[22], explaining *Durant*.

[146] Other helpful statutory 'checklists' are to be found in the Local Government Act 1972 and the Employment Rights Act 1996. The controls on surveillance contained in the Regulation of Investigatory Powers Act 2000 are also a useful reference point.

[147] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2015] 3 WLR 409.

an injunction. The DPA also creates offences of gaining illicit access to data. These important provisions are examined in detail in Chapter 7.

(3) The Freedom of Information Act 2000

1.74 This Act has been widely used by the media for news-gathering purposes since its main provisions entered into force on 1 January 2005. Section 1 of the Act grants 'any person' extensive rights to know[148] about 'information' which is recorded in some form,[149] and which is held by a 'public authority'.[150] These rights are not in any way dependent on the identity or motives of the applicant for information. However, the Act contains a substantial number of exemptions from the rights of access for which it provides, and the classes of exempt information include 'personal data' of the applicant and other personal data the disclosure of which would breach the DPA.[151] Also exempted is information obtained by the public authority from another person (including another public authority) if 'disclosure of the information to the public by the public authority . . . would constitute a breach of confidence actionable by that or any other person'.[152] The privacy of journalistic material is recognized in the Act. While the BBC, Channel 4, and S4C are subject to the Act, this is only in respect of 'information held for purposes other than those of journalism, art or literature'.[153]

(4) Statutory Offences of Relevance to the Media

(a) Publishing leaked information

1.75 Like the Freedom of Information Act, the legislation providing for public access to meetings and documents of local authorities contains exemptions for personal information. The Local Government Act 1972 contains a list[154] of fifteen classes of (mostly) personal information which may be withheld from the public, and provides for the withholding of 'confidential information'.[155] Regulations made under the Local

[148] The rights are, on making a request, '(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to the person requesting it': s 1(1) FIA.

[149] s 84 FIA (interpretation).

[150] The term 'public authority' covers a wide range of national, regional, and local bodies, including quangos and a large number of individuals holding public office: see s 3(1) and sch 1 FIA.

[151] s 40 FIA. 'Personal data' has the same meaning as in the DPA. Hence, the adoption of a narrow interpretation of 'personal data' as in *Durant* (n 145) would mean that the exemptions in s 40 FIA is correspondingly narrower.

[152] s 41 FIA. There are similar exemptions from access under the Local Government Act 1972.

[153] sch 1, pt VI FIA. The Act does not apply to material held to any significant degree for journalistic purposes. It does not matter whether the journalistic purpose is the dominant one: *BBC v Sugar (No 2)* [2012] UKSC 4, [2012] 1 WLR 439. See also *Kennedy v Charity Commissioner* [2014] UKSC 20, [2014] 2 WLR 808, in which the Supreme Court held (by a majority) that the FIA is compatible with Art 10.

[154] Local Government Act 1972, sch 12A.

[155] Local Government Act 1972, s 100A(2), (3). Provisions for withholding exempt or confidential information are in ss 100A(4), 100B(2), 100C(1)(a), 100D(4).

Government Act 2000 provide a separate and more restrictive regime in relation to public access to meetings of local authority executives, and information about such meetings.[156]

1.76 Leaks of personal information by a governmental or other state source may be in breach not only of the source's duties as an employee but also of a specific statutory duty of non-disclosure. Provisions of this kind are too numerous to list but examples are to be found in the Abortion Act 1967,[157] the Taxes Management Act 1970,[158] the Rehabilitation of Offenders Act 1974,[159] the Race Relations Act 1976,[160] and the Telecommunications Act 1984.[161] Such provisions are not uniform. Two features are common, however: the imposition of a duty of non-disclosure, and criminal sanctions for breach of that duty. Sometimes the duties are so expressed as to prohibit disclosure by 'any person', so that a journalist publishing the information in question would commit the offence.[162] More commonly, the duties and sanctions are expressed to apply to those who obtain information officially; in other words to media sources.[163] It is conceivable that in such a case a journalist might be prosecuted for inciting, procuring, aiding, or abetting such an offence[164] although, outside the context of national security, no examples are known and, in the context of the Official Secrets Act 1989, the Court of Appeal has said that a prosecution of the media for incitement would only be justified in an extreme case on the facts.[165]

[156] Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000, SI 2000/3272, as amended by SI 2002/716 and SI 2006/69.

[157] The Abortion Regulations 1991, SI 1991/449, reg 5, as amended by SI 2002/887, prohibit unauthorized disclosure of information which medical practitioners are required to provide about terminations. Section 2(3) of the 1967 Act makes it an offence wilfully to contravene or fail to comply with the requirements of the regulations.

[158] s 6, and sch 1, requiring Commissioners, Inspectors, Collectors, and other officers to make solemn declarations on taking office that 'I will not disclose any information received by me in the execution of [my] duties, except . . .' for certain specified purposes.

[159] s 9, making an unauthorized disclosure by officials of information about spent convictions an offence.

[160] s 52, imposing prohibitions on disclosure of information given to the Commission for Racial Equality (superseded in October 2007 by the Equality and Human Rights Commission).

[161] s 45, prohibiting disclosure of the contents of any message transmitted by a public telecommunications system, and about the use made of telecommunications services.

[162] An example is Electronic Communications Act 2000, s 4 which provides that, subject to exceptions, 'no information which (a) has been obtained under or by virtue of the provisions of this Part and (b) relates to the private affairs of any individual or to any particular business shall, during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business'.

[163] *eg*, the offence created by Race Relations Act 1976, s 52(2) is disclosure 'by the Commission or by any person who is or has been a Commissioner, additional Commissioner or employee of the Commission'. The offence under Telecommunications Act 1984, s 45 is intentional disclosure by 'a person engaged in the running of a public telecommunications system'.

[164] A prosecution for theft of the information would not be possible; information is not 'property' capable of being stolen for the purposes of the Theft Acts: *Oxford v Moss* (1978) 68 Cr App R 183.

[165] *R v Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206 [96]. The House of Lords, in dismissing the applicant's appeal, did not comment on this observation: [2002] UKHL 11, [2003] 1 AC 247.

As for civil proceedings, it will naturally be of powerful assistance to a person seeking to establish a claim for breach of confidence against the media to show that the information came to the media in breach of a statutory non-disclosure provision. In some circumstances a claim for breach of statutory duty may be possible.[166]

(b) 'Chequebook journalism'

1.77 A number of prosecutions took place in the second decade of the twenty-first century in which journalists were accused of paying public officials for information.[167] The charge commonly laid was the common law crime of misconduct in a public office, though there were some charges under the Prevention of Corruption Act 1916. That Act was repealed and replaced by the Bribery Act 2010, which prohibits payments to public and private sector officers and employees to induce them to perform otherwise than in accordance with the reasonable expectations of their employers. This is a broad prohibition, capable of application to a range of journalistic activities, some at least of which would be considered justified in the public interest. There is no public interest defence, but the exercise of the discretion whether to prosecute is governed by Guidance issued by the Director of Public Prosecutions on assessing the public interest in media cases.[168]

(c) Surveillance

1.78 The monitoring and recording by the media of messages and communications is subject to the Wireless Telegraphy Act 1949 and the Regulation of Investigatory Powers Act 2000 (RIPA). The 1949 Act creates two offences which can be summarized as (i) using wireless telegraphy apparatus to find out about messages, whether wireless or not, and (ii) disclosing information obtained by anyone in this way.[169] RIPA makes unauthorized interception of the public post or telecommunications and of private telecommunications an offence, and also makes most such interceptions actionable at the suit of the sender, recipient, or intended recipient.[170] While RIPA's short title might imply otherwise, these provisions apply not only to the conduct of public authorities but also to private persons such as journalists who may intercept the communications of others. RIPA also contains extensive provisions regulating surveillance.[171] These are concerned with authorization of official surveillance, but provide a reference point when considering the propriety of intrusion by non-government bodies such as the media.

[166] See 1.91–1.94.

[167] These included charges laid as the result of a police inquiry named Operation Elveden.

[168] <http://www.cps.gov.uk/legal/d_to_g/guidance_for_prosecutors_on_assessing_the_public_interest_in_cases_affecting_the_media_/> issued on 13 September 2012.

[169] Wireless Telegraphy Act 1949, s 5(b)(i) and (ii). These provisions and the possibility, raised in *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, CA, that a civil claim might be based upon them, are further discussed at 1.93.

[170] s 1.

[171] pt II, ss 26–48.

1.79 A variety of provisions of the criminal law have been relied on to prosecute journalists for offences arising out of the phone hacking affair. In the main the journalists alleged to have improperly intercepted voicemail messages while working for the *News of the World* at the relevant time were prosecuted for conspiracy to intercept communications without lawful authority pursuant to s 1 of the Criminal Law Act 1977.

(d) 'Doorstepping'

1.80 The media practice of confronting an individual for an interview outside his home or office may fall foul of s 42 of the Criminal Justice and Police Act 2001, by which doorstepping can be an offence if carried on in contravention of a police requirement to desist.[172] Doorstepping could also be contrary to the Protection from Harassment Act 1997 which prohibits the pursuit of a 'course of conduct' which a person knows or ought to know amounts to harassment of another.[173] Both criminal sanctions and civil remedies are available.[174] In addition, however, the concept of harassment under the 1997 Act is capable of applying to publication; the Court of Appeal has held that repeated newspaper publications may, in exceptional circumstances, amount to harassment and be actionable under the Act.[175] The 1997 Act is also considered in Chapters 6 and 10.

(e) Information disclosed in legal proceedings

1.81 Private and personal information and documents may come to the media as a result of their involvement, or the involvement of a source, in legal proceedings. If such material has been obtained through a process of compulsory disclosure in the proceedings then it is protected by duties of non-disclosure imposed by either primary or secondary legislation unless and until the information enters the public domain in the course of the proceedings. It will be a contempt of court for the party to use or disclose it otherwise than for the proceedings.[176] A journalist or publisher knowingly participating in such use or disclosure could face contempt proceedings.[177]

[172] See also the prohibitions on intimidation, harassment and persistent pursuit in cl 3 of the IPSO Editors' Code and at Appendix G(iii) (available at <http://www.5rb.com/publication/the-law-of-privacy-and-the-media>).

[173] s 1(1). Harassing includes alarming a person or causing a person distress; a course of conduct must involve conduct on at least two occasions; conduct includes speech: s 7. See further, chs 6 and 10.The PHA is set out in full at Appendix C (available at <http://www.5rb.com/publication/the-law-of-privacy-and-the-media>).

[174] See further 6.04.

[175] *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 4.

[176] In the criminal context, restrictions on disclosure of 'unused material' are imposed on the accused by the Criminal Procedure and Investigations Act 1996, s 17; and s 18 makes contravention a contempt. In civil proceedings, disclosures are protected by CPR 31.22 (documents provided by way of disclosure), CPR 32.12 (information in witness statements), and CPR 34.12 (information from an examination about assets other than at trial) and further information under pt 18 may be protected by direction of the court: CPR 18.2. In each case contempt proceedings are the sanction. These provisions are further discussed at 13.70–13.71 and 13.177–13.179.

[177] See *Home Office v Harman* [1983] AC 1 (albeit that decision would be different on its facts today). See further 13.127.

Non-party access to information about proceedings which is held on court files is restricted by the Civil Procedure Rules. These do not permit a general roving search[178] but a journalist or other non-party who is able to identify specific documents may be allowed to inspect them, even after a settlement, where they have been read or referred to in open court.[179] **1.82**

In a significant development the Court of Appeal has held that where documents have been placed before a judge and referred to in the course of proceedings (whether civil or criminal), the default position is that the media should be permitted to have access to those documents on the open justice principle.[180] **1.83**

(f) Restrictions on reports of crime and the courts

Victims and alleged victims of rape offences are afforded lifetime anonymity by the Sexual Offences (Amendment) Act 1976.[181] It is a criminal offence to identify a victim once the relevant allegation has been made. No provision is made for civil sanctions.[182] Similar anonymity for victims of a variety of other sexual offences is provided for by the Sexual Offences (Amendment) Act 1992.[183] The Act does not however provide the court with a power protecting victims of sexual crime by anonymizing defendants who have been named in open court.[184] The Rehabilitation of Offenders Act 1974 entitles most criminal convicts[185] 'to be treated for all purposes in law' as if they had not committed the crime[186] once a specified rehabilitation period of not more than ten years has elapsed. The main effects of rehabilitation set out in the Act are rights not to disclose convictions in answer to questions.[187] Publication of a spent conviction **1.84**

[178] *Dian AO v David Frankel and Mead (A Firm)* [2004] EWHC 2662 (Comm), [2005] 1 WLR 2951.

[179] *Re Guardian Newspapers Ltd* [2004] EWHC 3092 (Ch), [2005] 1 WLR 2965 (also known as *Chan U Seek v Alvis Vehicles Ltd*).

[180] *R (ex P Guardian News and Media) v (1) City of Westminster Magistrates Court (2) Government of the United States* [2012] EWCA Civ 420, [2013] QB 618.

[181] s 4(1)(a). The offences covered are rape, attempted rape, aiding abetting counselling and procuring, incitement, conspiracy, and burglary with intent to rape. Male rape is also covered. In November 2002 the House of Commons Home Affairs Select Committee recommended that consideration be given to the grant of anonymity to those accused of sex crimes: *HC Select Committee for Home Affairs Second Report* (HC Paper (2002–03) no 83) para 45. The Home Office was unconvinced: see its Response of March 2003 (Cm 5787), para gg. The rights of victims were however extended.

[182] But see 1.91–1.94.

[183] s 1. The offences include indecent assaults on men and women, buggery, various offences of procurement and unlawful intercourse, incest, and attempts and conspiracy to commit such acts: s 2. Anonymity for victims was extended to a wide variety of other sexual crimes with effect from 1 May 2004. The crimes include voyeurism, indecent exposure, engaging in or causing sexual activity with children, and numerous other offences involving children. This is by virtue of amendments to the Sexual Offences (Amendment) Acts of 1976 and 1992 made by s 139 of and sch 6, paras 20 and 31 to the Sexual Offences Act 2003, which created many of the offences in question.

[184] *R (Press Association) v Cambridge Crown Court* [2012] EWCA Crim 2434, [2013] 1 WLR 1979.

[185] The main exceptions being those who have been sentenced to life imprisonment, or to prison or youth custody, detention in a young offender institution, or corrective training for more than 30 months: s 5.

[186] Or been charged with, or prosecuted for, or convicted or sentenced for it: s 4(1).

[187] s 4(1)–(3).

is not a crime nor civilly actionable as such under the Act. However, malicious publication is made actionable as a libel.[188]

1.85 The confidentiality of jury deliberations is protected by the Contempt of Court Act 1981 by which it is a contempt to obtain, disclose, or solicit details of those deliberations.[189]

1.86 The privacy of children involved in any proceedings in adult courts may be protected by directions under the Youth Justice and Criminal Evidence Act 1999 prohibiting their identification or the publication of a picture of them.[190] In youth courts prohibitions on identification until adulthood of children concerned in the proceedings are automatic.[191] There is power to give directions prohibiting identification of children involved in any form of civil proceedings,[192] and automatic restrictions in certain specific kinds of civil proceedings.[193] Other provisions, too numerous to list here, either protect or confer on the courts power to protect those involved in legal proceedings from publicity.[194]

(5) Statutory Protections for Journalists/News-gatherers/Relevant to the Media

(a) Whistle-blowing

1.87 Information from an employee about perceived wrongdoing within his or her organization may be a source of important news stories. Workers who blow the whistle in the public interest are now protected by the Employment Rights Act

[188] s 8(5).

[189] Contempt of Court Act 1981, s 8.

[190] Youth Justice and Criminal Evidence Act 1999, ss 45 (anonymity until adulthood) and 45A (lifetime anonymity, under certain conditions). For the convoluted legislative history of these provisions and those mentioned in nn 191 and 192 see *Aitken v DPP* [2015] EWHC 1079 (Admin) [3]–[9].

[191] Children and Young Persons Act 1933, s 49 as amended by the Youth Justice and Criminal Evidence Act 1999. Anonymity can be dispensed with by the court. For the duration of the protection see n 192.

[192] Children and Young Persons Act 1933, s 39 as amended by the Criminal Justice and Courts Act 2015. The previous version of this provision was held to confer power to grant anonymity until adulthood only: *JC v Central Criminal Court* [2014] EWHC 1041 (Admin), [2014] 1 WLR 3697, aff'd [2014] EWCA Civ 1777. It appears that the same is true of s 49 of the 1933 Act (n 191). The position in criminal matters was changed with effect from 13 April 2015 by s 45A of the Youth Justice and Criminal Evidence Act 1999, which was added by the Criminal Justice and Courts Act 2015. In civil matters the position at the time of writing appears to be that lifetime anonymity cannot be granted under s 39: see *Aitken* (n 190).

[193] Administration of Justice Act 1960, s 12(1); Magistrates' Courts Act 1980, s 71; Children Act 1989, s 97(2).

[194] *eg* Judicial Proceedings (Regulation of Reports) Act 1926, s 1 which concerns divorce and related proceedings; Youth Justice and Criminal Evidence Act 1999, s 46 provides a power to restrict reports about certain adult witnesses in criminal proceedings. In *R v ITN* [2013] EWCA Crim 773, [2014] 1 WLR 199 the Court of Appeal held that the court has jurisdiction to make an order under s 46 where the name of a witness was common knowledge but publication of photographs of her and her children would have led to her identification which would have affected the quality of her evidence at trial.

1996 from action by their employers.[195] In particular, the Act makes void any contractual provision which would preclude what it calls a 'protected disclosure'.[196] This means a disclosure in good faith, to an appropriate person or persons, of one or more of six specified kinds of information, about criminal or civil misconduct; risks to justice, health, or the environment; or cover-ups of such matters.[197] Private, personal information could well fall within the scope of these provisions. If a worker's disclosure of such information to the media was a 'protected disclosure' then it would be reasonable to assume that the media would avoid liability for publishing it. By the same token, an attempt by the media to justify on public interest grounds the publication of a whistle-blowing story would be likely to fail if the worker's own disclosure failed to satisfy the statutory criteria for protection.[198] The scheme of the relevant provisions is such that disclosure to the public generally appears to be regarded as a measure of last resort needing clear justification.[199]

(b) Privacy of journalistic material

1.88 The identity of confidential media sources is given qualified protection by s 10 of the Contempt of Court Act 1981. This entitles a publisher or journalist to withhold the identity of 'the source of information contained in a publication for which he is responsible' and prohibits the court from ordering disclosure unless that is 'necessary in the interests of justice or national security or for the prevention of disorder or crime'. Journalistic material generally has exemption from the access rights under the DPA and, where this is otherwise applicable, the FIA.[200] Journalistic material also has special status under the Police and Criminal Evidence Act 1984[201] which

[195] pt IVA (ss 43A–L) and s 10(A), all inserted by the Public Interest Disclosure Act 1998. The Public Interest Disclosure Act's requirement for a disclosure to be in good faith was removed by s 18 of the Enterprise and Regulatory Reform Act 2013: the good faith requirement was replaced with a power to reduce damages by 25% where a protected disclosure was made in bad faith.

[196] s 43J.

[197] s 43B.

[198] Such an unsuccessful attempt was made in the context of a dispute over the disclosure of research data on the internet in *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385, [2001] EMLR 21, HC. See Sir Andrew Morritt V-C [22].

[199] The first port of call is the employer, or other person whom the worker believes to have legal responsibility over the matter in question: s 43C. This would cover, for instance, disclosure to the police in a case of alleged crime or to a regulator such as the Animal Procedures Committee in *Imutran* (n 198). Another possible course short of media publication which is contemplated by the Act is disclosure to a legal adviser: s 43D. For other disclosures the first in the list of factors to which regard is to be had is 'the identity of the person to whom disclosure is made': s 43G(3)(a).

[200] s 32 DPA. The FIA applies in qualified form to the BBC, Channel 4, and S4C. Where the access rights do apply, the identities of sources may be withheld if they do not consent and it is 'reasonable' to withhold their identities: s 7(4) DPA. In *Durant* (n 145) the Court of Appeal was wary of attempting to devise any principles of general application on the reasonableness test in s 7(4). It felt that everything depended on the circumstances, and that the Court should limit itself to a review of the data controller's decision rather than assuming the role of primary decision-maker or 'second guessing' data controllers' decisions.

[201] There are two categories. First, 'journalistic material' generally, which means 'material acquired or created for the purposes of journalism' which is 'in the possession of a person who

exempts all such material from the general power to enter and search premises under a search warrant[202] and imposes specific 'access conditions' which must be established to the satisfaction of a circuit judge before the police can have access to any of it.[203]

1.89 A similar procedure governs access to journalistic material under the Terrorism Act 2000[204] but there are important differences which give the police easier access.[205] Moreover, while the anti-terrorism legislation has recently undergone substantial reform it remains a criminal offence for a person not promptly to inform a police officer of his or her knowledge or suspicion, based on information gained in the course of his or her work, that another person is funding or providing various forms of financial assistance for terrorism, and the grounds for such knowledge or suspicion.[206] It is also an offence to 'interfere with' material knowing or suspecting that it is likely to be relevant to a current or prospective terrorist investigation, a provision which could, it seems, affect the destruction of journalistic material.[207] Finally, if a media organization possesses information the disclosure of which would infringe s 5 of the Official Secrets Act 1989[208] then it is a criminal offence not to hand it over to a government official when required to do so.[209]

1.90 Section 38B of the Terrorism Act 2000[210] adds a further criminal offence of failing without reasonable excuse to disclose information which a person knows or believes might be of material assistance in preventing an act of terrorism or

acquired or created it for the purposes of 'journalism'. This is amongst the categories designated in the Act as 'special procedure material', access to which requires the permission of a circuit judge. Secondly, 'journalistic material' which is held in confidence. This is amongst the categories designated as 'excluded material'. Access to excluded material can only be given under Police and Criminal Evidence Act 1984 if the circuit judge is satisfied that another Act allows access to it, and that this is appropriate.

202 Police and Criminal Evidence Act 1984, s 117.

203 Police and Criminal Evidence Act 1984, sch 1, paras 1–2. These provisions were analysed, and their stringency emphasized, in *Bright* (n 14).

204 sch 5, pt 1.

205 In particular, application may be made under sch 5 to the Terrorism Act 2000 without notice to the respondent, and excluded or special procedure material may be seized even if no other Act allows this.

206 Terrorism Act 2000, s 19(1)–(2). There is however a defence of 'reasonable excuse' for non-disclosure: s 19(3). In the course of parliamentary debates it was said on behalf of the government that it saw this as an important safeguard for journalists, given that protecting sources was 'clearly an important principle for journalists, particularly those working in this difficult area': *Hansard*, HL (series 6), vol 613, col 653 (23 May 2000) (Lord Bassam of Brighton).

207 Terrorism Act 2000, s 39(2) and (4). Again, though, this is subject to a defence (among others) of 'reasonable excuse'.

208 Some personal information may fall within these provisions. They cover not only government secrets as to security and intelligence, defence, and international relations but also any information the disclosure of which 'impedes the prevention or detection of offences' (s 4(2)(iii)) and any information obtained by official interception of communications, or about such interception (s 4(3)(a)).

209 Official Secrets Act 1989, s 8(4).

210 Inserted by Anti-Terrorism, Crime and Security Act 2001, s 117.

in securing the apprehension, prosecution, or conviction of a person for terrorist acts. Unlike the offence under s 19, this crime is not limited to information obtained in the course of employment. It applies even if the information is acquired overseas.

(6) Sanctions and Remedies

1.91 Leaving aside the DPA, the majority of the statutes mentioned above provide only for criminal sanctions. In such cases the question may arise as to whether an injunction can be obtained, or a claim for damages pursued, for breach of the statutory prohibition. Could damages and/or an injunction be obtained, for example, in respect of actual or threatened breaches of the anonymity provisions of the Sexual Offences (Amendment) Acts? These state that where a relevant allegation has been made:

> . . . neither the name nor address, and no still or moving picture, of that person shall, during that person's lifetime . . . be published in England and Wales in a written publication available to the public . . . if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.[211]

1.92 On conventional principles, an action for breach of statutory duty may be available where, as a matter of construction, it appears that 'the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty'.[212] This was the basis upon which the County Court of Melbourne (Victoria) found for a claimant in a claim for breach of statutory duty against a broadcaster who identified her as a rape victim.[213]

1.93 Provisions such as those of the Sexual Offences (Amendment) Act 1976 would certainly appear designed to protect a limited class of victims of crime. However, a parliamentary intention to protect a class is not enough; it must be shown that Parliament intended to afford a civil right of action.[214] Discerning whether this is so is not generally easy. While the Law Commission long ago proposed a simple, general presumption in favour of a civil right of action whenever a statute does not expressly exclude one,[215] this has never been acted upon. It may be that a breach of the duty not to identify a victim of certain sexual offences is actionable according to the tests for discerning parliamentary intent which have been developed by the courts.[216]

[211] Sexual Offences (Amendment) Act 1976, s 4(1)(a).

[212] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 732; *Rickless v United Artists* (n 137).

[213] *Jane Doe v Australian Broadcasting Corp* [2007] VCC 281.

[214] *Pickering v Liverpool Daily Post and Echo Newspapers Ltd* [1991] 2 AC 370; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, 170–1 (Lord Jauncey).

[215] Law Commission, *The Interpretation of Statutes* (Law Com No 21, 1969) para 38 and app A(4).

[216] Amongst the relevant factors are the remedies, if any, expressly provided for by the statute and the adequacy of alternative remedies whether administrative or at law, together with certain policy considerations.

The Court of Appeal has held it arguable that electronic eavesdropping on a telephone conversation in breach of s 5 of the Wireless Telegraphy Act 1949 amounts to an actionable breach of statutory duty.[217] However, the established tests have attracted understandable criticism for their inconsistency and the discretion they permit the courts.[218]

1.94 In the context of privacy statutes the single most important canon of statutory interpretation is, arguably, the one provided for by s 3 HRA, that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights' which, of course, include the privacy rights under Article 8. If some aspect of the Convention right to 'respect for . . . private and family life . . . home and correspondence' under Article 8 is protected by a particular statute which does not exclude a civil remedy then, it might be argued, a court which refused to grant a civil remedy for breach of the statute would be acting incompatibly with a Convention right, in breach of s 6 HRA. Such reasoning could be applied to the anonymity provisions mentioned above, and quite possibly to other statutory prohibitions.

F. The Media Codes

1.95 Running alongside the legislative and common law provisions relating to privacy are the Codes of Practice which apply to the media. These consist of the Ofcom Broadcasting Code to which broadcasters are required to adhere as a condition of their licences and in relation to the press the Editors' Code of Practice of the Independent Press Standards Organisation, a voluntary code to which members of the press commit themselves. IPSO was established in the wake of Lord Justice Leveson's recommendations and replaced the Press Complaints Commission. The BBC has additional responsibilities under its Editorial Guidelines. The relevant provisions of those codes relating to privacy are considered in Chapter 14 together with the adjudications made under them and the powers of the bodies which implement them. Study of these codes is important not least because of the interrelationship between them and the legal framework for the protection of privacy by virtue of s 12(4) HRA which requires a court to have particular regard to the terms of any relevant privacy code when considering whether to grant any relief which might affect the exercise of the right to freedom of expression and the publication of any journalistic, literary, or artistic material.

[217] *Francome* (n 176) 896–7 (Sir John Donaldson MR), 901–2 (Stephen Brown LJ).
[218] G Williams, 'The Effect of Penal Legislation in the Law of Tort' (1960) 23 MLR 233.

G. Privacy, the Internet, and Social Media

1.96 The authors of Chapter 15 have tackled the particular legal problems created by the ascendancy of social media. While the existing media industry codes of practice may apply to online versions of print and broadcast material if they would otherwise come within the regulator's remit, they do not apply to the various other forms of new media which have sprung up in recent years. These include citizen blogs, Twitter, and social networking sites such as Facebook which are of increasing concern as regards infringements of a right to privacy.

1.97 Unless the specific publication complained about is made by a journalist or media organization which is amenable to the jurisdiction of Ofcom, the BBC, or IPSO a victim must have recourse to the law in the ordinary way. As such the 'new media' are largely unregulated although the legislative and common law provisions considered in the previous sections will apply as appropriate. The legal means by which the court seeks to protect individuals against unwarranted infringements of privacy online are the same as those it deploys in other situations: there is as yet no civil cause of action directed specifically to online wrongdoing.

1.98 The criminal law may have a particular role in protecting individuals from the deleterious consequences of online activity. On 20 June 2013 the Director of Public Prosecutions published *Guidelines on prosecuting cases involving communications sent via social media*.[219] The guidelines make specific reference to the provisions of s 1 of the Malicious Communications Act 1988 (sending an electronic communication which conveys a threat), and s 127 of the Communications Act 2003 (sending a message of a menacing character by means of a public telecommunications network).

1.99 As for civil remedies, misuse of private information, breach of confidence, copyright, data protection, defamation, and human rights and anti-discrimination legislation all have a role to play, but the tort of harassment under the Protection from Harassment Act 1997 appears to have a special place in the armoury. A more detailed consideration of these issues, as well as the changes brought about by the implementation of the Defamation Act 2013 and the accompanying Defamation (Operators of Websites) Regulations 2013 is contained in Chapter 15.

[219] <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/>.