



THE ODYSSEUS TRUST SUBMISSION TO THE UN UNIVERSAL PERIODIC REVIEW

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

**THIRTEENTH SESSION OF THE UPR WORKING GROUP OF THE HUMAN RIGHTS COUNCIL
NOVEMBER 2011**

1. INTRODUCTION

1. The Odysseus Trust makes this submission under sections B, C and D as set out in the General Guidelines for the Preparation of Information under the Universal Periodic Review.¹

2. EXECUTIVE SUMMARY

2. This submission focuses on developments in the law on freedom of expression under Article 19 of the International Covenant on Civil and Political Rights (the ICCPR).
3. Since the UK's last UPR in 2008, the common law offences of blasphemous, seditious, obscene and criminal libel have been abolished and the freedom of information legislation has been modified. Reform of the civil law on defamation is currently underway, the Government is consulting on the possible removal of "insulting" from the Public Order Act 1986 and Parliament is taking evidence on the law of privacy and the use of injunctions to restrict free speech.

3. SECTION B: THE LEGISLATIVE FRAMEWORK

4. The United Kingdom has ratified several international human rights treaties, including the ICCPR and the European Convention on Human Rights (the ECHR).
5. The UK's constitution is contained both in written law (legislation) and unwritten law (the principles of the common law and equity declared by the courts). The courts recognise some Acts as of particular constitutional importance, so that they may be amended or repealed only expressly or by necessary implication.² Both the European Communities Act 1972 (the ECA) and the Human Rights Act 1998 (the HRA) are constitutional acts in this sense. The HRA gives legal effect the ECHR rights and freedoms. It requires the courts to read all legislation, as far as is possible, so as to be compatible with the ECHR and, where this is not possible, empowers the courts to make a declaration of incompatibility. The ECA requires the courts to give direct effect to the supremacy of EU law, and, where necessary, to displace inconsistent legislative provisions.
6. Article 10(1) ECHR provides a right to freedom of expression and to receive and impart information and ideas. Article 10(2) ECHR allows the exercise of Article 10(1) ECHR to be limited by "*such formalities,*

¹ Contained in Human Rights Council Decision 6/102, Follow-up to Human Rights Council resolution 5/1, section I adopted 27 September 2007, viewed at: http://ap.ohchr.org/documents/E/HRC/decisions/A_HRC_DEC_6_102.pdf

² *Toburn v Sunderland City Council* [2002] EWHC 195 (Admin), para. 62

conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

7. The Charter of Fundamental Rights of the European Union (the Charter) was given effect “*equal to the Treaties*” by Article 6(1) Treaty on European Union that came into force on 1 December 2009. Article 11 of the Charter provides for the right to freedom of expression and the right to information. Article 52(3) states that the rights set out in the Charter build on the rights set out in the ECHR. The UK negotiated a Protocol, Protocol 30, to the Treaty which states that the “*Charter does not extend the ability of the Court of Justice of the European Union*” to find that acts of the UK are contrary to the rights set out in the Charter. The effect of this Protocol is one of the issues for determination by the Court of Justice of the European Union in Case C-411/10.³
8. Prior to the entry into force of the HRA, freedom of expression was protected mainly by the common law but not as a positive right subject only to necessary and proportionate exceptions. There was no general right to information other than the right to view information put into the public domain in accordance with the thirty year rule under which official records were deposited with the National Archives and available for public inspection after thirty years. The Freedom of Information Act 2000 (the FOIA) created a public right of access to official information, subject to various exceptions.

4. SECTION C: CHANGES AND REFORM OF FREEDOM OF EXPRESSION

9. Recent changes to freedom of speech in the UK are that the common law offences of blasphemous, seditious, obscene and criminal libel have been abolished (4.1) and the freedom of information legislation has been modified (4.2). Ongoing developments include reform of the civil law on defamation (4.3), the Government’s consultation on the possible removal of “insulting” from the Public Order Act 1986 (4.4) and Parliament taking evidence on the law of privacy and the use of injunctions to restrict free speech (4.5).

4.1 Abolition of Common Law Speech Offences

10. The common law offences of blasphemy and blasphemous libel were abolished by the Criminal Justice and Immigration Act 2008 in England and Wales.⁴ Both offences still exist in Northern Ireland where Justice and Policing is devolved to the Northern Irish Assembly. Parliament has also abolished the common law offences of sedition and seditious libel; defamatory libel and obscene libel in both England and Wales and Northern Ireland by the Coroners and Justice Act 2009.⁵
11. Blasphemous libel is to be distinguished from the offence of incitement to religious hatred since it protected only the tenets of the Church of England whereas the statutory offence protects people of all religions and none against words or behaviour which are intentionally threatening, and freedom of expression is expressly protected in the legislation. The last successful prosecution for blasphemous libel was in the *Gay News* case in 1979 where the publishers of the *Gay News*, Gay News Ltd and Dennis Lemon, were fined £1,000 and

³ Case C-411/10 *N. S. v Secretary of State for the Home Department*

⁴ Section 79, Criminal Justice and Immigration Act 2008 (2008 c. 4):
<http://www.legislation.gov.uk/ukpga/2008/4/section/79>

⁵ Section 73, Coroners and Justice Act 2009 (2009 c. 25):
<http://www.legislation.gov.uk/ukpga/2009/25/section/73>

£500 respectively and Mr Lemon was sentenced to a nine month suspended sentence.⁶ In 2004, the Court rejected a private prosecution of the BBC attempted by Christian Voice over “*Jerry Springer: The Opera*”.⁷

4.2 *Changes to Freedom of Information*

12. The FOIA was amended by the Constitutional Reform and Governance Act 2010.⁸ Section 45 reduces the period after which documents must be transferred to the Public Records Office, and are thereby put into the public domain, to 20 years. This provision has not yet been brought into force although the Government are committed to doing so in this Parliament.⁹
13. The Protection of Freedoms Bill seeks to extend the FOIA to companies owned by two or more public bodies and will create a right to data covering datasets held by Government and local authorities. The datasets will have to be provided in a reusable format.¹⁰
14. Secondary legislation currently before Parliament extends the provisions of the FOIA to the Association of Chief Police Officers, the Financial Ombudsman Service and the University and Colleges Admissions Service.¹¹
15. Communications with the Sovereign, heir to the Throne and second in line to the Throne are wholly exempt from the right to freedom of information i.e. the public interest in disclosure can no longer outweigh the public interest in not disclosing.¹²

4.3 *Defamation Reform*

16. There is widespread recognition that the current civil law on defamation is being used to chill freedom of expression unnecessarily.
17. Several high profile cases have indicated that large corporations and institutions use the law on defamation to prevent what may be legitimate criticism.¹³ There is evidence that the mere threat of libel litigation, and the costs associated, is having a chilling effect on freedom of expression.¹⁴ There is also limited anecdotal evidence indicating that British courts are being used by individuals with little or no connection to the UK to obtain redress for harm done to their reputations outside the UK by words published outside of the UK (“libel tourism”).
18. On 26 May 2010 Lord Lester of Herne Hill QC introduced his Private Member’s Bill to reform of the law.¹⁵ The Bill was designed to make defending a defamation claim easier and less costly without altering the

⁶ *Whitehouse v Lemon* [1979] A.C. 617

⁷ *R (on the application of Green) v City of Westminster Magistrates’ Court and others* [2007] EWHC 2785 (Admin)

⁸ Constitutional Reform and Governance Act 2010 (2010 c. 25), Part 6:

<http://www.legislation.gov.uk/ukpga/2010/25/part/6>

⁹ Ministry of Justice, Opening up public bodies to public scrutiny, 7 January 2011:

<http://www.justice.gov.uk/news/press-releases/moj/press-release-070111a.htm>

¹⁰ Protection of Freedoms Bill, Part 6:

<http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0099/2012099.pdf>

¹¹ Freedom of Information (Designation as Public Authorities) Order 2011:

<http://www.legislation.gov.uk/ukdsi/2011/9780111514962/contents>

¹² Section 2(3), Freedom of Information Act 2000, as amended:

<http://www.legislation.gov.uk/ukpga/2000/25/schedule/7>

¹³ For example, the *McLibel* case (*Steel & Anor v McDonald’s Corporation McDonald’s Restaurants Ltd* [1999] EWCA Civ 1144) and *British Chiropractic Association v Dr Singh* [2010] EWCA Civ 350

¹⁴ See, for example, *Derbyshire County Council v. Times Newspapers Limited and others* [1992] UKHL 6, at 548D-E, *per* Lord Keith of Kinkell; *Reynolds v. Times Newspapers Ltd and Others* [1999] UKHL 45, at 192H, *per* Lord Nicholls of Birkenhead, and at 201, *per* Lord Steyn; and *British Chiropractic Association v Dr Singh* [2010] EWCA Civ 350, at para. 11, *per* Lord Judge, LCJ

¹⁵ See Appendix 1.

fundamental basis of the tort of defamation, but striking a fair balance between freedom of expression and the right to reputation. The Government responded by publishing its own draft Bill on defamation reform for public consultation on 15 March 2011.¹⁶

19. The consultation occurred alongside the scrutiny of the Government's draft Bill by a committee of MPs and Peers, the Joint Committee on the Draft Defamation Bill. On 19 October 2011, the Joint Committee published their report on the Draft Defamation Bill.¹⁷
20. The Government is committed to prepare a Bill for consideration by Parliament in the new session.

4.4 *Public Order Act 1986*

21. The Government is currently consulting on police powers for public order.¹⁸ As part of that consultation, the Government is examining the continued relevance of section 5 Public Order Act 1986.¹⁹

22. Section 5(1) Public Order Act 1986 provides:

(1) A person is guilty of an offence if he—

- (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or*
- (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,*

within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

23. The offence is tried by a magistrate who can impose a fine up to £1,000.
24. The section 5(1) offence is to be distinguished from section 4A which criminalises the same threatening, abusive or insulting words or behaviour which intends to harass, alarm or distress a person. There is no proposal to change the section 4A offence.
25. The Joint Committee on Human Rights²⁰ has consistently argued that, while the criminalisation of “threatening” and “abusive” speech may be proportionate, the criminalisation of insulting words, behaviour, signs or representations which do not intend to cause distress is a disproportionate infringement of the right to freedom of expression.

4.5 *Privacy and Injunctions*

26. Following the well-publicised use of interim injunctions in cases where newspapers have sought to publish the details of the private lives of some well-known individuals,²¹ the Government requested that Parliament take evidence on the use of injunctions to protect the right to privacy enshrined at Article 8(1) ECHR.²² The

¹⁶ Ministry of Justice, Draft Defamation Bill:

<http://www.justice.gov.uk/consultations/365.htm>

¹⁷ Joint Committee on the Draft Defamation Bill, First Report, HL Paper 203, HC 930–I:

<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>

¹⁸ <http://www.homeoffice.gov.uk/publications/about-us/consultations/police-powers/>

¹⁹ Public Order Act 1986 (1986 c.64):

<http://www.legislation.gov.uk/ukpga/1986/64/contents>

²⁰ Seventh Report of 2008-2009 Session, Demonstrating respect for rights? A human rights approach to policing protest, HL Paper 47-I, HC 320-I:

<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47i.pdf>

²¹ *Terry v Persons Unknown* [2010] 1 FCR 659, *Sir Frederick Goodwin v News Group Newspapers Ltd* [2011] EWHC 1309 (QB) and *Ferdinand v MGN* [2011] EWHC 2454 (QB)

²² House of Commons *Hansard*, 23 May 2011, col. 633:

Joint Committee on Privacy and Injunctions²³ is currently taking evidence and will report to Parliament by 29 February 2012.²⁴

27. The Master of the Rolls has also issued a report on the use of injunctions in privacy cases²⁵ which gave a practice direction for judges hearing privacy cases and set up a pilot study collecting data on the use of injunctions in privacy cases and the use of anonymised judgments.
28. The European Court of Human Rights has held that Article 8(1) ECHR does not impose on newspapers the requirement to notify an individual prior to the publication of a report about them.²⁶

5. SECTION D: RECOMMENDATIONS

29. The Government should give effect to the UK's obligations under the ICCPR, in particular General Comment 34,²⁷ and the ECHR by introducing legislation to:
 - extend the public right of access to official information under the FOIA in accordance with paragraphs 18 & 19 of General Comment 34;
 - give effect to the recommendations of the Joint Committee to reform defamation law in accordance with paragraph 47 of General Comment 34; and
 - remove "insulting" from section 5(1) Public Order Act 1986 in accordance with paragraph 22 of General Comment 34.
30. However, the Government should await the outcome of the Joint Committee on Privacy and Injunctions' enquiries and the results of the implementation of the Master of the Rolls' practice direction and pilot study on data collection, before drawing any conclusions as to reform of the law on privacy.

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110523/debtext/110523-0001.htm#1105237000004>

²³ Joint Committee on Privacy and Injunctions Terms of Reference:

<http://www.parliament.uk/business/committees/committees-a-z/joint-select/privacy-and-superinjunctions/role/>

²⁴ See Appendix 2 for Lord Lester's evidence to the Joint Committee.

²⁵ Master of the Rolls, Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice, May 2011, available at:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>

²⁶ *Case of Mosley v. The United Kingdom* (Application no. 48009/08), 10 May 2011

²⁷ CCPR/C/GC/34 Human Rights Committee, 102nd session, Geneva, 11-29 July 2011 General comment No. 34: Article 19: Freedoms of opinion and expression, <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>