



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. *Protection from Harassment Act 1997*

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. *Protection from Harassment Act 1997*

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴ Freedom of Information Act 2000 s.21.

⁵ *Ibid.*, s.34.

⁶ *Ibid.*, s.40.

⁷ *Ibid.*, s.41.

⁸ *Ibid.*, s.32.

⁹ *Ibid.*, s.23.

¹⁰ *Ibid.*, s.44.

¹¹ *Ibid.*, s.53.

¹² Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?



Submission to the 91st Session of the United
Nations Human Rights Committee

on

Respect for Freedom of Expression in the
United Kingdom of Great Britain and
Northern Ireland

London
October 2007

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1. Introduction

This submission outlines ARTICLE 19's main concerns regarding respect for the right to freedom of expression in the United Kingdom. Our submission is presented in respect of the consideration by the United Nations Human Rights Committee of the Sixth Periodic Report of the United Kingdom on the implementation of the International Covenant on Civil and Political Rights (ICCPR). A list of possible questions to be posed to the United Kingdom representation is appended to this submission.

ARTICLE 19 is an international, non-governmental human rights organisation which works around the world to protect and promote the right to freedom of expression and information.

2. Summary of concerns

The United Kingdom is a long-standing member of the Council of Europe and European Union and a party to the European Convention of Human Rights as well as the International Covenant on Civil and Political Rights. While the right to freedom of expression is generally respected, there are currently problems in five key areas:

Access to information:

- i) The Freedom of Information Act 2000 contains exemptions which allow access to information to be refused on arbitrary or inappropriate grounds.
- ii) The government has proposed FOIA amendments to the way the costs of processing a request under the Act are assessed, making it easier to reject politically sensitive or complex requests on the grounds of costs.
- iii) The Official Secrets Act does not recognise prior publication or disclosure in the public interest as defences, which creates the problematic scenarios where 'whistleblowers' or journalists who republish information that is already in the public domain may be unduly punished.

Anti-terror legislation:

- i) The 'encouragement of terrorism' offence introduced by the Terrorism Act 2006 lacks clarity, creating a 'chilling effect' on statements which contribute to legitimate debate about terrorism.

Libel laws:

- i) The existence of Conditional Fee Agreements and 'after the event insurance' has considerably increased the costs of defending or even settling a libel claim.

Public order laws:

- i) The Serious Organised Crime and Police Act 2005 ('SOCPA') prohibits, inter alia, demonstrations of one or more people within a square kilometre of the Houses of Parliament without prior permission.
- ii) The Protection from Harassment Act 1997 ostensibly prevents stalking, but is so broadly worded that it has been used to prevent demonstrations.

Outdated criminal offences:

- i) A number of ancient and outdated speech-related criminal offences still formally exist in United Kingdom law. The rationale for crimes such as blasphemy, sedition and criminal libel no longer exists in a modern democratic society and although they are no longer in frequent active use, they could theoretically be revived and they serve as a justification for the retention and application of similar laws in other countries.

The following sections consider these points in detail.

3. Threats to the right of access to information

There is a growing consensus in international law that the right to access publicly held information is part and parcel of the right to freedom of expression. In a landmark ruling in 2006, the Inter-American Court confirmed that a right of access is guaranteed by Article 13 of the American Convention on Human Rights,¹ whose wording closely follows Article 19(2) of the ICCPR.

The Freedom of Information Act 2000 for England, Wales and Northern Ireland came fully into effect in 2005. Despite shortcomings in the Act, its first year of operation was evaluated by the government as a “significant success”,² an assessment generally shared by civil society and the media. Since then, however, official enthusiasm for the Act has been waning and a number of retrogressive amendments have been proposed.

3.1. Underlying problems in the Freedom of Information Act

Overbroad and vague exemptions

The Act contains a number of exemptions which cannot be reconciled with the test for restrictions on freedom of expression found in Article 19(3) of the ICCPR. In the first place, certain exemptions are overbroad or do not meet the standard of clarity necessary for a limitation on freedom of expression. For example, s. 29 exempts information that ‘would, or would be likely to, prejudice...the economic interest of the United Kingdom’ from disclosure. The UN Special Rapporteur on Freedom of Opinion and Expression criticised such exemptions after his visit to the UK in 2000:

[T]he bill [now the Freedom of Information Act 2000] reportedly contains categories that should not be treated as class exemptions, such as section 22 [now section 27], which refers to information that would prejudice “the interest of the United Kingdom abroad”. Similarly, section 25 [now section 30] exempts information that has been held by public authorities for the purpose of various types of investigations. This exemption should be narrowed to include only material related to criminal process. Section 28 (3) [now section 36] exempts information likely to prejudice the maintenance of collective responsibility of ministers. Again, the Special Rapporteur

¹ *Claude Reyers v. Chile*, Serie C No. 151.

² Department for Constitutional Affairs, *Freedom of Information - One Year On*, June 2006, HC 991, p. 9.

believes that the bill should not cover all information relating to the development of policy, but only information which would inhibit legitimate policy process.³

Absolute exemptions

The exemptions under the Act are classed as either ‘qualified’ or ‘absolute’. A qualified exemption is an exemption which does not apply when the public interest in disclosure outweighs the interest served by the exemption. By contrast, absolute exemptions apply regardless of the public interest – the information covered by them is per se inaccessible. The possibility that information can be withheld despite the greater public interest in receiving the information is both illogical and inappropriate.

Absolute exemptions under the Act include where the information is accessible by other means⁴, where Parliamentary privilege applies⁵, where the requested information contains personal data⁶, where disclosure would amount to a breach of confidence⁷ and where the requested information is in the custody of a court or was created by a court in order to proceed with a case⁸. Most concerning of the absolute exemptions are those provided for in s.23 and s.44. These sections exempt information supplied by or relating to bodies dealing with security matters⁹, as well as information whose disclosure is “prohibited under any enactment”, or would be “incompatible with any Community obligation”, or would constitute contempt of court.¹⁰ The Act is thus in part subordinated to secrecy legislation, including the Official Secrets Act 1989, undermining the presumption of openness which should govern an access to information regime.

Ministerial discretion to refuse requests

Beyond exemptions, another problem in the Act is that a Minister is able to set aside a requirement to comply with an information request, and may even overrule the Information Commissioner.¹¹ Although reasons need to be given, no standard is laid out by which to judge the sufficiency of these reasons, nor is it clear what are the consequences if the reasons are considered inadequate. Similar issues surround s.36 of the Act, which considers information exempt if, in the reasonable opinion of a ‘qualified person’, it is likely to prejudice the effective conduct of public affairs. This provision has already been relied upon to prevent the release of information. In May 2006 a certificate was issued under s.36 by the Speaker of the House which prevented disclosure of the names and salaries of MP’s staff paid from the public purse¹² - information which is in the public interest and which is generally publicly available in comparative jurisdictions. It is not clear whether review of these sorts of decisions

³Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Visit to the United Kingdom of Great Britain and Northern Ireland*, UN Doc. E/CN.4/2000/63/Add.3, para 66.

⁴Freedom of Information Act 2000 s.21.

⁵*Ibid.*, s.34.

⁶*Ibid.*, s.40.

⁷*Ibid.*, s.41.

⁸*Ibid.*, s.32.

⁹*Ibid.*, s.23.

¹⁰*Ibid.*, s.44.

¹¹*Ibid.*, s.53.

¹²Information Commissioner’s Decision Notice FS50073128: *Heather Brooke vs House of Commons*

will be possible and as a result these exemptions represent clear inroads into the public's right to know.

3.2. Attempts to undermine the scope of the freedom of information regime through amendments to the Principal Act

The Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007 pose a threat to freedom of information by proposing reforms that would lead to a greater number of information requests being rejected on the grounds of costs.

Under the Act currently, requests for information can be refused if the cost of processing them exceeds the "appropriate limit"¹³ which has been set at £600 (US \$1200) for central Government and Parliament, and £450 (US \$900) for the wider public sector. Costs are assessed at £25 (US \$50) an hour and in calculating the overall cost of a request, regard may only be had to time spent on determining whether the requested information is held, and then locating, retrieving and extracting it. Under the proposed Regulations, the time spent examining the documents, consulting with others and considering whether an exemption applies will also be 'chargeable time' and so count towards to the cost limit, causing a greater number of requests to fall foul of this limit and so be refused. Furthermore, it is currently possible to aggregate requests – treating similar requests as a single one for the purpose of calculating costs – to prevent requesters from circumventing the appropriate limit by breaking up their request. Under the proposed Regulations, aggregation will be possible even for unrelated requests if they are received by the public authority in the space of 60 days and either refer to the same issue or it is considered 'reasonable in all the circumstances'¹⁴ to combine the costs of the requests.

The government argues that the reform is necessary to reduce disproportionately expensive and frivolous requests and bring down the overall cost of the Act (£35.5 million annually or about 0.0064% of total government expenditure). It has been widely warned, however, that the proposed Regulations will particularly affect requests made in the public interest and that cost-cutting can be achieved by better use of existing provisions in the Act.

First, the Act allows public authorities to refuse 'vexatious' claims¹⁵ or to charge any costs exceeding the appropriate limit to the requester.¹⁶ Second, there is no logical connection between the most expensive requests being frivolous or disproportionate. In fact, the contrary seems likely, given that the more sensitive a request is, the more consultation, consideration and examination of the relevant documents will be required. By the government's own admission, most of the top 5% of costly requests are made by journalists, MPs, campaign groups and researchers.¹⁷ Finally, the

¹³ The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, s. 3(2).

¹⁴ Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007, s. 7(2)(b)(ii).

¹⁵ Freedom of Information Act 2000, s.14.

¹⁶ *Ibid*, s.13.

¹⁷ Partial Regulatory Impact Assessment, para. 40.

possibility of denying requests on the basis of an estimate of how long consultation will take creates a great potential for abuse. The same applies to the possibility to aggregate requests when the public body deems it “reasonable” to do so.

In light of all the above, the Committee may wish to put the following questions to the United Kingdom:

- **Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?**
- **Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department’s schedule?**

3.3. *Official Secrets Act*

Despite the concerns expressed over the Official Secrets Act 1989 (OSA) by the Committee in 2001¹⁸, it remains in force without amendment.

The OSA prohibits all disclosures of information acquired by current and former employees of the security and intelligence services, Crown servants and government contractors. In the case of security and intelligence staff, the offence applies even if it has not been shown that the disclosure was damaging.¹⁹ The Act also criminalises the secondary disclosure of information by the media, to prevent information from being disseminated to the wider public if it is leaked.²⁰

The current version of the OSA was enacted following the 1985 trial of Clive Ponting, a civil servant who had disclosed information that demonstrated that ministers misled the public over the sinking of the Argentine cruiser *General Belgrano* during the Falklands war. Contrary to the official version of events, the ship had not been threatening British lives but was withdrawing from the theatre of conflict when it was attacked. The jury acquitted Ponting on the basis that his disclosure served the public interest. The OSA was subsequently amended to exclude the defence of public interest.²¹

We believe the OSA must be amended in three respects to be brought in line with the guarantee of freedom of expression in Article 19(2) of the ICCPR. First, disclosures which cause no harm should not attract criminal liability. Second, the media should not be made responsible for keeping official secrets; the prevention of leaks should be the exclusive responsibility of the authorities. Third, the OSA should recognise the

¹⁸ Concluding Observations, CCPR A/57/40 vol. I (2002), para. 21.

¹⁹ *Ibid*, s.2.

²⁰ *Ibid*, s.5.

²¹ See http://news.bbc.co.uk/onthisday/hi/dates/stories/march/1/newsid_4251000/4251355.stm

possibility of legitimate ‘whistleblowing’ by incorporating a defence of disclosure in the public interest.

These points are supported by the ARTICLE 19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,²² which state:

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The UN Special Rapporteur on Freedom of Opinion and Expression has also stated that:

Journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold.²³

Recent events illustrate the problematic nature of the OSA. Earlier this year, David Keogh, a Whitehall Communications Officer, and Leo O’Connor, a former researcher for an MP, received jail terms of six months and three months respectively for having leaked a confidential memo. The memo apparently contained a conversation in which Tony Blair dissuaded George W. Bush from bombing the Al-Jazeera offices in Qatar. Given the absence of a public interest defence, no regard was had to the fact that both thought they were acting in the public interest.²⁴ Importantly, the court also imposed a gagging order on the media so the contents of the memo are still prevented from entering the public sphere.²⁵

In the light of the above, the Committee could pose the following questions of the United Kingdom:

- **What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?**
- **Does the United Kingdom intend to add a defence of public interest to the OSA to ensure that whistleblowers are not deterred?**

²² U.N. Doc. E/CN.4/1996/39 (1996); the Johannesburg Principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his reports to the United Nations Commission on Human Rights.

²³ Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006.

²⁴ <http://United Kingdom.reuters.com/article/email/idUNITED KINGDOMML1060345320070510?pageNumber=1>

²⁵ See *Times Newspapers Ltd. & Ors v R.* [2007] EWCA Crim 1925.

4. Anti-Terror Legislation Encroaching on Freedom of Expression

The UN Human Rights Committee, amongst others, has voiced concern in the last few years about the adoption of far-reaching terror laws in some countries. In the United Kingdom, the offence of “glorification” or “encouragement” of terrorism, which was hurriedly introduced in the wake of the July 2005 bombings, is an example of legislation that fails to strike an adequate balance between the protection of the public against terrorism and the importance of freedom of expression.

Section 1 of the Terrorism Act 2006 is entitled ‘encouragement of terrorism’. It provides that it is an offence to publish a statement which is “likely to be understood by some or all of the members of the public ... as a direct or indirect encouragement or other inducement ... to the commission, preparation or instigation of acts of terrorism”. The offence also applies where the person did not intend to encourage or induce terrorism but was reckless as to whether members of the public would be directly or indirectly encouraged to this effect. According to paragraph 3, statements which are likely to be understood by the public as indirect encouragement of terrorist acts include those that glorify the commission or preparation of acts or offences, and those from which the public could reasonably infer that what is being glorified is conduct they should emulate. These provisions raise a number of concerns.

First, Section 1 is loosely drafted and could be interpreted in manifold ways; “encouragement” and “inducement” are vague terms already, “indirect encouragement or other inducement” is so vague as to be virtually without meaning. The terms “glorification” and “justification” can be understood to include expressions of support, sympathy with or even understanding of “terrorism”. In the current climate, there is a danger that such vague legislation will be used to prevent the peaceful expression of unpopular or extreme views. In July, four Muslim men were jailed for six years for having used offensive slogans during a demonstration against the Danish Mohammed cartoons, such as “Bomb, bomb Denmark. Bomb, bomb USA,” “7/7 on its way” and “Europe, you will pay with your blood”.²⁶ Such harsh sentences for what were in fact no more than expressions of extreme frustration are likely only to further alienate Muslims who feel marginalised from the rest of society. In addition these provisions fall below the ‘incitement’ threshold for restricting speech which has been established by Article 20 of the ICCPR and confirmed to apply in the context of combatting terrorism by the UN Security Council in its Resolution 1624.

Connected to the previous point, Section 1 may be applied to statements even if there is no real danger of violence occurring as a result of them. So long as a statement is likely to be understood by some members of the public as “direct or indirect encouragement or other inducement” to terrorism, its author will be liable regardless

²⁶ See http://news.bbc.co.uk/2/hi/uk_news/6904622.stm

of the likelihood of action resulting. This contradicts Principle 6 of the Johannesburg Principles:²⁷

- [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
- (a) the expression is intended to incite imminent violence;
 - (b) it is likely to incite such violence; and
 - (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression²⁸ and has often been recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.²⁹

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*³⁰ is particularly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the new offences under the Terrorism Act 2006). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly and that certain passages seemed to call for the use of violence. Nevertheless, it highlighted the fact that as an artistic expression, the poems had a limited impact and consequently there was simply no causal connection between the poems and the occurrence violence, and no need to penalise the author.³¹

It is clear from the Court's judgment in *Karatas* that a general prohibition of glorification of violence cannot be justified; only those statements of glorification that can be said to actually incite violence may be legitimately prohibited.

In light of threat to freedom of expression posed by this new offence, the Committee may consider putting the following question to the United Kingdom:

- **How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?**

5. Threat of libel claims limiting the free expression of writers and publishers

The difficulties and cost of defending - or even settling - defamation claims in the United Kingdom are such that they create a serious chilling effect for the exercise of

²⁷ See note 22.

²⁸ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

²⁹ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (United Kingdom House of Lords).

³⁰ 8 July 1999, Application No. 23168/94.

³¹ *Ibid*, paras. 50-52.

the right to freedom of expression. Faced with a threat to sue, newspapers or publishers will often abandon a story, not because it is untrue but to avoid the substantial burden of defending a lawsuit. English courts are so attractive as a forum for libel plaintiffs that London has earned nicknames such as “Club Med for libel tourists” and “a city called Sue”.

A particular problem of English law is that it is easy to make an allegation of defamation, and it is the defendant who then bears the burden to prove the truthfulness of the impugned statement or to show that it was made in the public interest.³² Although some problems with this system were addressed by *Jameel and others v Wall Street Journal Europe Sprl*,³³ the odds are still stacked in favour of the claimant in any action for defamation.

Apart from the procedural difficulties of defending a libel claim, the costs of doing so have increased significantly as a result of the introduction of Conditional Fee Agreements (CFAs) and ‘after the event insurance’ (ATE insurance). CFAs were legalised by the Courts and Services Act 1990 and allow lawyers to accept a case on a ‘no win, no fee’ basis. If the claimant wins, the lawyers may charge not only the normal fee for their services, but also an additional ‘success fee’, which is designed to reflect the risk of not being paid and may be as high as 100%. Both fees are recoverable from the defendant. CFAs are often used in combination with ATE insurance, a type of policy which guarantees that if the claimant loses, the insurance company will pay the defendant’s legal costs and expenses. However, if the claimant wins, the defendant must pay the insurance premium as well as the claimant’s legal fees and the success fee.

CFAs and ATEs make it easy for claimants of limited means to sue for libel, at very little risk to themselves. If the defendant is successful, the costs of the litigation will often not be fully recoverable, even if the claimant has taken out ATE insurance. One reason for this is that many ATE insurance policies are capped at a level below the actual costs incurred by the defendant. Additionally, anecdotal evidence suggests that the insuree may have told the insurer untruths which have been challenged in the proceedings, resulting in the voiding of the insurance policy.

If, on the other hand, the claimant is successful, the costs claimed under CFAs and ATE insurance can be very significant. Premium payments under ATE policies are usually large, reflecting the high risk of such a policy. Secondly, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel. Importantly, as these costs are incurred by the claimant, the defendant has little power to limit them³⁴, and they can reach levels out of all proportion to the actual damages

³² The defences of justification or public interest respectively.

³³ [2006] UKHL 44; Here the House of Lords identified that the list of factors set out by Lord Nicholls in the earlier case of *Reynolds v. Times Newspapers Ltd*, (2001) 2 AC 127, was not a strict series of hurdles that has to be cleared by the defendant for the defence to succeed. Instead whether a newspaper has acted responsibly and whether the matter is in the public interest will be a matter for the court to decide with regard to all the circumstances of the case.

³⁴ Although provisions for cost-capping do exist, they cannot be instigated by the court in its own motion and nor can they be put in place retrospectively. Furthermore a condition of allowing cost-

awarded. In *Campbell v. MGN*,³⁵ the model Naomi Campbell was awarded just £3,500 for her breach of confidence claim, while the costs for the two day hearing in the House of Lords amounted to £594,470, including a 100% success fee of £279,981.35 – the total of £874,451 to be paid by the defendant newspaper corporation.

While the House of Lords has held that both success fees and the use of CFAs by wealthy claimants are compatible with Article 10 of the European Convention on Human Rights, it is obvious that the combination of these factors – the disproportionate costs of losing an action and the danger of being unable to recover the costs of a win – discourages critical media reporting on ‘litigious’ individuals and encourages media outlets to settle rather than defend stories, even if they are known to be true.

This chilling effect is illustrated by the successes of the Saudi billionaire Khalid bin Mahfouz. Since March 2002, Mahfouz has sued or threatened suit 36 times in England and the U.S. against authors or publishers of books and articles linking him to terrorism. Nearly all of those threatened by such legal action have chosen to settle with him,³⁶ including respected academics. As recently as August 2007, Cambridge University Press agreed to pulp all the copies of “Alms of Jihad: Charity and Terrorism in the Islamic World”, issue a public apology to Mahfouz and pay his legal expenses and substantial undisclosed damages, all after he had threatened a lawsuit.

We urge the Committee to question the United Kingdom on the imbalances in the libel system, for example by asking:

- **How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?**

6. Public order restrictions on freedom of expression

Legislation introduced Britain in recent years to safeguard public order is unnecessarily wide in ambit. It limits legitimate protests which contribute to democracy on the grounds of hypothetical dangers.

6.1. *Serious Organised Crime and Police Act 2005*

Introduced in 2005, the Serious Organised Crime and Police Act 2005 (‘SOCPA’) extends police powers to control protests and demonstrations. Amongst others, it prohibits demonstrations of one or more people within one kilometre of Parliament Square, unless prior permission has been sought.³⁷

capping is that the costs incurred cannot be provided for by conventional means such as a detailed costs assessment after trial.

³⁵ [2005] UKHL 61.

³⁶ The exception being Rachel Ehrenfeld, author of “Funding Evil: How Terrorism is Financed - and How to Stop It”.

³⁷ Serious Organised Crime and Police Act 2005, s.132.

SOCPA is generally assumed to have been adopted to deal with protestor Brian Haw. For the last six years, Haw has camped opposite the Houses of Parliament in protest against the wars in Afghanistan and Iraq, surrounded by banners. Haw began his protest long before SOCPA came into force, and the High Court initially accepted that SOCPA did not apply to him, although this was overturned on appeal.³⁸ Haw's protest must still be allowed, but police have been able to impose restrictions such as limiting his banner display area to 9m².

When granting permission for a demonstration, SOCPA permits the Commissioner of the Police of the Metropolis to impose such conditions on the protest as he considers 'reasonably necessary' to prevent certain listed occurrences,³⁹ such as 'disruption to the life of the community'.⁴⁰ These conditions may include restrictions on the time and place of the demonstration, but also on the number of participants and the number and size of placards used.⁴¹ We believe SOCPA confers unduly broad discretion on the Commissioner to limit the exercise of a basic political right.

A further concern is that the area where the Act applies extends beyond what is strictly necessary to prevent disruption to the work of Parliament (the ostensible purpose of the Act). In particular, limiting protests within a kilometre of Parliament will also restrict protests outside HM Treasury and the Ministry of Defence, not to mention numerous buildings that have no connection with the running of government – such as Lambeth Palace, St. Thomas' Hospital and County Hall. It should also be noted that SOCPA makes all offences arrestable, meaning that protesters who might previously have received a warning can now be arrested, however trivial or peaceful their protest.

The first persons to be convicted under SOCPA were Maya Evans and Milan Rai. Their unauthorised two-person 'protest' consisted of reading a list of the names of the United Kingdom soldiers and civilians killed in Iraq at the Cenotaph on Whitehall.

6.2. Protection from Harassment Act 1997

On its face, the Protection from Harassment Act 1997 (PHA) is intended to allow victims of stalking to take action. Under the Act, a person commits an offence if he or she pursues a course of conduct which amounts to harassment and which the person knows or should know amounts to harassment. A 'course of conduct' must consist of more than one occurrence⁴² while the definition of harassment includes 'alarming the person or causing the person distress'.⁴³ Speech can constitute 'conduct'.⁴⁴

These definitions have allowed the PHA to be applied to cases of protest which have nothing to do with stalking as it is ordinarily understood. In *RWE NPower v Carrol*,⁴⁵ an injunction under the PHA was upheld against opponents of plans to turn a lake into

³⁸ [2005] EWHC 2061 (Admin).

³⁹ *Ibid.*, s.134(3).

⁴⁰ *Ibid.*, s.134(3)(e).

⁴¹ *Ibid.*, s.134(4).

⁴² *Ibid.*, s.7(3).

⁴³ Protection from Harassment Act 1997, s.7(2).

⁴⁴ *Ibid.*, s.7(4).

⁴⁵ [2007] EWHC 947 (QB).

the new dumping site for fly ash (a waste product which typically contains heavy metals) from the nearby Didcot Power Station. The injunction was granted on the grounds that the site's security guards felt threatened by the presence of protestors near the site because they feared identification and further harassment by other protesters. The majority of the security guards were former members of the armed forces, whilst the protests were peaceful and involved little more than gathering and photo-taking. Thus the PHA is being transformed from an Act designed to prevent intimidation to a tool to intimidate protestors.

In light of the above, we suggest the Committee to pose the following questions to the United Kingdom:

- **How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?**
- **Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?**

7. Outdated Criminal Offences are still retained in English law

English law retains a number of outdated offences such as blasphemy, sedition and criminal libel, which cannot be reconciled with the right to freedom of expression. While these offences have fallen into disuse, their existence creates the possibility of their revival or the expectation that they could be used. Moreover, their continued existence is used as a justification for the retention and active application of similar crimes in other countries.

7.1. Criminal Libel

The offence of criminal libel in England and Wales is contained within the Libel Act 1843. Those who are convicted face a one year sentence for publication in a permanent form, which is increased to two years if the author knew the material to be false. The original justification for this offence was the need to maintain public order by criminalising statements that are defamatory. Yet public prosecutions for this offence are in fact very rare,⁴⁶ and other, more effective public order legislation exists today, demonstrating that the offence's original rationale no longer holds force. Criminal libel is still occasionally used in private prosecutions, posing a threat of unduly harsh penalties while the reputational harm suffered by the claimant could equally well be redressed through civil law.

There is a growing body of international law which suggests that criminal defamation represents, in itself, a breach of the guarantee of freedom of expression given that civil measures are adequate to protect reputation. In 1999 the UN Special Rapporteur

⁴⁶ Even in 1973 the Attorney General's office advised against bringing criminal libel proceedings on the basis that the use of this offence was so rare it would attract unwarranted press interest. See <http://news.bbc.co.uk/1/hi/wales/3582858.stm>

on Freedom of Opinion and Expression, in a report to the UN Commission on Human Rights, said:

...penal sanctions, in particular imprisonment, should never be applied [in defamation cases].⁴⁷

In 2002, the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression stated jointly:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.⁴⁸

The Inter-American Commission on Human Rights has adopted a Declaration of Principles on Freedom of Expression, which states in Paragraph 10:

The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.⁴⁹

As recently as 2006, the UN Human Rights Committee has urged States to "ensure defamation is no longer punishable by imprisonment."⁵⁰

It should be noted that in recent years, a number of countries have in fact removed criminal defamation laws from their statute books.⁵¹ Given the widespread abuse of such laws in many countries where they do still exist, it is important that the international community continue to express its disapproval of such laws and the United Kingdom should set an example by moving to formally abolish criminal libel.

7.2. *Blasphemy*

Blasphemy is a crime under common law yet its use has been minimal in the last century. The last conviction for blasphemy was in 1979⁵² and the last jailing in England occurred in 1922.⁵³ This disuse suggests that blasphemy is no longer needed and led the Law Commission to suggest its abolition in 1985.⁵⁴

⁴⁷ Promotion and protection of the right to freedom of opinion and expression, UN Doc E/CN.4/1999/64, 29 January 1999, para 28.

⁴⁸ Joint Declaration of 10 December 2002, available at <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2002.pdf>.

⁴⁹ See also, ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, (London, July 2000), Principle 4.

⁵⁰ Concluding observations on Italy, 24 April 2006, UN Doc. CCPR/C/ITA/CO/5, para 19.

⁵¹ Including Ghana, Sri Lanka, New Zealand, Bosnia & Herzegovina, Estonia, Georgia and Ukraine. A number of countries have also moved to abolish imprisonment for defamation. These include Bulgaria, Croatia, France, Macedonia, Montenegro, Serbia, Cambodia, the Central African Republic and Togo.

⁵² *Whitehouse v. Lemon* [1979] AC 617.

⁵³ *R v. Gott* (1921) 16 App Rep 86.

⁵⁴ Law Commission Report No. 145, 1985.

While ARTICLE 19 believes the criminalisation of blasphemy can never be justified, two aspects of the English common law offence make its abolition a particular priority. The first is that it is a strict liability offence, so the beliefs or purposes of the author, the spirit of the publication and the literary or other value of the work are irrelevant to its application. Secondly, it applies only to statements that are scurrilous, abusive or offensive of the Anglican faith. This position was confirmed by the divisional court in *R v Chief Metropolitan Magistrate, ex parte Choudhury*⁵⁵. Choudhury had sought the prosecution of Salman Rushdie for the alleged blasphemy against Islam in *The Satanic Verses*.

The potential for such a discriminatory law to cause resentment amongst non-Anglicans is evident. The Parliamentary Assembly of the Council of Europe recently issued a Recommendation calling for the abolition of “one faith” blasphemy laws, as well as the abolition of laws which prohibit insult to a religion more generally:

[T]he Assembly considers that blasphemy, as an insult to a religion, should not be deemed a criminal offence. ... Even though today prosecutions in this respect are rare in member states, they are legion in other countries of the world.

...

The Assembly notes that under the International Convention on the Elimination of All Forms of Racial Discrimination of the United Nations, signatory parties are obliged to condemn discrimination and take effective measures against it. All member states signatory to this convention must ensure that members of a particular religion are neither privileged nor disadvantaged under blasphemy laws and related offences.⁵⁶

Although it has been suggested in some quarters that the offence of blasphemy should simply be extended to cover all religions, ARTICLE 19 shares the view of the Council of Europe Parliamentary Assembly that blasphemy is not a justifiable restriction on freedom of expression and should be abolished.

The crime of blasphemy does not serve any purpose recognised as a legitimate ground for restricting freedom of expression. It is not necessary for the protection of the rights or reputations of others, as would be required under Article 19(3) of the ICCPR, since the denial or ridiculing of a religious belief in no way prevents others from practising that faith, and religions do not have a “reputation” as such.

7.3. Seditio

The United Kingdom does not have a statutory offence of sedition. However, it has several common law sedition offences, such as the offence of uttering seditious words. Although there is no clear definition of sedition, the common law sedition offences are generally considered to require an incitement to cause violence or disorder directed at the government in power. The crime of sedition can therefore extend to a wide range of words or behaviours, and is undoubtedly a restriction on freedom of expression. Such a restriction is only justifiable, under Article 19(3) ICCPR, if the measure is provided by law and is necessary to protect one of the

⁵⁵ [1991] 1 QB 429.

⁵⁶ Recommendation 1805 (2007), 29 June 2007, available online at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>.

legitimate interests laid down. The crime of sedition meets neither of these requirements and as such is an unjustified restriction on freedom of expression.

‘Provided by law’ means not only that a restriction on the right must be officially enacted, but also that it must meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law.⁵⁷ There have been few prosecutions of sedition offences in the United Kingdom during the 20th century and this, in combination with the fact that sedition is a common law offence, serves to make the ambit of the offence less from precise. As a result it does not appear that this requirement of ‘provided by law’ is met.

Restrictions on freedom of expression must also be ‘necessary’ for the achievement of one of the aims specified in Article 19(3) of the ICCPR. ‘Necessary’ means, amongst others, that there is no alternative measure which would achieve the same goal in a less intrusive way. In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code to safeguard national security and public order because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁵⁸ In particular, the Law Commission stated that:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is ‘political’.⁵⁹

Since that time, the sedition offences have been further superseded by public order legislation, including the statutory crime of inciting racial hatred, and the various terrorist laws introduced in the Terrorism Act 2006 and the Prevention of Terrorism Act 2005.

In light of all the above, we urge the Committee to pose the following question to the United Kingdom:

- **Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?**

⁵⁷ M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1st edition, 1993), 171. See also *Sunday Times v United Kingdom*, (1979-80) 2 EHRR 245 (European Court of Human Rights), para. 49.

⁵⁸ Law Commission of England and Wales, Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences (1977), [77]–[78].

⁵⁹ *Ibid*, para. 78.

Summary of questions

On access to information:

- Has the British Government considered narrowing the exemptions in the Freedom of Information Act as suggested by the UN Special Rapporteur, and does it intend to make all exemptions subject to a public interest override?
- Does the British Government still intend to enact the Draft Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2007? If so, has consideration been given to options which would be less detrimental to the right to know, such as charging some costs to information requesters where the fees exceed the government department's schedule?
- What is the justification for penalising disclosures of information which are not harmful to national security, and for making the media liable for reporting leaked material?
- Does the United Kingdom intend to add a defence of public interest to the Official Secrets Act to ensure that whistleblowers are not deterred?

On anti-terror legislation:

- How will the United Kingdom ensure that the vaguely worded offence of 'encouragement of terrorism' does not discourage the peaceful expression of controversial opinions?

On civil libel law:

- How does the United Kingdom intend to remedy the disadvantages faced by the defendant in libel claims?

On public order legislation:

- How does the United Kingdom intend to prevent misuse of the powers given to the Police Commissioner to place such restrictions as he 'considers necessary' on any protest in the vicinity of Parliament?
- Does the United Kingdom plan to make any amendments to the Protection from Harassment Act 1997 to prevent its application to genuine protests?

On criminal libel, blasphemy and sedition:

- Does the United Kingdom plan to repeal the offences of criminal libel, blasphemy and sedition, and if not, what is the justification for their continued existence?