Tithe an Oireachtais

An Comhchoiste ar an mBunreacht

An Chéad Tuarascáil

Airteagal 40.6.1.i - Saoirse Cainte

Iúil 2008

Houses of the Oireachtas

Joint Committee on the Constitution

First Report

Article 40.6.1.i - Freedom of Expression

July 2008

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PREFACE

The Joint Committee on the Constitution was established by the 30th Dáil by orders of both Houses of the Oireachtas in October 2007 and is chaired by Sean Ardagh TD. The work of the Joint Committee is a continuation of work already undertaken by the Joint Committee on the Constitution and the All Party Oireachtas Committee during the 27th, 28th and 29th Dáileanna.

The Joint Committee's role is to examine the Constitution to identify those areas where constitutional reform may be required and to recommend change were necessary. In its current work programme the Joint Committee is examining the protection of Fundamental Rights under Articles 40 – 44 of the Constitution. This is the First Report of the Joint Committee. The First Report focuses on the Freedom of Expression under Article 40.6.1.i. and examines the potential areas for change, including the prohibition against blasphemy.

The Committee's work programme involves the holding of public and private hearings, consideration of written and oral submissions of interested parties, followed by joint deliberations with the assistance of legal expertise. This Report records the deliberations and conclusions of the Committee and sets out a number of recommendations for change.

The Committee wishes to thank Dr. Gerard Hogan SC for his on-going advice and assistance to the Joint Committee. His particular expertise in Constitutional and Administrative Law continues to be an immeasurable asset to the Committee in its deliberations.

The Committee thanks Mr. Stephen Dowling BL. Mr. Dowling assisted the Committee in the extremely complex task of considering the submissions received and provided sound guidance to the Committee both in its preparation for and throughout the review of this Article of the Constitution.

The Committee wishes to thank the Clerk to the Committee, Mr Alan Guidon and the staff of the Committee Secretariat for their on-going assistance to the Committee.

The Committee wishes also to thank all those who took the time to make a submission. These documents provided the Committee with a very valuable insight into the views held by the various groups.

Also, to those who attended at the oral hearings. Their attendance enabled the Committee to further examine (in more detail) the numerous issues raised in the submissions received.

Sean Ardagh TD (Chairman)

Jim O'Keeffe TD (Vice-Chairman)

Committee Members


Thomas Byrne TD


Michael D'Arcy TD


Tom Hayes TD


Brendan Howlin TD
(Leas Cheann Comhairle)


Michael Kennedy TD


Denis Naughten TD


Ned O'Keeffe TD*


Mary O'Rourke TD


Michael Woods TD


Senator Dan Boyle


Senator Denis O'Donovan


Senator Eugene Regan


Senator Alex White

*Deputy Ned O'Keeffe was appointed by Order of the House on 26th June 2008 in substitution for Minister of State Barry Andrews.

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CHAPTER ONE: INTRODUCTION

Background to the establishment of the Committee

1.1 By order of both Houses of the Oireachtas in October 2007, it was directed that a joint committee be established to complete a full review of the Constitution. The orders of reference provided as follows

> "(1) That a Select Committee, consisting of eleven members of Dáil Éireann, be appointed to be joined with a Select Committee to be appointed by Seanad Éireann, to form the Joint Committee on the Constitution to complete a full review of the Constitution in order to provide focus to the place and relevance of the Constitution and to establish those areas where Constitutional change may be desirable or necessary.
>
> (2) In considering such matters as it may select and see fit and on which it shall report to both Houses of the Oireachtas, the Joint Committee shall take cognisance of
>
> (a) the work already undertaken by the Joint Committee on the Constitution in the 28th and 29th Dáileanna and the All-Party Oireachtas Committee on the Constitution since its establishment in July 1996 and re-establishment in October 1997 and again in December 2002; and
> (b) the Report of the Constitution Review Group
>
> (3) The quorum of the Joint Committee shall be five, of whom at least one shall be a member of Dáil Éireann and one a member of Seanad Éireann.
>
> (4) The Joint Committee shall have the powers defined in Standing Order 83(1), (2), (3), (4), (8) and (9).
>
> (5) The Chairman of the Joint Committee shall be a member of Dáil Éireann."

1.2 Pursuant to its Orders of Reference, the Committee decided to examine Article 40.6.1.i relating to Freedom of Expression with a particular focus on the issue of blasphemy. The Committee noted that some work had been conducted by the All-Party Committee on the Constitution in the 29th Dáil and felt it appropriate to build on the work already undertaken and bring it to a conclusion as outlined in its Orders of Reference.

1.3 In preparation for its examination of Article 40.6.1.i relating to Freedom of Expression (including Blasphemy), the Committee initially drew up a list of potential interest groups. It agreed that a letter should be issued advising these groups of the Committee's role and inviting submissions to assist the Committee in its

deliberations. In addition to this, an advertisement was also placed on the Oireachtas website informing any other interested party of the Committee's intention to examine this matter.

1.4 The Committee received a number of submissions from the following parties.

1. The Bar Council.
2. RTÉ.
3. National Newspapers of Ireland Submission.
4. TV3.
5. School of Law, Trinity College.
6. Gorey Muslim Community.
7. Union of Students in Ireland.
8. Humanist Association of Ireland.
9. Institute of Advertising Practitioners Ireland.
10. Jason FitzHarris.

1.5 Following the deadline for receipt of submissions the Committee examined each submission received and selected what it considered to be a representative cross-section of the various interest groups. The following parties were invited to make oral submissions to the Committee.

23rd April 2008

Parties	**Represented by**
RTÉ	Mr Eamon Kennedy, Solicitor
The Bar Council	Mr Turlough O'Donnell SC, Chairman of the Bar Council; Dr Neville Cox BL; Mr James O'Reilly SC; Ms Siobhán Ní Chúlacháin BL and Mr Jerry Carroll, Director of the Bar Council.
School of Law, Trinity College	Dr Eoin O'Dell

30th April 2008

Parties	**Represented by**
National Newspapers of Ireland	Mr Frank Cullen, Co-ordinating Director; Mr Brendan Keenan, Group Business Editor, Independent Newspapers and Chairman of the Press Council Code Committee; Mr Colm MacGinty, Editor, Sunday World; Mr Cliff Taylor, Editor, Sunday Business Post and Mr Andrew O'Rorke, Solicitor.
TV3	Mr David McMunn, Director of Government, Regulatory and Legal Affairs; Mr Andrew Hanlon, Director of News & Information Programming and Mr David McRedmond, CEO.

Transcripts from these public hearings are available on the Oireachtas website.

Structure of this Report

1.6 The present report is divided to four key parts. Chapter 2 examines the present law on Article 40.6.1.i and related issues. In particular it tracks the legal developments which have taken place since May 1996, when the Constitution Review Group made certain recommendations concerning the amendment of this Article. It is hoped that this section gives a clear legal context for the current arguments for and against change.

1.7 Chapter 3 details the submissions received by the Committee and the deliberations which took place during the public hearings.

1.8 Chapter 4 outlines the various options which the Committee has, considering the various arguments which have been presented and in light of the current legal context.

1.9 Chapter 5 sets out the Committee's conclusions and recommendations.

CHAPTER 2: THE PRESENT LEGAL CONTEXT

Introduction

2.1 Article 40.6.1.i states

> The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
>
> i. The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
>
> The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

Freedom of Expression

2.2 In summary Article 40.6.1.i guarantees liberty for the exercise, subject to "public order and morality", of the right of citizens to express freely "their convictions and opinions". As the Constitution Review Group noted in 1996, the right of free speech and of expression is one which is guaranteed in virtually every constitution and relevant international human rights instrument and it is generally considered to be a key fundamental right.[1] However, as with many constitutional rights, the freedom of speech is not absolute. In particular, Article 40.6.1.i stipulates that this freedom shall not be used to undermine public order, morality or the authority of the State. Furthermore, the Article specifically states that the publication of blasphemous, seditious or indecent matter is an offence which shall be punishable by law. This latter restriction is one of the striking features of Article 40.6.1.i as it seems to create (or require the creation of), three offences arising out the abuse of the freedom of expression.

Historical Origins of Article 40.6

2.3 As shall be discussed in more detail below, the language of Article 40.6.1.i has been criticized, particularly by the Constitution Review Group in its report in May 1996. In

[1] Constitution Review Group, *Report of the Constitution Review Group*, May 1996 p. 291.

this regard, it is useful to understand the intention of the drafters and the circumstantial context behind the formulation of the Article.

2.4 While at this remove it is difficult to be dogmatic on the point, there is nonetheless some evidence that the drafters were anxious to safeguard the right of free speech. The relevant starting point is the predecessor to Article 40.6 as provided in Article 9 of the Constitution of the Irish Free State which stated

> "The right of free expression of opinion as well as the right to assemble peaceable and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious or class distinction".

2.5 Article 9 was amended in 1931 through the introduction of Article 2A (an anti-terrorism law). Some flavour of the nature of this provision may be gathered by Section 23 of Article 2A which provided that

> "23-(1): It shall not be lawful to publish, distribute, sell or offer or expose for sale any book, newspaper, periodical, pamphlet, leaflet, circular or other document which is issued or published on behalf of an unlawful association.
>
> 23-(2): Every person who shall publish, distribute, sell or offer or expose for sale any book, newspaper, periodical, pamphlet, leaflet, circular, or other document in contravention of this section shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding one hundred pounds or, at the discretion of the Court, to imprisonment for any term not exceeding six months or to both such fine and such imprisonment or, on conviction by the Tribunal, such punishment as the Tribunal shall think proper to inflict, and also in any case to forfeiture of every copy of such document in his possession and also, in the case of a person found guilty of the offence of possession of any such document, to forfeiture of all such machinery in his possession".

2.6 Bunreacht na hÉireann was drafted in 1937, amidst a need for a new Constitution, given the emergence of the doctrine of implicit amendment whereby if there was a conflict between an Act and the Constitution, then the Act of the Oireachtas prevailed. The drafting of the new Constitution was prefaced by the establishment of the Constitution Review Committee in 1934, whose task was to examine the Constitution of the Irish Free State. The Committee recommended that Article 9 (as a fundamental right) should be retained but subject to a qualification that:

"laws may be passed, and police action taken, to prevent or control open-air meetings which might interfere with normal traffic or otherwise become a nuisance or danger to the general public. We understand that legislation on these lines has been delayed by reason of doubts as to whether such legislation could validly be enacted in view of the present wording of the article".

2.7 Of particular interest is the fact that the Report of the Review Group gave consideration to Constitutions of other countries, and in this regard the Report contained extracts of comparable constitutional provisions, including those dealing with free speech and assembly.

2.8 The intentions of the drafters behind Article 40.6.1.i becomes clearer when one examines the relevant debates at the committee stage. Fine Gael and Labour had argued that the proviso to Article 40.6.1.i could infringe the right of freedom of expression. The debate between the then President of the Executive Council[2] (Mr. de Valera TD) and the opposition focused on what is now the second paragraph of Article 40.6.1.i[3] . In this regard Deputy Costello stated

> "We find here a statement of the general principle that the State guarantees liberty for the exercise of certain rights 'subject to public order and morality'. The first is the right of the citizen to express freely their convictions and opinions. If the Article had stopped there it would have received my full support, but the tag that is put on to it constitutes, in my view, a grave menace.....I think the tag at the end of this statement is entirely unnecessary. The liberty of the Press, and right of free speech, have in constitutional law a certain well known and well defined meaning....The result has been in the end to secure a very wide measure of free expression of opinion and the liberty of the Press, and the limitations on that are well known. A limitation on the liberty of the Press and on the right of free expression of opinion, would, in my view, be amply safeguarded by the general terms used in the introductory clause to this particular sub-Article of the Constitution, the right to be exercised 'subject to public order and morality'. Those wide general terms having been used, there was in my view, no necessity for the addition of this tag on sub-clause 1, paragraph 6 of the Article. The fact that such a tag is there, coupled with the general terms "subject to public order and morality" lends in my view, a powerful support to the argument that any future Government may advance to cover its tracks when it is in effect, making an attack on the liberty of the Press or the right of free speech"[4].

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[2] This was the then title for the office corresponding to the present day Taoiseach.

[3] "The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, shall not be used to undermine public order or morality or the authority of the State".

[4] *Dail Debates* June 3,1937 at Cols 1631 –1632,

2.9 The debate continued with Mr de Valera defending the 'tag', stating it was necessary to act as a 'guide as to what is the meaning or the implications of public order and morality". Mr de Valera continued

> "I say that you should not give to the propagation of what is wrong and unnatural the same liberty as would be accorded to the propagation of what is right. Every state has to protect itself against the abuse of liberty that otherwise be rightful liberty. We want to protect rightful liberty, but in the interests of the community as a whole we want to see that that rightful liberty is not abused. Therefore, I say that you cannot let the first part stand by itself – the part which merely declares the right of the citizens to express freely their convictions and opinions. That cannot be allowed and, in fact, is not permitted in any State that I know of".

2.10 Mr de Valera continued to defend the obligation, in the Article, on the State to ensure that organs of public opinion, such as the radio, the press, the cinema, shall not be used to undermine public order or morality or the authority of the State. Mr de Valera stated that

> "The only thing that may be said about this clause is that it is frank and open, that it says that the State ought to try to do things which the State does as a matter of fact".

2.11 Following submissions from the opposition[5] Mr de Valera conceded on the issue of criticism of government policy (albeit not considering it necessary) and at the Recommittal stage the phrase "including criticism of government policy" was included in the Article.

2.12 At the Recommittal stage, further debate ensued as to whether the inclusion of the phrase "including criticism of Government policy" overrides the phrase "undermining the authority of the State". The concern of the opposition was whether the proviso allowed the courts to invalidate a law which infringed freedom of expression. Despite contentions of Deputy McGilligan to the effect that the proviso would "take the determination of what is 'subject to public order and morality' away from the High Court and the Supreme Court and to give it to the legislature",[6] de Valera rejected these arguments and stated that the courts did retain a jurisdiction to invalidate laws on the grounds of infringement of freedom of expression.

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[5] Deputy McDermott stated "They have got public order and morality covered some lines before the sentence to which we are objecting. They got sedition covered in the sentence after the clause to which I am objecting. It is not at all apparent to me what they gain by this paragraph. If, however, they are determined to have it in, I think that the objection to it would be greatly diminished if the President would accept my amendment....which makes it plain that in talking about undermining the authority of the State, you do not intend to rule out criticisms of the Government of the day".

[6] 68 *Dáil Debates* at Cols. 193-194.

2.13 A number of conclusions can be deciphered from the debates that surrounded the introduction of Article 40.6.1, which are relevant to the focus of this report.

1. President[7] de Valera was 'concerned to preserve the rightful liberty of expression, including of course, the right to criticize the government and, by necessary implication, the general right of free speech'.
2. The drafters wanted to protect the right of free speech, but in an attempt to ensure that extreme versions of free speech would not be allowed, the resultant constitutional provision (whereby freedom of expression, cannot be used to undermine public order or morality or authority of the State) aesthetically suggests a lack of willingness to protect free speech.
3. It is arguable that the drafters intended to achieve much the same result as the drafters of the European Convention on Human Rights subsequently intended to achieve.

Freedom of speech and International Obligations

2.14 The United Nations Universal Declaration of Human Rights, adopted in 1948, provides, in Article 19, that:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

The Declaration is a resolution of the United Nations General Assembly (as opposed to a treaty) and so it is not legally binding, in its entirety, on members of the UN. However, freedom of speech is granted unambiguous protection in international law by the International Covenant on Civil and Political Rights which is binding on around 150 nations. Article 19 provides that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
    a. For respect of the rights or reputations of others;
    b. For the protection of national security or of public order, or of public health or morals.

[7] President of the Executive Council

2.15 The European Convention on Human Rights, signed on 4 November 1950, guarantees a broad range of human rights to citizens of member countries of the European Union. These rights include Article 10, which entitles all citizens to free expression. Article 10 states

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 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2.16 Each party to the convention must alter its laws and policies to conform with the Convention. In this regard, the United Kingdom and Ireland, have expressly incorporated the Convention into our domestic laws. In Ireland this has been done through the European Convention on Human Rights Act, 2003 which is discussed further below. The European Court of Human Rights is seized of responsibility for ensuring compliance with the Convention. Currently, all members of the European Union are signatories of the European Convention on Human Rights as well as having varying constitutional and legal protections for freedom of expression at the national level. The Convention is not legally binding, but it is taken into account by the European Court of Justice.

2.17 Under European Union Law, the Reform Treaty or "Treaty of Lisbon" proposes to make binding a Charter of Fundamental Rights. Article 11 of this Charter guarantees freedom of expression. The Charter is not presently binding. As drafted, the Charter would apply to the institutions of the European Union and to the Member States when they are "implementing" Union law.[8]

The Constitution Review Group Report

2.18 In its report published May 1996, the Constitution Review Group was of the opinion that the Article 40.6.1.i as drafted was unsatisfactory and recommended that it should be replaced by a new clause protecting the right of free speech which was modelled on Article 10 of the European Convention of Human Rights. The Review Group put

[8] Article 51.2 of the Charter.

forward a number of arguments supporting this proposal. The following is summary of the main arguments.

2.19 First, as a general point of policy, the Review Group pointed out that "any legislative restrictions on the exercise of free speech must be 'necessary in the public interest' and that the onus ought to be on the State to demonstrate that such restrictions are objectively justifiable."[9] The Review Group was of the opinion that this would be better achieved by a re-drafted version of Article 40.6.1.i which was modelled along the lines of Article 10 of the European Convention of Human Rights. Notably, however, the Review Group stated that such a development might also emerge having regard to the application of the proportionality doctrine to other areas. As discussed further below, this appears to have occurred.

2.20 Second, the Review Group argued that the language of Article 40.6.1.i was awkward at some places and obscure at others. For example, the phrase *"the State shall endeavour to ensure that...."* left it unclear as to whether the State was under a legally cognisable obligation in relation to control of the organs of public opinion so as not to abuse the freedom of expression. The Review Group also pointed out that the language appeared dated in that it did not refer to modern modes of communication, such as television or the internet.[10]

2.21 Third, the Review Group felt that because of the potential role which the media can play in the development and operation of political culture through opinion formation, the issue of its ownership and control is an important consideration within a democratic society. Thus, there is a danger if a large section of the media is under the control of a small group, which is neither democratically representative nor accountable. In this regard, the media should not only have the freedom, but also the responsibility for upholding democratic principles. In this regard, the Review Group were of the view that an amendment modelled on Article 10 of the European Convention of Human Rights would go as far as possible to promoting this ideal.

2.22 Fourth, the Review Group stated that the retention of the present constitutional offence of blasphemy was not appropriate. Furthermore, the Review group recommended that the reference to publication of "seditious" or "indecent" matter be deleted and that a form of words be employed to allow these matters be addressed by way of appropriate legislation.

2.23 Fifth, the Review Group stated that the qualifying phrase of "public order and morality" at the beginning of Article 40.6.1.i was too general and all embracing. A similar criticism was made of the reference to "the authority of the State". Instead, it recommended that the Oireachtas should have the right to qualify by law the right of

[9] Constitution Review Group, *Report of the Constitution Review Group*, May 1996, at p. 292.
[10] Constitution Review Group, *Report of the Constitution Review Group*, May 1996 at p. 293.

free expression for adequate reasons of public interest and a working modelled on Article 10 of the European Convention of Human Rights would achieve this.

Developments in case law since the Constitution Review Group Report

2.24 In addition to legislative developments there have been a number of important legal decisions, both European and Irish, since 1996. There is certainly much more litigation involving Article 40.6 now than there had been in the past. Furthermore, the case law of the European Court of Human Rights, which adopts the proportionality doctrine, has now being adopted by the Irish judiciary[11]. A number of key points can be taken from these developments.

Development of the doctrine of proportionality

2.25 In *Heaney v Ireland*[12] Costello J provided the first statement of the doctrine of proportionality and, in a justly celebrated passage, stated thus:

> "The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. They must: be rationally connected to the objective and not be arbitrary unfair or based on irrational considerations; impair the right as little as possible, and be such that their effects on rights are proportional to the objective".[13]

2.26 In summary, therefore, restrictions on constitutional rights need to be objectively justified, subject to judicial scrutiny and proportionate to their aims.

2.27 The proportionality doctrine is very significant in the context of Article 40.6.1. In practice, it has enabled the courts to overcome the textual limitations on the right of freedom of expression as expressly provided for in Article 40.6.1 and 40.6.1.i.

2.28 Since the publication of the Constitutional Review Group Report in 1996, some noteworthy developments have taken place in the realm of freedom of expression case law. These include the adoption by the courts of the proportionality doctrine and constitute a noteworthy change in judicial attitude to the interpretation of Article 40.6.1. This case law demonstrates that Article 40.6.1.i as now interpreted is a provision which can be effective in protecting freedom of expression.

2.29 The first of the major decision in this context is *Irish Times v Ireland*[14]. The case concerned a number of non-nationals who were charged with drugs offences. They

[11] See below, and in particular *Murphy v IRTC* [1999] 1 IR 12 and *Mahon v. Post Publications Ltd.* [2007] 2 ILRM 1.
[12] [1994] 3 IR 593.
[13] [1994] 3 IR 593 at 607
[14] [1998] 2 ILRM 161, [1998] 1 IR 359

were tried in the Circuit Court, and the trial judge, conscious that other similar trials had been aborted by reason of inaccurate reportage, imposed a ban on the media reporting anything other than the bare facts of the case in the interests of securing a fair trial. While the Supreme Court held that a trial subject to such reporting restrictions could not constitute the public administration of justice for the purposes of Article 34.1 of the Constitution, the case is also of vital importance for Article 40.6.1.i. In particular, the Supreme Court invoked the doctrine of proportionality by giving consideration and weight to the freedom of the press, (which the courts had shown a marked reluctance to so do prior to this decision[15], although shades of the former approach were still visible[16]).

2.30 Thus, it was held that the restrictions imposed by the trial judge in the Circuit Court were disproportionate to the threat posed by misinterpretation of facts, which in any event could have been adequately dealt with by a direction by the trial judge to the jury.

2.31 The proportionality test as outlined in *Heaney* was also adopted in *Murphy v IRTC*[17] . The defendant Commission banned a proposed advertisement by the plaintiff which sought to invite the audience to attend a public meeting at which a video detailing the evidence of the resurrection of Christ would be shown. The ban was imposed pursuant to section 10(3) of the Radio and Television Act, 1988 which provides

> "No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute".

2.32 The plaintiff claimed that the ban interfered with his right to free speech as protected by Article 40.6.1.i and his right to communicate under Article 40.3. The Supreme Court dismissed the plaintiff's claim. Whilst it accepted that the plaintiff's rights were being interfered with, it found that the interference was in the interests of the common good. Barrington J stated that

> "All three kinds of banned advertisement relate to matters which have proved extremely divisive in the past. The Oireachtas was entitled to take the view that the citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements, if permitted, might lead to unrest. Moreover the Oireachtas may well have thought that in relation to matters of such sensitivity, rich men should not be able to have access to the airwaves to the detriment of their poorer rivals".

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[15] See, e.g, *AG (SPUC) v Open Door Counselling Ltd* [1998] IR 753.

[16] Thus, O'Flaherty J. could observe that:

> "While freedom of the press is constitutionally guaranteed, there is a sense in which freedom of the press might be categorised as such freedom as remains after the Constitution and the law have had their say".

[17] [1999] 1 IR 12.

2.33 Perhaps not everyone would agree with Barrington J.'s assessment that the restrictions imposed here were "minimalist." At first sight, the proportionality justification advanced by the Court seems slender and imputes a legislative objective to the Oireachtas which not all members actually shared. If one considers the judgment of the Supreme Court in light of European case law it appears flawed in some respects. In particular *Handyside v UK*[18] and *Sunday Times v UK*[19] suggest that the European Convention of Human Rights affords greater protection to freedom of expression over competing interests of the State. Indeed, in the *Handyside* decision, the court found that freedom of expression includes that which shocks, offends or disturbs.

2.34 Nonetheless, two points emerge from *Murphy*. First, as Joyce comments:

> "By focusing on proportionality, the courts have demonstrated that it is possible to move beyond the textual limitations of Article 40.6.1.i in order to increase protection for freedom of expression without replacing the provision entirely.... However, if the text is becoming less and less important, the one element still missing from a successful organic overhaul of Article 40.6.1.i is judicial will"[20]

2.35 Second, it must be pointed out that in *Murphy v. Ireland*[21] the European Court of Human Rights substantially endorsed the approach of the Supreme Court's judgment, albeit that judgment appears to suggest that the capacity of the State to circumscribe religious speech may be somewhat broader than in the case of pure political speech. Thus notwithstanding the criticisms which can be made of Article 40.6.1.i, the fact that the European Court of Human Rights upheld that decision might be thought to suggest no necessity to alter the wording of Article 40.6 albeit that one single decision could scarcely be dispositive on this point.[22].

2.36 Another case which involved balancing the freedom of expression with other constitutional rights was *Foley v Sunday Newspapers Ltd*[23]. This concerned the right to freedom of expression and the right to life and bodily integrity. The case came before Mr Justice Kelly on an interlocutory application by the Plaintiff seeking an order of a prohibitory injunction restraining the defendant from publishing or broadcasting any material relating to the Plaintiff which endangered the life of the Plaintiff, and/or suggested that the plaintiff acted as an informer for the Gardai and/or interfered with the Plaintiff's right to life, privacy and bodily integrity as protected by

[18] (1976) 1 EHRR 737
[19] (1979) 2 EHRR 245
[20] Ibid at page 99.
[21] (2004) EHRR
[22] See also *Colgan v. IRTC* [2000] 2 IR 490 which is in similar terms.
[23] [2005] 1 IR 88,

Article 40.3 of the Constitution. The case arose out of the writings of Paul Williams, crime editor of *The Sunday World* (which said paper had the policy of exposing and reporting on the criminal underworld).

2.37 The Court did not consider injunctive relief under the European Convention on Human Rights Act, 2003 as it was accepted by the parties that no injunctive relief, under the Act, could be granted at the interlocutory stage of proceedings, and so the court did not have jurisdiction to grant any order under the 2003 Act. The Court then considered the nature of the relief sought (prohibitory injunction) and cited the rule in *Bonnard v Perryman*[24], wherein Kelly J cited with approval the dicta of Lord Coleridge CJ as follows

> "The right of free speech is one which is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions".

2.38 The court went on to consider where the balance of convenience[25] lay and identified the stance of the plaintiff which was to avoid publication of material which could give rise to a risk to his life and bodily integrity, between the interlocutory hearing and trial. The defendant contended that it should be free to publish material if it wishes to do so and that it could stand over the material as being true. Kelly J found for the defendant, stating:

> "In this country we have a free press. The right to freedom of expression is provided for in Article 40 of the Constitution and Article 10 of the European Convention on Human Rights. It is an important right and one which the courts must be extremely circumspect about curtailing particularly at the interlocutory stage of a proceeding. Important as it is, however, it cannot equal or be more important than the right to life. If, therefore, the evidence established a real likelihood that repetition of the material in question would infringe the plaintiff's right to life, the court would have to give effect to such a right".

2.39 The plaintiff had argued that once an injunction was sought to protect a constitutional right, the balance of convenience is recalibrated so as to permit only the consideration

[24] [1891] 2 Ch. 269.

[25] When an interlocutory injunction is sought a number of issues are taken into consideration by the court as identified in *American Cyanamid* – serious issue to be tried, damages are not an appropriate remedy and the balance of convenience lies in favour of granting the injunction.

of another competing constitutional right. This contention was rejected by Kelly J on the basis that it would give rise to injustice and he stated that:

> "A formulaic assertion of a claim to protect a constitutional right without any analysis of the background against which it was made being open to the court and an ability only to consider on the balance of convenience a competing constitutional right could give rise to considerable injustice".

2.40 The court ultimately rejected the plaintiff's claim for an injunction, stating that it was not justified in restricting the defendant's right to report and/or write about the plaintiff.

2.41 This case is significant as far as the printed media is concerned. The court gave significant weight to the freedom of the press and stated that if the plaintiff sought to curtail the said freedom, then compelling evidence would have to be adduced (presumably threats to his life) to justify such a restriction.

Judicial Interpretation of Article 40.6.1.i in accordance with the European Convention of Human Rights

2.42 In *Foley v Sunday Newspapers Ltd*[26] Kelly J also cited from *Venables v News Group Newspapers Ltd.*[27] where an injunction was sought on the basis of Article 10. The court held that the freedom of the media to publish could not be restricted unless the need for such restrictions fell within the exceptions in Article 10(2) which were to be construed narrowly. In this regard there appears to be a divergence between Article 40.6.1 from Article 10.2. Article 40.6.1 states that the freedom of expression is subject to 'public order and morality' and 'the authority of the state'. As the Constitution Review Group stated "the use of the qualifying phrase 'public order and morality' is too general and all-embracing to be regarded as satisfactory and this is also true of the reference to the 'authority of the State'". This is in contrast with Article 10 of the ECHR, which specifies more precisely the restrictions on the right to freedom of expression.

2.43 However, notwithstanding that Article 40.6 allows a restriction on the right to freedom of expression in the vaguest of terms, Kelly J appeared to bypass the textual limits of Article 40.6 and relied on Article 10 and more particularly Article 10(2) of the ECHR and construed the exceptions to freedom of expression in line with European case law. The approach of Kelly J might be thought to provide further evidence of the ability of the judiciary to give appropriate weight to the guarantee of freedom of expression, notwithstanding the inadequacies of the wording of Article 40.6.1.

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[26] [2005] 1 IR 88,
[27] [2001] Fam. 430.

2.44 This trend continued with the seminal decision in *Mahon v. Post Publications Ltd*[28]. Here a majority of the Supreme Court approved a decision of Kelly J in the High Court which rejected the Mahon Tribunal's claim of 'confidential information' which was afforded to documents. In October 2004, the Defendant published two articles relevant to the Tribunal, which the Plaintiff contended had been written on the basis of confidential documents. The plaintiffs had secured an interim injunction against the defendant restraining them (a)from publishing any document, in relation to which the defendant was aware that the Tribunal had directed that such information should remain confidential until disclosed at a public hearing; and (b) from publishing information or documents in relation to which the defendant was aware that the Tribunal had circulated such information on a confidential basis to any party or witness before the Tribunal, until such time as the said information was made public at the tribunal.

2.45 The Tribunal's basic contention was that they had difficulties as regards unauthorised disclosure of confidential information, which disclosure they believed to be deliberate, and had been made by persons who had been or were to be called to give evidence to the Tribunal and who intended to undermine and delay the Tribunal in its work. The defendant argued that the plaintiff was not entitled to the injunctions sought in circumstances where this would infringe their constitutional rights enjoyed under Article 40.6.1.i of the Constitution and Article 10 of the ECHR.

2.46 Kelly J, in his judgment, accepted that Article 40.6.1 protected not only the "expression of convictions and opinions" but also "the dissemination of information". Kelly J. emphasised the importance of the freedom of expression, and in particular cited from the decision of Hoffman LJ in *R v Central Independent Television*[29]:

> "Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous and irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute…..It cannot be too strongly emphasised that outside the established exceptions, or any new ones which Parliament may enact in accordance with its obligations under the Convention, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins".

[28] [2007] 2 ILRM 1.
[29] [1994] Fam. 192.

2.47 Kelly J recognised the importance of press freedom, and that any restriction thereon must be proportionate and no more than is necessary to promote the legitimate aim of the restriction. He considered the case in light of the position of press freedom as above and cited with approval from Lord Hope in *R v Shayler*[30] that

> "The wording of Article 10(2) as applied to this case indicates that any such restriction, if it is to be compatible with the Convention right, must satisfy two basic requirements. First, the restriction must be prescribed by law....The second is that it must be such as is 'necessary' in the interests of national security. This raises the question of proportionality".

2.48 Kelly J gave particular weight to the issue of proportionality concluding that the orders sought by the plaintiff

> "could not be regarded as proportionate....Why should the court lend its hand to the curtailment of press freedom in respect of material which is alleged to be confidential by reason of a decision of the Tribunal, where it is clear that that decision seeks to impose confidentiality on material some of which is not and could not be regarded as confidential in nature? The fact that the material in the brief may contain information obtained in confidence cannot be justification for the wide form of restraint which is sought. It is entirely disproportionate to the aim being pursued and in excess of any legitimate need".

2.49 Kelly J refused the injunctions sought on the basis that the restraint on freedom of expression could not be justified by reference to Article 10(2) of the ECHR.

2.50 The judgment further evidences the willingness on the part of the courts to adopt the doctrine of proportionality. Furthermore, Kelly J did not rely on the limitations of Article 40.6.1 and the 'broad' exceptions to the freedom of expression. Instead he decided the case on the basis that there was no justification under Article 10(2) of the European Convention of Human Rights for an order restricting the press reporting.

2.51 As already pointed out, the Constitution Review Group stated in 1996 that

> "The key point... is that any legislative restrictions on the exercise of free speech must be necessary in the public interest and that the onus ought to be on the State to demonstrate that such restrictions are objectively justifiable."

2.52 The Constitution Review Group further stated that the restrictions in Article 40.6.1.i are vague and allow the court to infer wide limitations – to an extent detrimental to the guarantee of freedom of expression. Notwithstanding this, Kelly J relied on the

[30] [2003] 1 AC 247.

case law and tests established in European Law which are necessary to justify exceptions to freedom of expression.

2.53 This judgment received unanimous approval from the Supreme Court. Fennelly J made it clear that the European Convention of Human Rights played an important role in assessing any restriction on the freedom of expression. He pointed out that Section 2 of the European Convention of Human Rights Act 2003 now required the court, when interpreting any statutory provision or rule of law, to do so in a manner compatible with the State's obligations under the Convention provisions.

2.54 He stated that

> "the Convention analysis provides a particularly useful mechanism for examination of the justification for imposition of the restriction sought by the tribunal in the present case."[31]

2.55 This meant that

> "A restriction on freedom of expression, if it is to be permitted pursuant to *Art.10(2)* of the Convention, must, as that provision requires, firstly, be prescribed by law and, secondly, be *"necessary in a democratic society ..."*[32]

2.56 Fennelly J went on to point out that the Court of Human Rights has consistently held that to satisfy this requirement the restriction sought must serve *"a pressing social need."* [33] In this regard he stated that a

> "further crucially important aspect of that requirement is that the restriction should not be any broader than strictly necessary to serve the interest invoked to justify it."[34]

2.57 This approach was also manifest in the recent case of *Mahon v Keena & Kennedy*[35]. This case concerned the protection of journalistic sources. The Divisional Court's approach to this was firmly based on the jurisprudence surrounding Article 10 of the EHCR and it was notable the judgment referred more to this provision than Article 40.6.1.i. The Court held that

> "the non-disclosure of journalistic sources enjoys unquestioned acceptance in our jurisprudence and interference in this area can only happen where the requirements of Article 10(2) as set out above are clearly met. The restriction

[31] Fenelly J at paragraph 57.
[32] Fennelly J at para. 60.
[33] Fennelly J at para. 62. In this regard Fennelly J referred to the case of *Observer and Guardian v United Kingdom* judgment of November 26, 1991, Series A No. 216 p.30.
[34] Fennelly J at para. 62.
[35] [2007] IEHC 348, 23 October 2007, High Court (Divisional (Johnson P, O'Neill J, Kelly J.)

on the exercise of freedom of expression by the disclosure of journalistic sources contended for by the Tribunal must be demonstrated by the Tribunal to be warranted in the context of Article 10(2). First, it must be demonstrated that the basis for the interference is one which is 'prescribed by law'; secondly, is 'necessary in a democratic society'..."

2.58 Thus the analysis invoked by the Court in *Mahon v Keena* was firmly rooted in the notion of freedom of expression as is provided for in Article 10 of the European Convention of Human Rights.

Recent European Approach to Restrictions on Freedom of Expression

2.59 Notwithstanding that the Constitution guarantees freedom of expression, the said freedom is subject to a number of laws which restrict the freedom of expression. Indeed Article 40.6.1 provides the guarantee is "subject to public order and morality" and this is reiterated in 40.6.1.i where it states that "the State shall endeavour to ensure that organs of public opinion...shall not be used to undermine public order or morality or the authority of the State".

2.60 The Constitution Review Group contended that the use of the qualifying phrase 'subject to public order and morality' is too 'general and all-embracing to be regarded as satisfactory and this is also true of the reference to the 'authority of the State'. The phrase allows for a restriction on freedom of expression in cases where opinions and morals of the government and of the public are offended.

2.61 The Constitution Review Group recommended, from the perspective of general policy considerations regarding the restrictions on the right to free speech, that any legislative restrictions on the exercise of free speech must be 'necessary in the public interest' (mirroring the restrictions contained in the text of Article 10 ECHR). This recommendation, however, came at a time when Article 10 was receiving close scrutiny in Strasbourg and the European Court of Human Rights was adopting strong language in order to ensure that freedom of expression was upheld as a principle in its own right, subject only to exceptions provided in the text of Article 10, and the said exceptions were interpreted narrowly by the Court[36].

2.62 This contrasted with the Irish courts approach to Freedom of Expression, which suggested that freedom of expression, or even commitment to such freedom was lacking in Irish society[37], attributable to judicial attitudes or an 'inert people'[38]. Thus the a lack of case law caused some to suggest that either "there is in fact extensive freedom of speech in this country or else that highly controversial utterances are not often made"[39].

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[36] *Handyside v UK* (1976) 1 EHRR 737; *Sunday Times v UK* (1979) 2 EHRR 245
[37] *AG (SPUC) v Open Door Counselling Ltd* [1987] ILRM 447 (High Court), [1988] IR 753 (Supreme Court).
[38] *Whitney v California* 274 US 357, 375 (1928), per Brandeis J.
[39] Forde, *Constitutional Law*, Second Edition, at page 533.

2.63 There are good grounds to the view that the qualifying phrase, subject to 'public order and morality' and the 'authority of the State', is too wide and vague to be practical. However, before considering whether a change in line with the restrictions of the ECHR should be adopted, the following factors should be noted. Firstly, the Irish judiciary appear to be changing their attitudes to Freedom of Expression (as discussed above). Secondly, the European Convention on Human Rights has been incorporated via the 2003 Act (discussed further below). Thirdly, there has been a convergence of Article 40.6.1 judgments in line with the Strasbourg judgments[40] on freedom of expression.

2.64 The restrictions under Article 10 received judicial attention by the European Court of Human Rights in *Bergens Tidende and Others v Norway* [41]. The applicants were the largest newspaper on the Norwegian west coast (Bergens Tidende) and the newspaper's former editor in chief, and a journalist with the paper. Dr R., a plastic surgeon had brought defamation proceedings in Norway against the applicants arising out of a number of articles published which detailed complaints of former patients of Dr R. concerning work that had been carried out on them. In 1994, the Supreme Court found for Dr R and awarded damages and costs of four million to him.

2.65 The applicants complained to the European Court of Human Rights that the requirement to pay damages and costs to Dr R constituted an infringement of their right to Freedom of Expression under Article 10 ECHR. The Court considered that the impugned measures constituted an 'interference by a public authority' with the applicant's right to freedom of expression as guaranteed under Article 10, that the interference was 'prescribed by law' (Damage Compensation Act 1969) and necessary to protect 'the reputation and rights of others'. The issue for the court was whether the interference 'was necessary in a democratic society'. The court found that the articles concerned important aspects of human health and consequently affected the public interest. The Court, however, asserted that Article 10 was not unrestricted even as regards press coverage of matters of serious public concern. The right of the press to report on matters of public interest was subject to the proviso that they were acting in good faith and to provide accurate information. The Court found that the articles had serious consequences for the practice of Dr R, notwithstanding the justified criticisms of his post surgical care and follow up treatment. It was held that the reasons invoked by the government, although relevant were not sufficient to show that the alleged interference with freedom of expression was 'necessary in a democratic society' as there was no 'reasonable relationship of proportionality between the restrictions imposed by the Supreme Court and the legitimate aim pursued'. Accordingly, there had been a violation of Article 10[42].

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[40] In particular *Murphy v Independent Radio and Television Committee*[1999] 1 IR 12, and the judgment of the EctHR of 10 July 2003, where Section 10(3) of the Radio and Television Act 1988 was upheld as being a legitimate restriction on the Plaintiff's freedom of expression under Article 10 of the ECHR.

[41] (2001) 31 EHRR 16

[42] Judgment of the European Court of Human Rights, 2 May 2000.

2.66 Thus, the European Court of Human Rights was upholding the right of the press, when acting in good faith, to discuss matters of public interest even where this involved the publication of defamatory statements about private individuals.

Legislative Developments since the Constitution Review Group Report

2.67 Since the Constitution Review Group Report there has been a number of statutes enacted which require consideration. These include

- European Convention of Human Rights Act, 2003
- The Defamation Bill 2006
- The Privacy Bill 2006

These three legislative developments deserve special attention in the context of the present report.

The implications of the European Convention of Human Rights Act 2003

2.68 The Constitution Review Group recommended that the European Convention of Human Rights should not be incorporated directly into our Constitution, and accordingly the government adopted the interpretative model of incorporation of the European Convention on Human Rights.

2.69 The Long Title of the European Convention on Human Rights Act, 2003 provides that the Act is "an act to enable further effect to be given, subject to the constitution, to certain provisions of the ECHR". The question arises, therefore, whether it is still necessary to change Article 40.6.1 of the Constitution given the approach adopted by the government to the implementation of the Convention into Irish law?

2.70 The interpretive approach obliges the courts to interpret statutes and laws in a manner compatible with the Convention. The Act is subordinate to the Constitution, and it merely allows for "further effect" to be given to the Convention, but always subject to the Constitution.

2.71 The method of incorporation of the Convention obliges the courts, under Section 2(1) of the Act, to interpret legislation in a manner compatible with the provisions of the European Convention of Human Rights insofar as possible. The net effect is surmised by Lowry as follows

> "In the event that no 'convention compatible' interpretation of the rule of law or statutory provision is possible, the Irish legal rule will prevail against the

ECHR and the organ of the State will no longer be under a duty to comply with the Convention"[43].

2.72 The editors of Kelly, *The Irish Constitution,*[44] argue that it is

> "unlikely that the 2003 Act will make a significant difference to the protection of fundamental rights in Irish law, particularly when one has regard to the sentiments of judges like Geoghegan J in *Murphy v IRTC* wherein he suggested that the protection afforded by the Constitution is equivalent to that provided by the Convention".

In this case Geoghegan J stated

> "The recent Report of the Constitution Review Group recommends amendment of the Constitution so as to conform with Article 10 of the ECHR. But I do not think that there is a serious clash between the Constitution and the Convention in this particular respect. I think that the rights protected by Article 10 are for the most point protected by Article 40.3. of the Constitution and the limitations on the exercise of those rights in the interest of common good largely correspond to the limitations expressly permitted by Article 10 of the Convention".[45]

2.73 Similarly, O'Caoimh J in *Hunter v Duckworth* stated that

> "I am satisfied that no essential difference exists between the provisions of the (ECHR) and the provisions of Article 40.6.1 of the Constitution".

2.74 Indeed Hogan, on comparing the Convention and the Constitution, concluded that there existed

> "a striking degree of overlap between the respective guarantees (as judicially interpreted) contained in the Constitution and the Convention. The Constitution contains no significant omissions compared with the ECHR, although the guarantee of the rights to family life in Article 8 and free speech in Article 10 are probably more extensive than the corresponding constitutional guarantees, although in the latter case, judicial attitudes seem to be changing"[46].

[43] *Bar Review* November 2003, p 183
[44] *JM Kelly: The Irish Constitution* Fourth Edition at 7.1.161.
[45] [1999] 1 IR 12.
[46] Hogan, *The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland* (1999) Bar Review 205 at pp 208-9.

2.75 Has judicial attitude changed? It appears that on the basis of recent case law[47] the Irish courts are willing to embrace the European developed concept of proportionality and/or 'organic evolution' of the law in cases of free speech. But should the guarantee of freedom of expression be dependent on 'judicial will' as opposed to a clearly defined guarantee subject to limitations which are 'necessary in the public interest'? This is a matter further addressed in the final section of this report.

The Defamation Bill 2006 in Context[48]

2.76 The Constitution Review Group suggested that "aspects of defamation laws are arcane and unsatisfactory and, in certain respects, inimical to the right of free speech". According to the Review Group, the key issue for the Constitution was whether

> "the defamation laws effect a fair balance between the right to free speech on the one hand and the need to protect individual reputations on the other."[49]

2.77 It is clear that the freedom of expression can be restricted by reference to the (potentially competing) guarantee in Article 40.3.2 of the Constitution, protecting an individual's right to a good name. Under the existing defamation laws (and especially the Defamation Act, 1961) strict liability attaches to the tort of defamation (although there is a defence of privilege), whereby mistaken belief as to the truth of a statement is not available as a defence.

2.78 These competing rights came into sharp focus in *Hunter v Duckworth & Co Ltd*[50] where the defendants published a booklet alleging that the quashing of the plaintiff's conviction for bombing of a Birmingham pub did not restore their presumption of innocence. The defendants argued that defamation did not adequately balance their right to freedom of expression against the plaintiff's right to a good name. The defendants further argued that they should not have to establish the defence of privilege or fair comment on a matter of public interest and their right to freedom of expression should prevail over the plaintiffs' constitutional right to a good name, unless the plaintiffs could show that it was an unjust attack on their good name.

2.79 O'Caoimh J rejected the defendants' submission that the constitutional guarantee of freedom of expression prevailed over the constitutional right to one's good name.

> "I am not satisfied that the correct approach is to say that the right to freedom of expression should be viewed as paramount to the right to one's reputation. I am satisfied that the right to freedom of expression may result in a situation

[47] *The Irish Times v Muprhy, Murphy v IRTC, Foley v Sunday Newspapers, Mahon & Ors v Sunday Business Post.*
[48] At the time of writing this Bill has since passed Second Stage in the Dáil and has now been referred to a select Committee (Third Stage) for consideration.
[49] Constitution Review Group, *Report of the Constitution Review Group*, May 1996, p. 295.
[50] High Court, July 31, 2003.

where in the context of a democracy the position of the press and other organs of public opinion have to be respected and protected, having due regard to the right to one's reputation. Accordingly, it is clear that the circumstances in which the right to freedom of expression is invoked may differ from one case to another and the relationship between that right and the right to one's reputation may change depending on those circumstances".

2.80 O'Caoimh J did not accept that the law of defamation was inadequate to protect freedom of expression in relation to a matter of public interest. On the issue of whether the defence of qualified privilege should incorporate a requirement of reasonableness on the part of the publisher of defamatory statements relating to matters of public interest, O'Caoimh J held that this was a matter for the Oireachtas, thereby endorsing the views of the Law Reform Commission (in its *Report on the Civil Law of Defamation* 1991) and the Constitution Review Group.

2.81 In its Report the Constitution Review Group stated that while the Group agreed that certain aspects of the defamation laws are not satisfactory, the question of any reform was principally a matter of legislative policy for the Oireachtas. In this regard, the emergence of the Defamation Bill 2006, is a key development. The Defamation Bill 2006 (see below) may serve to ease some of the restrictions on Irish defamation law through extension of the defence of fair comment in line with the English decision in *Reynolds v Irish Times Newspapers*[51]. In *Hunter* O'Caoimh J. relied on the approach of Lord Nicholls in *Reynolds* and stated that

> "It is clear that in certain cases, in the context of the democratic nature of the State, primacy may have to be given to freedom of expression (over the right to protection of one's reputation). The approach adopted by the House of Lords [in *Reynolds*] has the merit of enabling the law to be developed on a case by case basis having regard to the requirements of the Constitution and the Convention which may inform the court in its approach to the interpretation of the Constitution".

Thus *Hunter* follows the recommendations of the Constitution Review Group whereby "the courts would still be required on a case by case basis to ensure that the balance was fair".

2.82 The purpose of the Defamation Bill 2006 was to "revise in part the law of defamation and to replace the Defamation Act 1961 with modern updated provisions taking into account the jurisprudence of our courts and the European Court of Human Rights"[52].

[51] [2001] 2 AC 127.
[52] Explanatory and Financial Memorandum, Defamation Bill, 2006 "Purpose of the Bill".

2.83 The main features of the Bill (as relevant to this discussion) include the introduction of a new defence of fair and reasonable publication on a matter of public importance and the establishment of an independent Press Council.

2.84 The defence of 'Fair and Reasonable publication on a matter of public importance' is contained in section 24 of the Bill and provides that

> "(1) Subject to subsection (4), it shall be a defence..to a defamation action for the defendant to prove that the statement in respect of which the action was brought was published –
>
> (a) in good faith, and
> (b) in the course of, or for the purpose of, the discussion of a subject of public importance, the discussion of which was for the public benefit,
>
> and in all the circumstances of the case, it was fair and reasonable to publish the statement."

2.85 The defence is subject to the criterion of fairness and reasonableness and other matters specified in section 24 which the court shall take into account in deciding whether the publication of the statement is fair and reasonable. The defence of fair and reasonable publication is lost when, for example, the defendant believed the statement to be untrue, or acted on bad faith, or where the statement was made out of spite, ill-will, or improper motive.

2.86 It is necessary to consider the case law of the European Court of Human Rights in this context. Thus, in *Bladet Tromso v Norway*[53] the EctHR upheld the right of the press, acting in good faith, to discuss matters of public interest even where this involved the publication of defamatory statements about private individuals. The proposed new defence in the Defamation Bill appears to go along these lines in affording the media greater protection of free speech. Furthermore, under section 7, the plaintiffs and the defendants in a defamation action will have to submit a sworn affidavit verifying assertions or allegations and have to make themselves available for cross examination. Furthermore, section 37 proposes to amend the Statute of Limitations 1957 by reducing the limitation period for the commencement of defamation proceedings from six years to one year from the date of publication. And section 11 provides for a general rule that only one cause of action will lie in respect of a multiple publication.

2.87 The Defamation Bill also proposes the establishment of a Press Council, under section 43. (Schedule 2 of the Bill sets out the minimum requirements of a body seeking recognition as a Press Council.) In any event, the Press Council has been established independently of the Bill itself.

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[53](2000) EHRR 125.

2.88 There have been a number of attempts to restrict freedom of expression (and in particular freedom of the press) in defence of the constitutional right to privacy[55] (which is sourced in Article 40.3). In *M v Drury*[56] O'Hanlon J refused to grant an interlocutory injunction restraining the publication of material pertaining to the break-up of the plaintiff's marriage. In this regard, he approved the following dictum from Hoffman LJ in *Re Central Independent Television plc*[57]

> "The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Any publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom".

2.89 O'Hanlon J went on to say that this approach is to be recommended in cases where the freedom of the press is sought to be circumscribed on the basis that publication may be a source of distress to persons named. He said there are extreme cases where intervention is required, for example, protecting against the disclosure of confidential communications between husband and wife during their married life.[58]

2.90 In *Cogley v RTE & Ors*[59] an issue arose as to whether the Plaintiff's right to privacy could be outweighed by a public interest defence. The proceedings concerned the hidden recording of a nursing home and a broadcast that was due to be published by RTE. It was contended on behalf of the plaintiffs that key aspects of the programme (that is to say the secretly filmed footage) were obtained in circumstances which amounted to a breach of the plaintiff's right to privacy and were also unlawful as having been obtained while the person concerned was a trespasser. Clarke J. noted that it was clear that the plaintiff had a right to privacy and that such a right is one of the personal rights of the citizen guaranteed by Bunreacht na hÉireann. In relation to balancing this right with that of the freedom of expression he stated

> "The form of parliamentary democracy enshrined in the constitution requires that there be a vigorous and informed public debate on issues of importance. Any measures which would impose an excessive or unreasonable interference

[54] The Privacy Bill was presented in the 22nd Seanad. It was restored to the Order Paper in the 23rd Seanad. The Status of Bill is "Bill as initiated". It remains to be seen as to whether there will be any further impetus to enact this Bill.
[55] See for example, *X v Flynn* High Court, 19 May 1994, *M v Drury* [1994] 2 IR 8.
[56] [1994] 2 IR 8, [1995] 1 ILRM 108
[57] [1994] 3 WLR 20 at p. 30
[58] *Duchess of Argyle's case* [1965] 1 All ER 611.
[59] [2005] 4 IR 79.

with the conditions necessary for such debate would require very substantial justification. Thus the reluctance of the courts in this jurisdiction (and also the European Court of Human Rights) to justify prior restraint save in unusual circumstances and after careful scrutiny. Similar considerations also apply to a situation where a party may contend that there has been a breach of his right to privacy but where there are competing and significant public interest values at stake. It is for that reason that I have distinguished between a right to privacy which subsists in the underlying information which it is sought to disclose on the one hand and information which might legitimately be the subject of public debate on an issue of public importance (albeit private to some extent) but where there may be a question as to the methods used to obtain that information on the other hand."

2.91 Clarke J, however, went on to point out that different considerations might apply where there was little "legitimate public interest" attached to its disclosure. He said

> "I would wish to emphasise that the balancing exercise which I have found that the court must engage in is not one which would arise at all in circumstances where the underlying information sought to be disclosed was of a significantly private nature and where there was no, or no significant, legitimate public interest in its disclosure. In such a case (for example where the information intended to be disclosed concerned the private life of a public individual in circumstances where there was no significant public interest of a legitimate variety in the material involved), it would seem to me that the normal criteria for the grant of an interlocutory injunction should be applied. In such cases it is likely that the balance of convenience would favour the grant of an interlocutory injunction on the basis that the information, once published, cannot be unpublished. It is also likely, in such cases, that damages would not be an adequate means of vindicating the right to privacy of the individual."

2.92 More recently, events such as the decision of the European Court of Human Rights in the Princess Caroline case[60] and the recent death of Liam Lawlor (and subsequent press reporting) have brought into sharp focus situations where the right to privacy may demand the curtailment of freedom of expression.

2.93 In the European Context, Article 10 of the Convention guarantees the right to freedom of expression, subject to well defined exceptions in Article 10(2). The European Court adopts a proportional approach when faced with conflicts between these rights and privacy rights which are protected under the Convention under Article 8.

[60] *Von Hannover v. Germany* (2005) 40 EHRR 1.

2.94 In *Van Hannover v Germany*[61], Princess Caroline of Monaco took an action to the German courts in relation to photographs taken of her in public places. There was a series of photographs which formed the basis of the complaints. The judgment of the court is considered in detail elsewhere[62], suffice to say that the German court held that as a public figure she had to tolerate publications of photographs of her shopping with her children, notwithstanding that this was not a public duty, albeit in a public place.

2.95 The case was appealed to the German Constitutional Court which dismissed the appeal in respect of photographs which did not feature Princess Monaco with her children, balancing the public interest of being informed against the interests of the public figure.

2.96 Princess Monaco appealed the German court's decision to the European Court of Human Rights, where it was held that the photographs of the Princess shopping was protected by Article 8 of the Convention given that it concerned an aspect of her private life and it followed, could have no public interest element. According to the European Court of Human Rights, where publication facilitated debate of general interest in society then freedom of expression could be construed narrowly, but given that the motivation for the photographs in the *Van Hannover* case was for commercial gain, then freedom of expression would have to bow to the right to privacy of the applicant. Whilst the judgment of the European Court of Human Rights is to be welcomed and has made a difference in the area of freedom of expression it is arguable that by expanding the right to privacy, freedom of expression has been accordingly contracted.

2.97 Article 8 of the ECHR protects privacy, but is subject to limitations. Interestingly, Freedom of the press is regarded as a limitation on the right to privacy under the Convention. It has been stated that

> "This provision (Article 10- freedom of expression without interference by public authority) has been interpreted by the Court as attracting very considerable importance to the freedom of the press and media, upon whom it has been held there is an obligation to impart information and ideas in relation to political issues and on other areas of public interest"[63].

2.98 The Report of the Working Group on Privacy cites *Van Hannover* as a suggestion of "a general obligation on the States to introduce measures to protect privacy".[64] The Report concluded that the "decisions of the Strasbourg Court afford a strong argument in favour of the provision by law in Ireland of a clear and identified cause of action to vindicate" privacy rights.

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[61] (2005) 40 EHRR 1
[62] Report of the Working Group on Privacy – Murray Report, March 31, 2006.
[63] Ibid, page 45.
[64] Page 52.

2.99 It was in this context that the Privacy Bill was introduced. This proposed the introduction of the tort of violation of privacy. Notwithstanding that there appears to be constitutional protection of the right to privacy (see Article 40.3). According to the working group, one is entitled to expect that the legislature will provide a clear mechanism for enforcing that right.

2.100 Under the provisions of the Privacy Bill, section 2 established the tort of violation of privacy, whereby it is a tort where a person wilfully and without lawful authority violates the privacy of an individual. Section 4 entitled "Matter to which court shall have regard" stated at subsections (3) and (4) that the claim of a plaintiff in a privacy action in respect of disclosure shall not be defeated by reason only of the defendant's proving that the disclosure consisted of information which was already in the public domain (either through acts of the Plaintiff or the Defendant)[65].

2.101 As regards freedom of expression and whether the Privacy Bill curtailed this freedom, section 5 of the Bill sets out a number of defences to a privacy action. In particular Section 5(1)(e) set up a defence where the act

> "was an act of newsgathering, provided any disclosure of material obtained as a result of such was
>
> 1. done in good faith,
> 2. for the purpose of discussing a subject of public importance,
> 3. for the public benefit, and
> 4. fair and reasonable in all of the circumstances"

2.102 Section 5(2) continued to define an "act of newsgathering" as

> "an act that is reasonable in all of the circumstances and that consists of, or is necessary or incidental to –
>
> (a) the acquisition or preparation of material for publication in a periodical[66], or
> (b) the acquisition or preparation of material for broadcasting."

2.103 Further protection to freedom of expression was provided in section 6, which stipulated certain disclosures which are not a violation of privacy. This included disclosure of information where the disclosure was done in good faith and was for the purpose of discussing a subject of public importance, for the public benefit, and was fair and reasonable in all of the circumstances.

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[65] Consider whether the decision in *Foley v Sunday Newspapers* (discussed above) would have been decided differently if the tort of violation of privacy was available at the time.
[66] 'Periodical' is given the same definition as in Section 2 of the Defamation Bill, 2006.

2.104 The Privacy Bill was initiated in the 22nd Seanad. It was restored to the Order Paper in the 23rd Seanad. The present status of the Bill is that of "Bill as initiated". It remains to be seen as to whether there will be any further impetus to enact this provision.

The Legal Position in respect of Blasphemy since 1996

2.105 Article 40.6.1.i at paragraph 3 provides "The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law". This issue of the offence of blasphemy was the subject of special focus during the deliberations of the Joint Committee. Therefore, it is necessary to set out the present legal position in relation to this issue, particularly since the recommendation of the Constitution Review Group that reference to this should be removed from Article 40.6.1.i.

2.106 The Common law provided for the offence of spoken blasphemy and the Constitution Review Group noted that the last prosecution for the offence was in 1909. Section 13(1) of the Defamation Act, 1961 had created the statutory offence of blasphemous libel, whereby "the publication of a blasphemous or obscene libel shall be an offence carrying a maximum penalty of two years' imprisonment". However, section 34 of the Defamation Bill 2006 provides that "The Common law offences of criminal libel, seditious libel and obscene libel are abolished".

2.107 As stated the Constitution Review Group report in 1996, recommended that "The retention of the present constitutional offence of blasphemy is not appropriate".

2.108 The difficulty as regards blasphemy was the lack of a constitutional or statutory definition thereof. At common law, blasphemy consisted only of attacks on the doctrines of the established Church, Anglicanism, containing an element of vilification, ridicule or irreverence likely to result in a breach of the peace and so did not embrace attacks on other Christian denominations or other world religions[67].

2.109 In *R v Chief Magistrate, ex p Choudhury*[68], the English High Court held that the common law offence was confined to protection of Christian religions only. Yet our Constitution prohibits discrimination on the grounds of religion under Article 44.2.3., which suggests that blasphemy should extend to all religions.

2.110 Given the lack of statutory or constitutional definition of blasphemy[69] it is useful to revert to the sentiments of De Valera who believed that Article 40.6.1.i did not create a new offence, and that the offence of blasphemy referred to in the Constitution simply referred to the common law offence[70]. Given that the common law offence is

[67] Kelly *The Irish Constitution* (Fourth Edition) at 7.5.70
[68] [1991] 1 All ER 306
[69] See Walsh J, *Quinn's Supermarket v Attorney General* [1972] IR 1.
[70] Paul O'Higgins, "*Blasphemy in Irish Law*" (1962) 23 MLR 151.

to be abolished under the Defamation Bill 2006, the reference to blasphemy in the Constitution will, in effect, be redundant.

2.111 In *Corway v Independent Newspapers (Ireland) Ltd*[71], a Dublin carpenter sought leave to bring a criminal prosecution under section 8 of the Defamation Act, 1961, against a daily newspaper, a weekly newspaper, and a music magazine which had published articles (relating to the referendum on divorce in 1996) which the applicant believed to be blasphemous. He was refused leave to bring the prosecution and appealed to the Supreme Court. The Supreme Court stated that the Constitution "guarantees freedom of conscience and of expression to those of all religions and none", notwithstanding that "the homage of public worship is due to almighty God". The Court held that "It is impossible to say of what the offence of blasphemy consists". Barrington J, with whom the court agreed, stated that

> "From the wording of the Preamble to the Constitution it is clear that the Christian religion is one of the religions protected from insult by the Constitutional crime of blasphemy. But the Jewish religion would also appear to be protected as it seems quite clear that the purpose of the Fifth Amendment to the Constitution was certainly not to weaken the position of the Jewish congregations in Ireland but to bring out the universal nature of the constitutional guarantees of freedom of religion. What then is the position of the Muslim religion? Or the polytheistic religions such as Hinduism? Would the constitutional guarantees of equality before the law and of the free profession and practice of religion be respected if one citizen's religion enjoyed constitutional protection from insult and another's did not?"[72]

2.112 Notwithstanding that the Supreme Court did not define blasphemy, it did hold that the articles in question were not blasphemous. The judgment can be regarded as a strengthening of the freedom of expression, given that it appears that nobody can be indicted for blasphemy. It is thus been suggested that the decision of the Court has "essentially neutralised this reference to blasphemy (in Article 40.6.1.i) and also renders inoperable, at least in part, s 13(1) of the Defamation Act, 1961"[73]. The Court in effect held that the common law rules as to blasphemy - intertwined as they were the tenets of Christianity in general and the former established church in particular - were inconsistent with the religious equality provisions of Article 44 and thus had not survived the enactment of the Constitution.

2.113 Accordingly, it comes as no surprise that the Defamation Bill 2006 proposes to repeal the 1961 Act and also to abolish the common law offence of blasphemy.

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[71] [1999] 4 IR 484, [2000] 1 ILRM 426
[72] [2001] 1 ILRM 426 at 436.
[73] Kelly *The Irish Constitution* (Dublin, 2003)).

2.114 The case law of the European Court of Human Rights establishes that a blasphemy clause is not a violation of Article 10 of the European Convention of Human Rights.[74] Any analysis of blasphemy must consider whether an attack on religion is an attack on a private right, or an attack on social values. Ireland has evolved to a multi-cultural society, where now it can be said that any attack on religion is an attack on the private rights of individuals. This coupled with the lack of definition of 'blasphemy' together with the proposed Defamation Bill 2006, which abolishes the common law offence of blasphemy, would suggest that the deletion of the reference to 'blasphemy' from the Constitution might be advisable. However, given that blasphemy has not caused any problems in the past, there is an argument for allowing the reference to stand. However, no attempt should be made to revive the reference to blasphemy.

2.115 On the EU stage, the Danish cartoon case is widely regarded as evidence of a curbing of free speech. The situation arose out of the publication of twelve cartoons in a Danish newspaper *Jyllands-Posten* in September 2005, depicting the prophet Muhammad as a terrorist. The cartoons were not illegal in Denmark, but Islamic religion deems images of prophets disrespectful and caricatures blasphemous. Following the Danish publication, Norway published, in a Christian magazine, the twelve cartoons in an attempt to support Denmark, but was forced to remove the cartoons from its website following threats. Denmark was called upon to apologise for its actions, but viewed the demand as an important issue as to freedom of expression. Denmark did ultimately apologise, but France also published some of the cartoons in a newspaper, endorsing the principle of press freedom. However, it was stated that this freedom should be "exercised in a spirit of tolerance and with respect for beliefs and religions"[75].

Seditious Matter

2.116 The Constitution Review Group recommended the abolition of the reference to sedition in Article 40.6.1.i, given that the common law offence (seditious libel) is unconstitutional in light of the guarantee in Article 40.6.1.1 of the right of criticism of the government policy[76].

2.117 Section 34 of the Defamation Bill 2006 provides that the common law offence of seditious libel is to be abolished. Thus, the reference to Sedition in the Constitution will remain impossible to enforce, given the lack of definition of the offence and due to the fact that no such common law offence of seditious libel exists. It is a redundant reference in Article 40.6.1.i.

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[74] *Wingrove v United Kingdom* 25 November 1996.
[75] Statement from the French foreign ministry as reported on www.news.bbc.co.uk, Wednesday 1st February, 2006.
[76] Seditious libel was discussed in the case of *R v McHugh* [1901] 2 IR 569 which concerned the latest prosecution for seditious libel. [There are also references to this in the Report of the Offences against the State Review Group (2002))

Indecent Matter

2.118 Section 40.6.1.i makes publication or utterance of 'indecent matter' an offence punishable in accordance with law. The problems associated with blasphemy also pertain to the issue of 'indecent matter'. There is no definition of 'indecent matter' whether in the Constitution, in statute, or by the judiciary. The common law offence of 'obscenity' was provided in *R v Hicklin*.[77] Statutory provisions which concern indecent or obscene material exist and include Section 13 of the Defamation Act, 1961. However, Section 34 of the Defamation Bill 2006 proposes to abolish the common law offence of obscene libel. A plethora of legislation exists in the area of censorship and this is discussed elsewhere[78].

Position of the Media

Ownership of the Media

2.119 The Constitution Review Group emphasised the role of the media as 'guardian of democracy'. It argued that the media should not only have the freedom, but also the responsibility for upholding democratic principles. The Report also stressed the dangers of media interests having a disproportionate influence on opinion formation. The Constitution Review Group concluded that no private medium of expression could be compelled to express particular opinions without infringing the right of free speech. This has been evidenced clearly in the recent episode of the Danish cartoons. In this regard, the Constitution Review Group opined that constitutional provisions could scarcely go further in promoting freedom of expression if Article 40.6.1.i was to be amended on the model of Article 10 of the ECHR.

2.120 Article 10(1) guarantees freedom of expression, and states that "This Article shall not prevent states from requiring licensing of broadcasting, television or cinema enterprises". The Constitution Review Group considered that the provision regarding the licensing regime for broadcasting and cinema enterprises was unnecessary, it recommended that there should be no departure from this provision on the basis that

> "Such a provision ensures that legitimate interests of the State are protected, while at the same time providing...that aspects of any licensing system which actually impinge on the substance of the right of free speech can be justified only where 'they correspond to a pressing need".[79]

2.121 Whilst the Constitution Review Group thought it inappropriate to identify precisely the technology in question (on the basis that such specificity would soon be outmoded) it recommended that the Article should be replaced on a model based on

[77] (1868) LR 3 QB 360
[78] See the Report of the CRG, relevant statutes include the Censorship of Publications Act, 1946, The Censorship of Films Acts, 1923 –1992 and the Video Recording Acts 1989-1992.
[79] Constitution Review Group, *Report of the Constitution Review Group*, May 1996 p. 303

Article 10, which will allow legislation for a licensing regime for the electronic media.

Protection of Sources

2.122 The law in relation to protection of media sources has been the focus of recent judicial scrutiny in two high profile cases, both involving the deliberations at the *Mahon* tribunal. In *Mahon v Post Publications*[80] the Defendant published two articles relevant to the Tribunal, which the Plaintiff contended had been written on the basis of confidential documents. The Tribunal then demanded that at a public hearing that the sources for the articles be revealed on the basis that this was necessary to ensure no further leaking of Tribunal documents would occur. The Defendant argued that confidentiality of sources should be maintained in the public interest. It argued that journalists only acquire information from sources on the basis of a guarantee that their identity will never be revealed. If that guarantee was broken in any given case then the likelihood of other material being provided in the future would be 'very small indeed'." The Defendant also contended that the job of the newspaper was to publicise the proceedings of the Tribunal, and without such publication the public would not be able to inform itself of its workings. Furthermore, the secretary of the Defendant refused at a public hearing to give an undertaking to the Tribunal that the Defendant would not publish information which the Tribunal had directed to remain confidential until disclosed at a public hearing.

2.123 Accordingly, the Plaintiff instituted proceedings seeking injunctions against the defendant restraining it publishing information or documents which the Tribunal had circulated on a confidential basis to any party or witness before the Tribunal, until such time as the said information is made public at the tribunal. The defendant argued, *inter alia,* that the plaintiff was not entitled to the injunctions sought in circumstances where this would infringe their constitutional rights enjoyed under Article 40.6.1 of the Constitution and Article 10 of the ECHR.

2.124 In refusing the injunctions sought Kelly J recognised the importance of press freedom and that any restriction thereon must be proportionate and no more than is necessary to promote the legitimate aim of the restriction. Kelly J gave particular weight to the issue of proportionality concluding that the orders sought by the Plaintiff

> "could not be regarded as proportionate....Why should the court lend its hand to the curtailment of press freedom in respect of material which is alleged to be confidential by reason of a decision of the Tribunal, where it is clear that that decision seeks to impose confidentiality on material some of which is not and could not be regarded as confidential in nature? The fact that the material in the brief may contain information obtained in confidence cannot be justification for the wide form of restraint which is sought. It is entirely

[80] [2007] 2 ILRM 1

disproportionate to the aim being pursued and in excess of any legitimate need".

2.125 Kelly J refused the injunctions sought on the basis that the restraint on freedom of expression could not be justified by reference to Article 10(2) of the ECHR.

2.126 The issue of journalistic sources was again the subject of controversy in *Mahon v Keena & Kennedy*[81]. This case arose out of the publication by *The Irish Times* of an article in relation to the matters being investigated by the Mahon Tribunal. This article was published after an anonymous communication was received by the Defendants. Subsequent to this publication, the Tribunal ordered the Defendants to produce all documents comprised in that anonymous communication. On been made aware of this, the Defendants then destroyed the material the subject matter of the anonymous communication.

2.127 In addressing the issue of whether the Tribunal could compel the Defendant's to comply with further orders seeking to elicit information the Court made a number of comments in relation to the protection of sources. It stated

> "An essential feature of the operation of a free press is the availability of sources of information. Without sources of information journalists will be unable to keep society informed on matters which are or should be of public interest. Thus there is a very great public interest in the cultivation of and protection of journalistic sources of information as an essential feature of a free and effective press."

2.128 The Court went on to point out that

> ....the non-disclosure of journalistic sources enjoys unquestioned acceptance in our jurisprudence and interference in this area can only happen where the requirements of Article 10(2) as set out above are clearly met. The restriction on the exercise of freedom of expression by the disclosure of journalistic sources contended for by the Tribunal must be demonstrated by the Tribunal to be warranted in the context of Article 10(2).

2.129 However, the Court ultimately concluded that because of the destruction of the documents there was little or no risk of identification of the source and therefore the inquiries sought to be made by the Tribunal would present little danger to the freedom of expression, whilst at the same time giving the Tribunal the opportunity to establishment that *it* was not the source of the leaks.

[81] [2007] IEHC 348, High Court (Divisional), 23 October 2007.

CHAPTER 3: THE ARGUMENTS FOR CHANGE: DELIBERATIONS OF THE COMMITTEE

Introduction

3.1 It was against this legal backdrop that the Joint Committee invited submissions from interested parties on the issue of the amendment of Article 40.6.1.i with a particular focus on the reference to blasphemy as a restriction on the freedom of expression.

3.2 As discussed in chapter 1, the Committee received 10 written submissions. Of these, the Committee invited oral submissions from

- RTÉ
- The Bar Council
- National Newspapers Ireland
- TV3
- Dr Eoin O'Dell, Law School, Trinity College, Dublin.

3.3 In addition to these, the Committee considered further the written submissions of

- The Institute of Advertising Practitioners Ireland
- Gorey Muslim Community
- The Union of Students of Ireland
- The Humanist Association
- Mr Jason FitzHarris

3.4 The oral submissions were heard on 23rd April and 30th April 2008, during which the members of the Joint Committee had the opportunity to discuss the issues arising therein.

Submission of RTÉ

3.5 In its written submission RTÉ pointed out that Article 40. 6. 1. i appears to adopt an instrumentalist model of media freedom. This posits that the media's freedom of expression is protected because it fulfils an important social role – that of educating and informing the public. RTÉ stated that this interpretation is supported by the Article's description of media organisations as "organs of public opinion", and by the emphasis which it places on the "education of public opinion" as a "matter of … grave import to the common good".

3.6 RTÉ referred to a number of authorities where it was confirmed that freedom of expression was necessary for the proper functioning of a democratic society.[82] For

[82] Irish Times v Ireland [1998] 1 IR 359; *Cogley v RTÉ* [2005] 4 IR 79

example, RTÉ pointed to the comments by Barrington J in *Murphy v IRTC*[83] where he explained how Article 40.6.1.i was designed to secure the conditions in which democracy could flourish.

3.7 Thus, RTÉ was of the view that

> Expression is protected by this Article because it is beneficial to democracy. It is protected because of what it may do rather than because of what it is.

3.8 RTÉ was also of the view that the Irish Constitution provides full coverage for freedom of expression in its most important forms, in that it secures both individual expression and media expression.[84]

3.9 RTÉ was also of the view that the European Convention of Human Rights embraces a comparable philosophy of media freedom, whereby Article 10(1) underlined the importance of freedom of expression and Article 10(2) described a range of circumstances in which the freedom may be subject to restriction. RTÉ pointed out that some of these restrictions replicated those which existed in the Irish context. For example, RTÉ stated that the restriction in Article 40.6.1.i which subjected expression to "public order and morality" could be comparable to the restriction in Article 10(2) which provided that expression could be limited for "the prevention of disorder" or for the "protection of...morals". In RTÉ's view this indicated that

> the divergence between the two texts may not be as significant as has sometimes been assumed.

3.10 RTÉ also argued that a review of the Irish and European Court Human Rights judgments indicates the concept of media freedom contained in Article 40.6.1.i is not necessarily incompatible with Article 10 of the European Convention of Human Rights. Both provisions, according to RTÉ, balance a commitment to freedom of expression with a concern that the freedom not be improperly exercised. Both provisions envisage the media fulfilling the broadly comparable role of ensuring that the public is informed about matters of public importance. Furthermore, RTÉ pointed out that the jurisprudence that has developed under both provisions has confirmed this view.

3.11 RTÉ also argued that the perceived inadequacies of Article 40.6.1.i are based, in part, on the way in which the constitutional text had been interpreted and applied by the courts up until 1996. However, it stated that decisions since the publication of the

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[83] [1999] I IR 12

[84] In this regard, RTÉ referred to the distinction (originally drawn by Costello J in *AG v Paperlink* [1984] ILRM 373) where the individual right to communicate (and receive information) was to be found in Article 40.6.1.i but in Article 40.3. However, as has been pointed out in this paper, some doubt was expressed over this distinction in *Irish Times v Ireland* [1998] 1 IR 359 where it was suggested that this aspect of freedom of expression was also included in Article 40.6.1.i. In any event the point made by RTÉ remains valid, that both forms of expression are protected in the Constitution.

Constitution Review Group report have an increasingly rigorous approach to freedom of expression issues. In particular RTÉ referred to the decisions of *Mahon v Post Publications*[85] and *Foley v Sunday Newspapers Ltd*[86]. RTÉ also referred to a number of judicial dicta which indicate that the guarantees under the freedom of expression in the Constitution and the Convention are analogous.[87] In addition to this RTÉ was of the view that the enactment of the European Convention of Human Rights Act 2003 "copperfastened" the influence of the Convention.

3.12 In addition to the foreoing, RTÉ referred to the fact that the Irish courts have now adopted and applied the principle of proportionality (whose application is influenced by the jurisprudence coming from Strasbourg).

3.13 RTÉ was of the opinion that above developments meant that an exercise which would involve the insertion of principles into the Constitution which are already being applied by the courts would be "otiose". It stated

> "Developments in Irish constitutional jurisprudence since 1996 mean that the aims upon which the Constitution Review Group's recommendations were premised have already been substantially achieved."

3.14 RTÉ also stated that an amendment of the present Article might in fact lead to more problems. It stated that it would introduce "short-term" uncertainty into this area of law and would raise novel questions of interpretation. It could even lead to a legal regime which offers less effective protection for media freedom. RTÉ stated that

> "taking such risks seems unnecessary when the existing text is currently operating in a relatively stable and Convention-compatible manner.

3.15 In relation to the issue of blasphemy, RTÉ stated that the decision in *Corway*[88] rendered the reference to blasphemy in the Constitution as a dead letter provision. In its view, at present, this aspect of Article 40.6.I.i cannot be relied upon to restrain freedom of expression. Thus there does not appear to be a pressing need for amendment in this matter. Similar considerations apply in relation to the issue of sedition and in this regard RTÉ pointed out that

> "Like the reference to blasphemy....although the removal of sedition would be worthwhile in the context of a general exercise in tidying-up the constitutional text, there is no urgent need to press for an amendment at this time.

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[85] [2007] IESC 15 – referred to above.
[86] [2005] 1 IR 88
[87] RTÉ referred to the comments by Denham J in *De Rossa v Independent Newspapers* [1999] 4 IR 432 and *O'Brien v Mirror Group Newspapers* [2001] 1 IR 1 and O'Caoimh J in *Hunter v Duckworth* [2003] IEHC 81. This was also evident in *Mahon v Keena* [2007] IEHC 348
[88] *Corway v Independent Newspapers* [1999] 4 IR 484 (discussed above)

3.16 In respect to the reference to indecent material, RTÉ referred to the decision of *Muller v Switzerland*[89] where it was held that the prevention of publication of indecent material was a permissible regulation of freedom of expression under the European Convention of Human Rights. Thus the concern expressed (by the Constitution Review Group) that the vagueness of the expression "indecent material" could allow a low threshold for criminal prosecution in this area was no longer well founded as any such threshold would have to still comply with the principles of the Convention.

3.17 Finally, in respect to Defamation RTÉ concluded that this was a matter for the legislation rather than constitutional text and no amendment was necessary to the current Article in this regard.

3.18 RTÉ concluded saying

> "Since the CRG recommended reform in 1996, considerable changes have occurred. Some of the issues....have been clarified or resolved in the intervening period. Other aspects of their desired reforms – such as the widespread use of the proportionality doctrine, or the placing of the onus of justification on the party purportedly infringing the freedom of expression guarantee – have been introduced by judicial developments. In particular, the CRG's call for an ECHR-style amendment has been overtaken by the Irish courts' increasing reliance on Article 10 principles.
>
> That is not to say, of course, that the text of Article 40. 6. 1. i could not be improved upon. In its references to blasphemy, sedition, or an incomplete list of media organs, it is undoubtedly a creature of its time. However, its central conception of freedom of expression as a necessary and important element of a democratic society is directly in accordance with the underlying philosophy of Article 10 of the ECHR."

Response of the Members

3.19 Mr Eamon Kennedy, solicitor, presented the submission to the Joint Committee on 23rd April 2008. A number of observations and questions were made by the members present.

3.20 Deputy Sean Ardagh, Chairman of the Committee, raised the issue of blasphemy with Mr Kennedy. In particular, he asked whether RTÉ's experience in relation to the reaction to comments made by Tommy Tiernan on the "Late Late Show" had any relevance to the issues before the committee. Mr Kennedy responded saying that people would not necessarily have considered those comments as blasphemous but in terms of causing offence. He stated that the concepts of blasphemy and blasphemous

[89] (1991) 13 EHRR 212

libel are difficult to import into a legal system and the matter would be better dealt with in the context of broadcasting standards.

3.21 Deputy Brendan Howlin pointed out that the general approach of the committee should be that, unless there is a compelling reason for change, one should not propose changes to the Constitution. He pointed that it had been well argued that case law has given clarity to the Constitution in this regard. Deputy Howlin also raised the possibility of legislating in relation to blasphemy, but that this would appear to be less of a problem today for Christianity than for Islam.

3.22 Senator Alex White stated that he was perplexed by the attitude of RTÉ, although he could understand it from the practical point of view of a broadcaster. He pointed out that there were strong opinions which indicated that Article 40.6.1.i does not live up to the standards required by Article 10. It appeared to him that RTÉ were advocating a position of leaving well enough alone. In particular, Senator White asked that if blasphemy was a dead letter, would it not be better to take it out of the Constitution?

3.23 Senator White also raised the issue (which was raise by TV3's submission) as to whether there are restrictions applicable to broadcasting media, which do not apply to print media. In response to this Mr Kennedy pointed out that that the distinction between both has been referred to by the European Court of Human Rights and it might not be constitutionally possible to mandate that both have the exact same restrictions placed on them.

3.24 Senator Dan Boyle considered that, on hearing Mr Kennedy's submission, the Committee appeared to be given three options in relation to blasphemy – to leave well enough alone, to remove the reference entirely or to define the term "blasphemy" in a manner which would be inclusive of all religious values and belief systems. He pointed out, however, that this third option would open a "far bigger can of worms".

3.25 Deputy Barry Andrews stated that he had a problem with the point of view that because Article 10 was having a greater gravitational pull on the judiciary than our Constitution that this article could be "put in mothballs". He felt that the situation regarding freedom of expression in Ireland was not satisfactory and that it lacked clarity, particularly relating to the question of protecting journalist sources. He stated that this was a matter which needed to be addressed, either in the Constitution or through legislation. In response, Mr Kennedy was of the view that this was a matter which would be better dealt with through legislation than by Constitutional amendment and gave the example of Contempt of Court Act, in England and Wales.

3.26 Senator Eugene Regan pointed out that the "Tommy Tiernan" incident highlighted religious sensitivities that exist. He observed that it therefore may be premature to say that it is a complete anachronism to have a crime of blasphemy in the Constitution.

Submission of The Bar Council

3.27 The Bar Council stated that its submission was intended to focus on the structure of constitutional protection of free speech within the Irish Constitution and then to look in more detail at the blasphemy provision. However, it pointed out that it did not intend to take a particular position or stance on the various issues, but rather would attempt to analyse what are regarded as the most salient issues that arise within the constitutional protection itself.

3.28 The Bar Council submitted that Article 40.6.1 has proven to be unusually ineffective as a mechanism for ensuring a robust protection of speech, in that, to date, only one law has ever fallen foul of this constitutional clause – namely a law concerning begging[90] – despite the fact that, certainly until recently, there was a wide range of different circumstances in which free speech could be restricted by law in the interests of competing social goals. Thus in Ireland freedom of expression has been restricted to protect State security, official and individual privacy and private reputations, interests of public peace and order, the authority of the Courts, the interests of a fair trial, the interests of protecting copyright or confidential information, to prevent incitement to hatred, to prevent religious and political advertising, to protect the life of the unborn (until 1992) and in other respects to safeguard public morality. Yet despite recent judicial endorsements of the value of free speech as a constitutional norm[91], the Bar Council stated that no section of any of these laws has been struck down by the courts on the basis of the guarantee of free speech, despite the fact that some are arguably anachronistic and ineffective in practice.

3.29 According to the Bar Council, it was arguable that the reason why Article 40.6.1 has been ineffective as a protector of free speech is because of the manner in which the clause is framed. The clause appears, after all, to give priority of consideration not to the right which it protects but rather to the limitations which may validly be imposed on that protection, thereby giving the impression that the framers of the constitution were more concerned with controlling the corrosive effect of so called "immoral speech" than with the protection of speech itself. Furthermore, the range of the constitutional protection of freedom of expression was uncertain in that it was not clear whether it was restricted to the expression of convictions or opinions or whether it also extended to the expression of factual information. However, the Bar Council noted that recent decisions of the courts would appear to make it clear, however, that the latter is the case[92].

3.30 The Bar Council pointed out that there are two clear arguments as to why the Irish protection of free speech should be increased (and consequently as to why the terms of what is now Article 40.6.1 should be amended). The first is the legal imperative in

[90] *Dillon v. AG* (High Court 15 March 2007
[91] *Murphy v. Irish Times*,[1998] 2 ILRM 161, *Murphy v. IRTC* [1998] 2 ILRM 360
[92] *Kearney v. Minister for Justice* [1986] IR 116, *AG v. Paperlink* [1984] ILRM 373, *Irish Times v. Murphy* [1998] ILRM 161, *Murphy v. IRTC* [1998] ILRM 360

this regard that is imposed by reason of the European Convention on Human Rights. The Bar Council acknowledged that certain High Court judges have suggested that the constitutional protection of free speech under Article 40.6.1 is the same as that under Article 10[93]. However it stated it was strongly arguable that in certain areas (for example in the freedom of the media to publish material that is reasonably believed to be true concerning matters of public importance) Irish law simply does not live up to the standards required by Article 10 nor is Article 40.6.1 capable of engendering such standards[94].

3.31 The Bar Council also submitted that there were broader philosophical reasons for affording a strong protection for freedom of speech in a liberal democracy. For example, democracy could be imperiled if people are not given a strong ability to present their views and opinions. Moreover, without a strong protection for free speech, (especially what may be classified as "public interest" speech) people will be disinclined to engage in necessary whistle blowing against corruption and will also tend to feel cut off from the workings of the political process. Furthermore, it is arguable that the free ability to express one's beliefs, opinions and ideas contributes to innovation, and thus to social progress.

3.32 On the other hand, the Bar Council pointed out that these philosophical arguments do not necessarily demand that free speech be unlimited. Indeed there are strong arguments for saying that the supposedly virtually absolutist guarantee of free speech in the first amendment of the American constitution would be inappropriate outside of the American context. From an Irish perspective, there will inevitably be countervailing interests to be balanced against the right to free speech, and any recasting of the constitutional guarantee of free speech should make provision in this regard – as for example, Article 10 of the European Convention on Human Rights does.

3.33 In the Bar Council's view it would be helpful for any "new" version of Article 40.6.1(i) to be clear on the question of whether and when it is possible lawfully to restrict the right to freedom of expression. A pivotal question in this regard is whether legitimate restrictions on speech must be content neutral and/or value neutral or not. So for example, in America, it is possible to restrict speech because it has a particular harmful tendency, but it is not possible to restrict the speech of one side in a debate[95]. By comparison most European jurisdictions do permit particular viewpoints to be restricted because of the nature of their content alone. Thus in Germany, Austria and various other continental European countries, it is a crime to deny the existence of the holocaust and irrespective of whether or not any particular instances of holocaust denial would have definable negative social consequences[96].

[93] See *Hunter v. Duckworth* [2003] IEHC 81
[94] *Lingens v. Austria (No.2)* (1986) 8 EHRR 407
[95] *Collin v. Smith* 578 Fed 2d 1197 (7 Cir) 1978
[96] *Holocaust Denial*, (1994) 90 BverfGE 241

3.34 The Bar Council stated that it was notable that in 1996 the Constitution Review Group in its report recommended that the Irish guarantee of free speech should be remodeled along the lines of Article 10 of the European Convention on Human Rights. The Bar Council submitted that there is considerable merit to this approach in that Article 10 seeks to achieve a workable balance between the right itself and the various legitimate interests that may justify a restriction being imposed on that right.

3.35 In relation to the issue of blasphemy, the Bar Council stated that one of the most extraordinary features of the Irish Constitution is that Article 40.6.1 details the only constitutional crime, namely the publication or utterance of blasphemous, seditious or indecent matter; an offence which shall be punishable by law. This clause was apparently enacted on entirely religious grounds, and represented a concern that the framers of the Constitution had that any new and expanded protection of free speech should not be used as a justification for permitting anti-religious speech.

3.36 The Bar Council pointed out that, apart from the question of whether this should be removed, there was a difficulty in establishing the precise meaning of the term "blasphemy". It noted that it has not received much legislative or judicial consideration and there has been an increasing religious tolerance and secularization of Ireland and a greater judicial and popular concern with liberal values and specifically the value of free speech. This has meant that the level of vocalized popular objection to blasphemy (whatever this may mean) has reduced considerably.

3.37 The Bar Council noted that, as a matter of definition, the notion of blasphemy would seem to mean one of three things and the definition which is adopted by the law will naturally influence the question of what it prohibits.

- The first definition sees blasphemy as an offence against God[97]. If this is the approach taken (and it is difficult to see how such an approach could be workable in a modern setting) then the law will prohibit any publication likely to offend or irritate the Almighty
- The second sees blasphemy as an offence against religion, in which case what is prohibited is any publication which somehow undermines religion (including, presumably, denial of its truth).
- The third and most workable definition (which it will later be submitted reflects the current position) is that blasphemy is an offence against religious devotees, in which case what will be prohibited is offensive or scurrilous treatment of sacred themes.

3.38 The Bar Council stated that it is unclear as to which of these definitions applies to the relevant Irish constitutional clause, although almost inevitably it will be either the second or third definition.

[97] See *inter alia* Rick Simpson *Blasphemy and the Law in a Pluralist Society* (Grove Ethical Studies no 90: 1993) and Cox, *Blasphemy and the Law in Ireland* (Edwin Mellen Press, 2000).

3.39 The Bar Council noted that Mr. de Valera suggested that the Constitution did not create a new offence of blasphemy but simply represented a constitutional enshrinement of the existing common law offence of blasphemy.[98] This was also the approach taken by the Supreme Court in the only "blasphemy" case in Ireland post-1937, namely *Corway v Independent Newspapers*[99] a case which turned on the question of what was meant by "blasphemy" in the constitution.

3.40 The Bar Council analysed the case of *Corway* and pointed to Barrington J's conclusion that although the crime of blasphemy must exist in Irish Law, in the absence of legislation and in the present uncertain state of the law, the Court could not see its way to authorising the institution of a criminal prosecution for blasphemy. The Bar Council pointed out that this decision has been criticised[100] and it could be strongly argued that it was strange for the Supreme Court, as guardians of the Constitution, to refuse to give effect to a constitutional clause on the basis that it did not feel capable of defining a key term within that clause.

3.41 Furthermore, the Bar Council noted the Supreme Court's view in *Corway* that blasphemy law exists to protect the established religion as part of the law of the land. According to the Bar Council submission, if this was correct then only the established religion would be protected by the blasphemy law. On the other hand, the second view of blasphemy (that the law exists to protect the religious sensitivities of devotees) would impose no such limitations in that presumably the kind of law could protect anyone who is religiously devout, and constitutional guarantees of equality[101] would suggest that this would in fact be imperative. However, as the Bar Council pointed out this could lead to a whole raft of technical questions that would need to be resolved as far as the blasphemy law was concerned.

3.42 In relation to whether the reference to blasphemy should be retained the Bar Council noted that a number of relatively recent incidents indicate that religious offence is still something which can cause genuine distress and may, indeed amount to a legitimate reason for restricting the right to free speech. The Bar Council made reference to the performance of Tommy Tiernan on the *Late Late Show*[102], the reaction to the show "Jerry Springer the Opera" in England, the publication of the allegedly blasphemous cartoons in Denmark and the arrest and conviction of an English teacher in the Sudan for blasphemy.

3.43 The Bar Council also noted that the European Court of Human Rights has consistently held that the existence of a criminal law against blasphemy is not repugnant to Article

[98] See O'Higgins "Blasphemy in Irish Law" (1960) 23 *Modern Law Review* 151 at p. 153.
[99] *Corway v. Independent Newspapers* [2000] 1 ILRM 426
[100] See Cox, (2000) 22 *Dublin University Law Journal*, 201 and Ranalow, 'Bearing a Constitutional Cross – Examining Blasphemy and the Judicial Role in *Corway v. Independent Newspapers*, (2000) 3 TCLR 95
[101] *Quinns Supermarket v. Attorney General* [1972] IR 1
[102] 21 November 1997

10 of the European Convention on Human Rights. [103] However, both the Law Reform Commission (in its 1991 *Consultation Paper on the Crime of Libel*) and the Constitution Review Group in its 1996 Report have both called for the abolition of the constitutional reference to blasphemy – albeit the Law Reform Commission recommended that it would not be an appropriate use of resources to have a stand alone referendum dealing exclusively with the blasphemy issue. In addition, the Bar Council noted that the Defamation Bill proposes to abolish the mechanics for a private blasphemy prosecution. However, in the Bar Council's view, until the Constitution is amended, it is absolutely clear that blasphemy must remain a crime in modern Ireland, and thus such mechanics must either exist or be found to exist.

3.44 The Bar Council also noted that, beyond simple abolition of the relevant constitutional clause and of the offence of blasphemy (which has been recommended *inter alia* by the English Law Commission, and the Law Society of New South Wales), various reform bodies both in Ireland and England have suggested possible ways of dealing with the offence of blasphemy. Amongst the suggestions that emerge have been:

- Use existing obscenity laws to target the most extreme publications that are of sufficient scurrility to justify use of a blasphemy prosecution
- Use incitement to hatred legislation as a way of targeting certain blasphemies. (Equally this approach would mean that the relevant touchstone would be the level of incitement to hatred involved rather than the level of offence which was caused by the publication)
- Create a new offence of causing outrage to religious feelings irrespective of the religious identity of those who are outraged.

Response of Members

3.45 Representatives of the Bar Council appeared before Joint Committee to make oral submissions. Present was Mr Turlough O'Donnell SC, Chairman of the Bar Council, James O'Reilly SC, Dr. Neville Cox BL and Ms Siobhán Ní Chúlacháin. Dr. Cox presented the submission on behalf of the Bar Council and various contributions were made by the other representatives present.

3.46 In response to the submissions, Deputy Jim O'Keeffe pointed out that events such as Salmon Rushdie's, the *Satanic Verses,* the cartoons published in Denmark and the arrest of the English teacher in Sudan all pointed to the fact that there were difficulties surrounding the area of blasphemy.

[103] This logic comes from cases such as *Lemon v. UK* (1983) 5 EHRR 123, *Otto Preminger Institute v. Austria* (1995) 19 EHRR 35 and *Wingrove v. UK* (1997) 24 EHRR 1 in all of which the European Commission or European Court of Human Rights have determined that it is acceptable for the purposes of Article 10 of the European Convention on Human Rights for a state to retain a blasphemy law.

3.47 Senator Alex White stated that the notion of blasphemy, like that of sedition, is deeply anachronistic. He stated that blasphemy was quite ancient in its genesis and did not seem particularly useful, but that incitement legislation could prove more useful, and the current legislation in this area could be improved. However, in relation to the question of remodelling the current provision along the lines of Article 10, Senator White noted that some of the thinking from the European Court of Human Rights was "washing through". He asked whether this meant that the Constitution did not require amendment. In response this Dr Cox pointed there was a certain logic to that argument but that, none the less, in as much as the Constitution represents a statement of the ideals of a nation, it would be appropriate for that statement to be consistent with the modern view of how the nation operates.

3.48 Senator Eugene Regan pointed out that there is greater clarity on the law relating to freedom of expression because of the interpretation applied and informed by the European Convention of Human Rights. He also noted that under the Constitution blasphemy appears to be a criminal office and that this cannot be ignored in the Defamation Bill and other legislation.

3.49 Deputy Michael Woods stated that he would envisage great difficulty if an attempt was made to change amend or legislate for the issue of the offence of blasphemy.

Submissions of Dr Eoin O'Dell, School of Law, Trinity College

3.50 Dr O'Dell began by stating that the existing draft of Article 40.6.1° is a badly drafted protection of freedom of expression, especially having regard to modern constitutional norms. He stated it was unclear and that the right is expressed very grudgingly and it had been interpreted in the past very narrowly by the courts. The restrictions are stated very broadly. They have been interpreted even more broadly again by the courts and sometimes almost treated as more important than the right. The middle clause relating to the press is, he said, at best obscure and cryptic.

3.51 He stated that it is true that the courts have in the recent past begun to try to set this to rights, but he suggested they are simply making the best of a bad lot. Even though the Irish Courts may now have assistance from Strasbourg, Dr O'Dell felt that this was not enough given the starting point they have been given by Article 40.6.1°.

3.52 He stated that the specific point relating to blasphemy in terms of the blasphemy provisions is, first, that the word "blasphemy" is hard to define and, second, we have achieved a constitutional position of two extremes. We either have, on the one hand, a constitutional crime, which is an extraordinary thing to find in a freedom of expression clause or, on the other hand, what the Supreme Court has done in Corway, which is to render it a constitutional dead letter. He stated that the existing text of Article 40.6.1° is, frankly, terrible. This is borne out by comparison with other freedom of expression guarantees the world over.

3.53 Dr O'Dell stated that generally constitutional rights are clearly and comprehensively stated and broadly interpreted. Reasons for restrictions tend to come afterwards. There is usually a full and complete list of reasons for restrictions such as public order, the rights of others and a reasonable expectation of privacy. This complete list tends to have clearly stated restrictions. The restrictions are generally well cast, understood to be subsidiary to the right and not *vice versa*, usually narrowly interpreted and always required to be substantial and not trivial in the individual cases and in practice. In addition, there is usually a clear standard for determining whether a particular restriction is justifiable, having regard to the reason relied upon, which is usually articulated on the face of the text as well. In his view the Constitution fails all these standards and requirements.

3.54 Dr O'Dell also pointed out that blasphemy is not usually stated expressly on the face of any such constitutional text. The essence of the existing crime of blasphemy, to the extent that it is enforceable at all after *Corway,* is that it reflects public order concerns, which are the traditional common law understandings, or reflects the need to protect the rights of others, which is the emerging understanding. These more general things are more appropriate to a constitutional text rather than an expressed reference to blasphemy.

3.55 Dr O' Dell stated that he would replace the existing text with a more appropriate text. (In his written submission, he proposed an alternative formula of words.) The thrust of his submission was that the existing text does not work, and if it is broken, we should fix it. The more appropriate text would have a better, more comprehensive and clearer statement of the right referring, for example, not merely to expression but also to thought, belief, speech, freedom to receive ideas and an express and clear statement of freedom of press and other media. There should be a complete and closed list of restrictions, which could include matters such as public order and the rights of others, which might encompass blasphemy legislation.

3.56 The general grounds of restrictions, as stated in any new constitution should not expressly include the word "blasphemy" but blasphemy legislation might be justified on the basis of restriction to protect the rights of others or restriction to prevent public disorder. Whether legislation to prevent incitement or blasphemy on the basis of such restrictions ought to be introduced would then become a matter for legislators, which is the more appropriate forum for making this determination than a constitutional crime.

Response of Members

3.57 In response to this submission Deputy O'Keeffe stated that it did seem that Article 40.6.1.i was a disorderly article and commended Dr O'Dell on his scholarly analysis. He pointed out that his understanding was that when the Article was originally drafted

it came with late amendments during the course of the debate and, for one reason or another, the amendments were not accepted.

3.58 In response to Senator White, Dr O'Dell pointed out that it was true that European standards were finding their way into Irish case but that it was happening slowly and in an inhospitable context. Furthermore, he stated, in reference to Senator White's question as to blasphemy laws elsewhere, that these laws tend not to be enacted in common law jurisdictions. Rather the issues are dealt with through incitement legislation.

Submission of the National Newspapers of Ireland ("NNI")

3.59 On 30th April 2008, representatives of the National Newspapers of Ireland attended a hearing of the Committee. Present were Mr Frank Cullen, co-ordinating director, Brendan Keenan, Group Business Editor Independent Newspapers and Chairman of the Press Council Code Committee, Colm MacGinty, Editor of the Sunday World, Andrew O'Rourke, solicitor, and Cliff Taylor, Editor of the Sunday Business Post.

3.60 Mr Cullen made the oral submission to the Joint Committee. He started by pointing out that freedom of expression is an essential right of each and every citizen and goes to the heart of democracy. Newspapers often provide the vehicle for that free expression. Neither the fact that newspapers undoubtedly have a financial interest in advocating freedom of expression, nor even the fact that the freedom is doubtless abused from time to time deprives the principle of importance. Mr Cullen stated that National Newspapers of Ireland recognises that the exercise of the freedom carries with it duties and responsibilities and is necessarily subject to conditions and restrictions. An indication of that recognition is the initiation in the recent past of the Press Council of Ireland by NNI and its industry partners. He stated that NNI acknowledges that any constitutional recognition of freedom of expression is also legitimately subject to restrictions. He suggested the present text of the Constitution dealing with these issues does not recognise the importance of freedom of expression and, in particular, does not go as far as is required by the European Convention on Human Rights in vindicating freedom of expression which we, as a nation, committed to as far back as 1953.

3.61 Mr Cullen stated that freedom of expression and press freedom are under attack on a number of fronts. First, we have the large libel awards made by juries. An award of £300,000 in 1999 was described as being "top of the bracket". Notwithstanding this, there have been recent jury awards of €750,000 and €900,000. Awards such as these are bound to have a considerable, chilling impact on freedom of expression. In addition, in recent times a number of injunctions have been sought to restrain freedom of expression, for example, in the Leas Cross case.

3.62 In respect of confidentiality of sources, Mr Cullen stated it is worth noting that the Government, politicians and others frequently avail of the media to inform or reveal information anonymously in the public domain in the belief this serves the public interest. Although Article 10 of the European Convention on Human Rights recognises that an essential part of freedom of expression is the media's right to retain the confidentiality of sources, this has come under scrutiny in Ireland in recent times.

3.63 Mr Cullen noted that the principles under European Convention of Human Rights have been accepted in Irish law. Since the passage of the European Convention on Human Rights Act 2003, it has been the obligation of any court when interpreting legal norms to do so in a manner compatible with the State's obligations under the European Convention on Human Rights. Mr Cullen stated that NNI believe the freedom of expression protected by the Constitution and the European Convention on Human Rights encompasses the right to state and impart facts and information; the right to express freely ideas, convictions and opinions; the right to receive facts, information, ideas, convictions and opinions; the right to scrutinise and criticise public policy; and the right to educate public opinion, a matter of grave import to the common good and the system of democratic government prescribed by the Constitution.

3.64 Mr Cullen stated that if it is deemed desirable to reform this part of the Constitution, it should be reformed in a way that makes it clear that if the rights set out in the Constitution on freedom of expression are to be restricted, this should only be done in accordance with the principles of the European Convention of Human Rights. That would have two desirable effects. First, it would emphasise the need to justify restrictions on freedom of expression, without making it impossible or more difficult to impose such restrictions. Second, it would ensure the Constitution was brought into line with the European Convention of Human Rights, which would make it increasingly unlikely that successful claims could be brought against Ireland in the European Court of Human Rights.

3.65 In respect to blasphemy, Mr Cullen pointed out that the Law Reform Commission considered the matter in 1991 and concluded there was no place for the offence of blasphemous libel in a society that respected free speech. It recommended that the reference to blasphemy in Article 40.6.1°(i) should be deleted as part of any extensive revision of anachronistic or anomalous constitutional provisions. Although this is not an important aspect of daily life for newspapers, he stated that National Newspapers of Ireland recommends this view to the committee.

3.66 Mr Cullen also referred to the report of the Constitution Review Group published in May 1996 and pointed out that National Newspapers of Ireland is generally in agreement with the views and conclusions outlined in the group's lengthy reflection on the issue of freedom of expression.

3.67 In conclusion Mr Cullen stated National Newspapers of Ireland's overall recommendation in respect of this aspect of the Constitution. He stated that NNI respectfully submits that Article 40.6.1°(i) could be reworded to provide:

> The State guarantees liberty for the exercise of the right of citizens to express freely their convictions and opinions and state the material upon which the same are based. The State also guarantees liberty for the exercise of the freedom of the press. Any restriction on these rights must be prescribed by law, must correspond to a pressing social need, and must be proportionate to the legitimate aim pursued.

Response of Members

3.68 In response to this submission Deputy Sean Ardagh (Chairman) raised the issue in respect of the abuse by the press of its freedom and the freedom of expression and how that is to be addressed.

3.69 In this regard, Mr Cullen referred to the Press Council and a new code of practice to which NNI was in process of having newspapers sign up to. Mr Brendan Keenan pointed out that this sets out the principles the media have agreed they are obliged to follow. Mr Keenan also pointed out that if a newspaper is now the subject of a complaint which is upheld by the Ombudsman, then it is obliged to publish the ombudsman's ruling with due prominence.

3.70 Deputy Ardagh pointed out that this was in the future, but asked what had been done up until now in this regard. Mr Cullen pointed out that this code did not exist. Mr Keenan stated that the NNI discovered that Ireland seemed to be the only democracy that had no system of this nature. He said that they had even learnt that several tyrannies have such systems. Ireland had been exceptional in not having such a structure, albeit for historical reasons, but there is now a system in place. He said he believed it would work.

3.71 Senator Eugene Regan stated that he agreed with the principle of publishing findings of complaint against newspapers and said that the Defamation Bill 2006 makes a similar provision. Senator Regan stated that the provision requiring newspapers to give an apology in equal prominence to the offending article will have a deterrent effect on editors and journalists.

3.72 Deputy Barry Andrews also agreed that those in the journalistic profession will work studiously to avoid, if possible, being the subject of an observation or criticism published by the Office of the Press Ombudsman. The publication of such statements will act as a form of sanction in practice, even if it does not constitute a suspension, fine or anything more serious. He accepted that a substantial commercial imperative

underpins everything the newspaper industry does. It is a question of selling newspapers.

3.73 Deputy Andrews also stated the he had reservations about the manner in which journalism covers crime, not only in Ireland but also in the UK. He stated that the coverage given to such matters is not in proportion to the incidence of crime in Ireland, which is one of the safest countries in western Europe. He stated he did not consider that a great deal of responsibility is being shown in this regard. The Office of the Press Ombudsman will not rap newspapers on the knuckles for their actions in this area, as it is beyond its remit. However, he stated that this was not a matter entirely within the remit of the joint committee.

3.74 Deputy Andrews also pointed out that an examination of the freedom of expression cannot avoid looking at the question of privacy and, in particular, Article 8 of the European Convention of Human Rights which has the ability to restrict press freedom in favour of rights of privacy for individuals.

3.75 Deputy Michael Kennedy stated he appreciated that those involved in the newspaper industry are interested in selling newspapers, which may involve getting the story before another newspaper or using a better headline than one's rivals. However he was concerned about the manner in which tragic cases are reported. He pointed to the example of the recent death of the Waterford GAA man. The immediate headline declared it a suicide. He pointed out that he had a difficulty with the fact that banner headlines are used in the immediate aftermath of the death, instead of having more consideration for the families. He also pointed to similarly instances, such as the Liam Lawlor case.

3.76 Senator Eugene Regan also stated that he did not necessarily agree that press freedom was under attack and he did not see this from his observation of the court cases or from the basic principles laid down in the Constitution on freedom of expression.

3.77 Deputy Michael Woods stated that the right to state and impart facts and information is all fine, but we get into trouble when it comes to the right freely to express ideas, convictions and opinions, not just in the opinion section of a newspaper but in various articles. He said there is an onus on the Press Council and on the Press Ombudsman to deliver balance. He said it is also important to get the balance right in terms of the defamation legislation. Deputy Woods stated that he was concerned about that the Press Council be strong and be seen to take action. He stated the code of practice is hugely important. Every necessary support to make it function should be given. He stated that when some experience of operating the code of practice has been gained, it should be examined to see how it might be improved. If a reasonable balance can be achieved, most of the other issues can be dealt with. He also questioned the ability of the courts to protect ordinary citizens when it came to privacy. He said that ordinary

decent citizens keep far away from the courts because their houses, their families and everything else are at stake, so we need a strong press council and ombudsman.

Submission of TV3

3.78 TV3 were invited to make an oral submission and present were Mr David McRedmond, Chief Executive of TV3, Mr. Andrew Hanlon, director of news and information programming at TV3 and Mr. David McMunn, director of legal affairs.

3.79 Mr McRedmond made the presentation. He started by stating that Article 40.6.1°, as it stands, may not provide sufficient protection against restrictions which have been placed on broadcast media and which curtail freedom of expression. He said that the first set of restrictions relate to how TV3 cover the news, particularly during elections and referenda. He said he would specifically mention three issues: the moratorium on broadcasting 24 hours before an election, objective and impartial coverage; and the ban on television advertising by political parties. These regulations are specified by the Broadcasting Commission of Ireland and derived from the Radio and Television Act 1988 and the Referendum Act 2001. They could be defended within the Constitution as it stands but are problematic from the viewpoint of a broadcaster.

3.80 Mr McRedmond stated that the moratorium is an anachronism and is based on a belief that media could be controlled as envisaged in the Constitution. Today, given the existence of global media, on-line transmission and the overspill of UK channels and satellite broadcasting, all the provision achieves is to reduce informed debate within the territory. The idea behind it is to allow a period of reflection for voters, which does not really exist nowadays. If, on the day preceding an election, a newspaper printed something controversial or headline-grabbing then politicians and other interested parties would have no comeback, which is often provided by the broadcast media as they operate in the here and now.

3.81 He pointed out that the requirement for balanced coverage does not apply to print media. The requirement is, in itself, a restriction on freedom of expression and arguably is impossible to meet.

3.82 Mr MacRedmond then addressed the issue of the restriction on political advertising. He said, for a commercial broadcaster, this might be the most insidious restriction on freedom of expression. There is no logical reason to treat broadcast media differently from print media. If the restriction were extended to print media or outdoor advertising the measure would probably be viewed as almost Stalinist. While it might address controls over funding of parties, its impact is a restriction on freedom of expression. He said it is particularly of concern where 75% of Irish television viewing comprises State-owned channels, which do not suffer from the restriction, though they do not get the political advertising. However, they benefit from increases in licence

fees while commercial broadcasters suffer restrictions on their funding and, therefore, on the amount they can spend on news programmes.

3.83 Mr MacRedmond also raised the issue of sponsorship of news programming, which is on the same lines as the restrictions on political advertising. All commercial broadcasters depend on advertising, as do newspapers, as a way of raising funds for programming. If, however, TV3 are restricted in that regard it cannot afford to fund news coverage to the same level as a State broadcaster can. That creates a serious issue for freedom of expression, particularly where there are different views and people need different channels as outlets in which to express themselves.

3.84 Mr MacRedmond pointed out that TV3 had raised a couple of specific issues in its submission. TV3 believed the rule on blasphemy is outdated and would be better left to general provisions on public order. The provision is probably ignored, which is probably not a good thing. At the same time, as a responsible broadcaster, TV3 like to think it would exercise due care and attention in the scheduling of programming in terms of taste and decency, for which guidelines exist through the Broadcasting Commission of Ireland and the Broadcasting Complaints Commission.

Response of Members

3.85 In response Deputy Michael D'Arcy stated that much of what the delegates have said may be relevant to the Broadcasting Bill which will soon be debated in the Oireachtas. He agreed with much of what had been said about the right to reply. If people are very clever in the way they pitch an issue, whether on local radio or in a newspaper, a day or two before an election, there is no right of reply.

3.86 Senator Eugene Regan pointed out that the question of balanced coverage is important in the context of there being a state broadcaster and other commercial broadcasters. He stated the idea of balanced coverage can be interpreted in different ways. It can distort the democratic process. In the debate on the Lisbon treaty, for example, there is an over-representation of particular individuals who, in many cases, have an incentive to take a negative view in such a campaign in order to garner publicity.

Other Written Submissions received by the Joint Committee.

3.87 The Joint Committee received written submissions from the Gorey Muslim Community, the Union of Students of Ireland, the Humanist Association, Jason Fitzharris and the Institute of Advertising Practitioners Ireland (IAPI).

3.88 Whilst the Committee considered these submissions, some of the points raised therein were outside the remit of the Committee's scope of work. However, it did note the following points which were raised.

3.89 The Gorey Muslim Community submitted there should be a clear censure in the Constitution of hate speech, which largely affects rights of minority groups.

3.90 The Union of Students in Ireland submitted that there should be removal of the terms Blasphemy and Morality from the Article 40.6.1. In addition to the freedom of expression, the Union stated there should be a right to *access* the freedom of expression. This would include access to information relating to crisis pregnancy and abortion. It would also guarantee access to information through the medium of Irish. It also submitted that there should be a clarification that hate speech is not protected speech and that there should be a clarification that religious expression is protected.

3.91 The Humanist Association of Ireland submitted that no religious or philosophical beliefs should enjoy greater protection compared with non-religious beliefs. It stated that ideas and beliefs do not require protection, rather people do. Thus laws relating to incitement to hated should provide sufficient protection for all people. Furthermore, it stated that it is not a proper role of the State to defend faiths and beliefs.

3.92 The Institute of Advertising Practitioners Ireland paper set out that the IAPI is a signatory to European Association of Communications Agencies Declaration of Rights and Responsibilities of Commercial Communications, and sets out that declaration. However, it made no formal suggestions relating to the amendment of Article 40.6.1.

3.93 Finally, the submission from Mr Fitzharris made a number of arguments advocating the removal of the reference to blasphemy.

CHAPTER 4: THE POTENTIAL OPTIONS FOR CHANGE

4.1. In the light of the foregoing discussion, the Committee considered the following options in relation to (1) revision of Article 40.6.1.i and (2) the reference to blasphemy in Article 40.6.1.i.

(1) REVISION OF ARTICLE 40.6.1.I

Option 1: Recommend no change

4.2. The first option is to suggest that no change is necessary or even desirable.

Arguments for:

4.3. Whilst it is acknowledged that the drafting of Article 40.6.1 is inelegant and may leave something to be desired, in practice it has shown itself to be sufficiently robust and more than adequate to protect the fundamental right of free speech. This is especially so over the last decade or so, as changing judicial attitudes - prompted no doubt by decisions of the European Court of Human Rights - have ensured that the essence of the right of free speech is taken more seriously than heretofore.

Arguments against

4.4. The wording of Article 40.6.1 is too weak and grudging of the basic right to be worthy of any democratic state which is sufficiently committed to the protection of free speech. While the courts have done their best - especially in the last decade - to make the best of this inelegantly drafted provision, the Constitution deserves better. Even accepting that change is not immediately required, no Oireachtas Committee charged with the task of reviewing the present wording of Article 40.6.1 should endorse the present version.

Option 2: Recommend change, but accept that change is not immediately necessary

4.5. A second option might be to accept that Article 40.6.1 is inelegant and insufficiently protective of free speech (and, thus, that a new or improved wording is desirable), while at the same time acknowledging that the presently wording is not so defective or the legal consequences not so unacceptable that change is imminently required. In effect, endorsement of this option would suggest that change is not necessary, but is simply desirable and that the effectuation of this change could be postponed to some convenient date when,

for example, there was a referendum to effect a series of technical constitutional changes.

Option 3: Recommend change along the lines suggested by the Constitution Review Group

4.6. The Constitution Review Group (May 1996) recommended that Article 40.6.1 be replaced by a new provision which incorporated in substance the provisions of Article 10 of the European Convention of Human Rights.

Arguments for

4.7. While accepting that the case-law on Article 40.6.1 has, to some extent, moved on in a positive sense since the Review Group reported some twelve years ago, the basic problems still remain. Article 10 ECHR is better drafted and has stood the test of time. Moreover, now that the Convention is part of Irish law - albeit incorporated at a sub-constitutional level via the European Convention of Human Rights Act 2003 - the case for change is even more stark. It makes no sense at all if the courts continue to derive their inspiration in free speech cases from a sub-constitutional source such as Article 10 ECHR.

Arguments against

4.8. While a cogent theoretical case can be advanced for change along the lines advocated by the Constitution Review Group, in practice such a change would make no real difference at all, save, perhaps, in a tiny minority of cases. A referendum would be scarcely be justified just for the sake of legal coherence and drafting elegance. In any event, the Article 40.6.1 case-law has moved on significantly since the Review Group first reported in May 1996.

(2) The Reference to Blasphemy

Option 1: Recommend no change

Arguments for

4.9. It is true that in theory the Supreme Court's decision in *Corway v. Independent Newspapers Ltd.* (1999) has created a constitutional mess, but, if so, this is a mess which has gone unnoticed by the general public. In *Corway* the Supreme Court held (in effect) that the existing common law of blasphemy was unconstitutional and that Article 40.6.1 obliged the Oireachtas to enact fresh legislation on the topic. In practice, however, it would be almost impossible for the Oireachtas to enact fresh legislation on this type of

topic which could meet the very exacting *Corway* standards of ensuring that there is no discrimination between religions or particular denominations in respect of a blasphemy law. The very essence - historically, at any rate - of a blasphemy law after all is to give protection to *particular types* of religious beliefs.

4.10. Besides, given that there have been no prosecutions for blasphemy in the history of the State, it is scarcely surprising that the legal vacuum created by *Corway* has created no real practical problems. A further consideration is that fresh legislation on this topic would probably create more problems than it is worth.

Arguments against

4.11. Article 40.6.1 obliges the State to make blasphemy a crime and there is a necessity to legislate in the wake of the *Corway*.

Option 2: Legislate for religious hatred

4.12. A second option might be to abandon attempts to legislate for a new blasphemy law, but instead to legislate by creating a new crime of seriously offending religious beliefs.

Arguments for

4.13. This type of legislation would represent a modern form of blasphemy law and would give effect to the underlying principle and spirit of the decision in *Corway*.

Arguments against

4.14. All the arguments which have been advanced against a fresh blasphemy law could equally be deployed against such legislation. Moreover, the enactment of such legislation could lead to a curtailment of important free speech rights, especially if such new legislation resulted in the prosecution of those who were, for example, severely critical of the tenets of a particular religious belief.

Option 3: Delete the reference to blasphemy in Article 40.6.1

4.15. In any re-casting or general revision of Article 40.6.1, the references to blasphemy might usefully be deleted. In practice, however, the present day provision is unproblematic, especially now that it has been effectively

emasculated by the Supreme Court's decision in *Corway*. The State has, in effect, been without a blasphemy law since 1999, yet this has scarcely been noticed, nor has there been any demand for change or for new legislation.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 It is the Committee's view that Article 40.6.1.i requires reform. It is a provision which is a creature of its time whose language and structure do not sufficiently reflect the primacy which must be placed on the freedom of expression in a modern democracy. The entitlement to express one's views freely is a cherished ideal which requires an effective legal foundation. At present the language of Article 40.6.1.i fails to meet this standard. In particular, it places an undue emphasis on the restrictions on free speech whilst making references to matters such as blasphemy, sedition and indecent material which are more properly matters for legislative treatment rather than constitutional protection.

5.2 However, the Committee is also of the view that change is not an immediate necessity. In 1996 the Constitution Review Group recommended that the best way to ensure adequate protection for freedom of expression would be to re-model Article 40.6.1.i along the lines of Article 10 of the European Convention of Human Rights.[104] The Committee endorses this recommendation. However, since 1996, two key developments have occurred which militate against the urgency in implementing this proposal. The first development stems from the enactment of the European Convention of Human Rights Act 2003. This now requires the courts to interpret legislation in a manner compatible with the provisions of the Convention. The second development relates to the emerging jurisprudence of the Irish Courts relating to the interpretation and application of Article 40.6.1.i.[105] It is clear from this that the Courts are giving effect to the freedom of expression as it is envisaged by Article 10 of the Convention and, in that regard, are transcending the potential structural and linguistic limits which might otherwise arise from Article 40.6.1.i.

5.3 In forming these views the Committee had regard to a number of issues, which arose from submissions and discussions during the Committee's deliberations. In particular, the following matters deserve comment.

Restrictions on the Freedom of Speech

5.4 The Committee was of the view that the Article 40.6.1.i appears to give undue priority of consideration to the limitations on freedom of speech rather than on the entitlement itself. The drafting of the Article gives the impression that the framers were concerned with controlling the corrosive effect of matters such as immorality, blasphemy, sedition and indecent material. Whilst it is vital that the State can legitimately impose restrictions on free speech, it is also vital that any such restrictions be measured, justifiable and proportionate to the protection of other freedoms and rights.

[104] Discussed at paragraph 2.18 above.
[105] Discussed at paragraph 2.24 above.

5.5 In this regard, the Committee was of the view that there were two clear reasons for improving the language of Article 40.6.1.i so as to increase the protection for free speech itself.

5.6 The first reason is the imperative to ensure that Ireland is fully in compliance with its obligations under the European Convention of Human Rights. Whilst the recent decisions of the Courts show Article 40.6.1.i is being interpreted along these lines (and in fact certain judgments express the view that there is no distinction in substance) an amendment modelled along the lines of the European Convention of Human Rights article would provide welcome clarity in this regard.

5.7 The second reason is that the current trend of judicial interpretation is potentially temporal in its effect. Whilst there is no immediate concern, the Constitutional imperative to protect free speech should not be dependent on judicial support alone, but protected by the will of the people as expressed through the Constitution.

Freedom of the Press

5.8 Ancillary to the freedom of expression is the freedom of the press. This is a vital liberty in a healthy and functioning democracy. The Committee is of the view that reform along the lines of Article 10 of the European Convention of Human Rights will provide improved clarity in this area. That being said, the Committee does not take the view that Article 40.6.1.i, as currently interpreted, presents any danger to this freedom.

5.9 During its deliberations, the Committee focused on two issues in this area. In particular, it was argued by National Newspapers of Ireland that the freedom of expression was coming under attack on a number of fronts. In this regard, it pointed to, amongst other matters, the libel laws and confidentiality of sources.

5.10 In respect to the libel laws, the Committee was conscious of what the Constitution Review Group stated in 1996. It said that if there is to be a review of the defamation laws, this is best achieved through legislation. In particular it pointed out that

> "As far as the Constitution is concerned, the essential question is whether the defamation laws effect a fair balance between the right of free speech on the one hand and the need to protect individual reputations on the other."

5.11 The new Defamation Bill is currently progressing through the various legislative stages.[106] In that regard, the Committee feels that the current problems relating to the libel laws are best addressed through that legislation. However, in terms of Constitutional protection, the Committee is of the view that Article 40.6.1.i, as presently interpreted by the Courts, is not the source of those problems.

[106] The Defamation Bill is discussed in more detail at paragraph 2.76 above.

5.12 The Committee also looked at the issue of journalistic sources. The protection of sources is vital to ensuring freedom of the press and, in turn, the freedom of expression. Recent case law in this issue has brought questions in relation to this matter to the fore.[107] However, the Committee is not of the view that Article 40.6.1.i presents an immediate danger to the freedom of the press or compromises the value that should be placed on the protection of sources. It is clear from recent decisions such as *Mahon v The Sunday Business Post* and *Mahon v Keena* that the courts gave great emphasis to the importance of confidentiality of sources and fully invoked the jurisprudence of Article 10 of the European Convention of Human Rights when considering this area. Considering that Article 10 of the European Convention sets the standard for the protection of free speech, it appears that the Irish Courts are applying that standard when it comes to confidentiality and protection of sources. Thus an immediate change to ensure the language of Article 40.6.1.i is in conformity with Article 10 of the Convention would not necessarily provide any greater protection that is currently being afforded by the Courts.

Ownership of the Media[108]

5.13 In 1996, the Constitution Review Group pointed out that

> "Where a large section of the media is under the control of a small group, which is neither democratically representative nor accountable, there is always the possibility that such a group will exercise disproportionate influence on opinion formation owing to its controlling financial (and inevitably, editorial) influence on the medium in question."

5.14 This is a view which this Committee also endorses. Furthermore, from a Constitutional perspective, the Committee agrees with the Constitution Review Group that a reformed Article 40.6.1.i which is modelled along the lines of Article 10 of the European Convention of Human Rights would go as far as one can go to provide the correct legal framework in which the above risk would be minimised.

Privacy

5.15 The right to privacy is sometimes seen as the mirror right to free speech. There is a correspondence between these rights and it is notable that both the Constitution and the European Convention of Human Rights expressly provide for them.

5.16 The Committee is of the view that, at present, there is no evidence that the right to privacy in Irish Law unnecessarily or disproportionately interferes with the freedom of expression. In fact, as the law currently stands, it would appear that it is the right to

[107] Discussed above at paragraph 2.122
[108] Discussed above at paragraph 2.119

privacy which is more vulnerable. As was concluded by the Working Group on Privacy (March 31st 2006)

> "While the Constitution has been held to provide a personal right of privacy, the nature and extent of the remedies derived from that guarantee are uncertain. An analysis of the constitutional jurisprudence demonstrates not merely an inherent, and we believe largely unavoidable, lack of clarity as to definition and the precise application of the general entitlement to privacy in particular circumstances, but the dimensions of the constitutional cause of action are also unclear in many other important respects, particularly in relation the considerations which the Courts will determine justify what might otherwise be considered an invasion of privacy."

5.17 It was on foot of this report that the Privacy Bill was introduced which is discussed earlier in this report. The Privacy Bill was presented in the 22nd Seanad. It was restored to the Order Paper in the 23rd Seanad. The status of the Bill is "Bill as initiated". It remains to be seen as to whether there will be any further impetus to enact this provision.

Blasphemy[109]

5.18 Article 40.6.1.i, at paragraph 3, provides "The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law". This issue of the offence of blasphemy was the subject of special focus during the deliberations of the Joint Committee.

5.19 The Constitution Review Group report in 1996 recommended that "The retention of the present constitutional offence of blasphemy is not appropriate". The difficulty as regards blasphemy is the lack of a constitutional or statutory definition. At common law, blasphemy consisted only of attacks on the doctrines of the established Church, Anglicanism, containing an element of vilification, ridicule or irreverence likely to result in a breach of the peace and so did not embrace attacks on other Christian denominations or other world religions[110]. Mr de Valera believed that Article 40.6.1.i did not create a new offence, and that the offence of blasphemy referred to in the Constitution simply referred to the common law offence[111].

5.20 In the only decision on this area, *Corway v Independent Newspapers (Ireland) Ltd*[112], the Supreme Court concluded that although the crime of blasphemy must exist in Irish Law, in the absence of legislation, it could not authorise instituting a criminal prosecution for blasphemy. It also clearly indicated that the existing common law rules regarding blasphemy - stemming as they do from a historical desire to

[109] Discussed above at paragraph 2.105.
[110] Kelly *The Irish Constitution* (Fourth Edition) at 7.5.70
[111] Paul O'Higgins, "*Blasphemy in Irish Law*" (1962) 23 MLR 151.
[112] [1999] 4 IR 484, [2000] 1 ILRM 426

protect an established church - were unconstitutional given that they did not treat all religions equally. Furthermore, given that the common law offence is to be abolished under the Defamation Bill 2006, the reference to blasphemy in the Constitution will, in effect, be redundant.

5.21 However, there is no doubt that recent incidents indicate that religious offence is still something which can cause genuine distress. In submissions to the Joint Committee various references were made to the performance of Tommy Tiernan on the *Late Late Show*[113], the reaction to "Jerry Springer the Opera" in England, and the publication of the controversial cartoons in Denmark. Furthermore, the European Court of Human Rights has consistently held that the exercise of a criminal law against blasphemy is not necessarily repugnant to Article 10 of the European Convention of Human Rights.

5.22 Notwithstanding this, it is the Committee's view that the specific reference to blasphemy should be deleted from the Constitution. The reference itself has effectively been rendered a "dead letter" by virtue of the decision of the Supreme Court in *Corway*. Furthermore, the Committee is of the view that in a modern Constitution, blasphemy is not a phenomenon against which there should be an *express* constitutional prohibition. If there is a need to protect against religious offence or incitement, it is more appropriate that this be dealt by way of legislative intervention, with due regard to the fundamental right of free speech.

References to Seditious and Indecent Matter

5.23 The Committee is of the view that the problems associated with references to blasphemy also apply in relation to the references seditious and indecent matter. There is no particular definition of these terms and it would appear that these references will become less relevant by virtue of section 34 of the Defamation Bill. These provide for the common law offence of seditious libel and obscene libel to be abolished.

5.24 In that regard, it is also recommended that references to these matters be deleted in any new text adopted for Article 40.6.1.i.

[113] 21 November 1997

RECOMMENDATION OF THE JOINT COMMITTEE

The Joint Committee has concluded that the wording of Article 40.6.1.i, as drafted, is unsatisfactory. The Article is drafted in such a way that the limitations on free speech are accorded undue prominence. Furthermore, the Article seems to have been informed by concerns which do not require to be dealt with at a constitutional level, such as the prohibition against blasphemy.

In light of the foregoing, the Joint Committee recommends that the freedom of expression as provided for in Article 40.6.1.i should be amended to be expressed along the lines of Article 10 of the European Convention of Human Rights. This will ensure greater emphasis on the freedom of speech whilst allowing for proportionate and measured restrictions on that freedom.

However, given the development in case law and the jurisprudence which has emerged on freedom of expression since 1996, the Committee is of the view that amendment is not immediately necessary. It is now clear that the Courts are interpreting Article 40.6.1.i in light of Ireland's obligations under Article 10 of the European Convention of Human Rights, thereby overcoming the potential structural and linguistic limitations which might otherwise arise from Article 40.6.1.i. However, to ensure certainty into the future, the Joint Committee recommends that change is made when an appropriate opportunity presents.

It is also recommended that any such amendment would delete the express restrictions on free speech based on blasphemy, sedition or the publication of indecent material. Whilst the reference to these matters in the Constitution at present does not present any practical problem, they are matters which, if necessary, are more appropriately regulated by legislation.

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1. Department or other body laying document ..	**Houses of the Oireachtas**
2. Title of document	Houses of the Oireachtas. Joint Committee on the Constitution. First Report - Article 40.6.1.i - Freedom of Expression
3. Parliamentary number (Prn) (available from Government Supplies Agency (01) 647 6628)	**A8/0950**
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- 9 JUL 2008

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