

**Joint submission by ARTICLE 19 and English PEN to the UPR of the United Kingdom**  
*For consideration at the 27th Session of the Working Group in April/May 2017*

## **Executive Summary**

1. ARTICLE 19 and English PEN welcome the opportunity to contribute to the third cycle of the Universal Periodic Review (UPR) of the United Kingdom (UK). This submission focuses on the UK's compliance with its international human rights obligations, in particular in respect of the rights to freedom of expression and freedom of information, as well as the rights to privacy, freedom of assembly, and freedom of association. The section entitled 'Freedom of Information' was drafted in consultation with the Campaign for Freedom of Information.
2. This submission addresses the following areas of concern:
  - Surveillance and Investigatory Powers Bill
  - Proposed Legislation on "Extremism"
  - Defamation Law
  - Media Regulation
  - Social Media Prosecutions
  - Freedom of Information
  - Freedom of Peaceful Assembly
  - Freedom of Association
  - The Human Rights Act

## **Surveillance and the Investigatory Powers Bill**

3. During its 2nd UPR, the UK supported recommendations from Egypt, Japan, and Norway<sup>1</sup> relating to the protection of human rights in counter-terrorism policy and action. However, proposed legislation relating to surveillance fails to comply with international standards on freedom of expression and privacy, or to uphold commitments made during the last UPR.
4. In November 2015, the UK Government introduced the Investigatory Powers Bill<sup>2</sup> in order to consolidate and update existing legislation on surveillance powers. Though in terms of transparency and oversight the Bill would be an improvement on the present situation, wherein surveillance powers are governed largely by the Regulation of Investigatory Powers Act 2000 (RIPA), it does not go far enough. It remains vague and lacks adequate protections for freedom of expression and privacy, and if enacted will introduce broad powers that threaten to undermine these rights.
5. We are further concerned that the Bill has not received adequate scrutiny through the legislative process, and requires a fundamental reassessment to comply with the UK's international human rights obligations.

### **Bulk surveillance powers**

6. The powers for bulk surveillance and bulk interference with communications devices (Part 6 of the Bill) are inherently disproportionate.<sup>3</sup> There is no upper limit on the number of people whose private communications may be intercepted or whose data may be collected and retained.
7. Part 6 of the Bill does not recognise that the interception of a person's private communications is an interference with the right to privacy which must be subject to justification, instead it only sets restrictions on the circumstances in which intercepted communications or data may be examined (clauses 107(1)(b)), 122(1)(a), and 137(1)(b)). This is contrary to international standards,<sup>4</sup> and to the jurisprudence of the European Court of Human Rights.<sup>5</sup>

<sup>1</sup> UPR 2nd Cycle Recommendations to the UK: Egypt 110.118; Japan 110.119; Norway 110.20.

<sup>2</sup> Investigatory Powers Bill available here <https://services.parliament.uk/bills/2015-16/investigatorypowers.html>

<sup>3</sup> See e.g. European Court of Human Rights, *Zakharov v. Russia*, Communication No. 47143/06, 4 December 2015, at para. 260: "[Any authorisation for surveillance powers] must be capable of verifying the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures, such as, for example, acts endangering national security."

<sup>4</sup> See 'The right to privacy in the digital age' Report of the Office of the United Nations High Commissioner for Human Rights, June 2014, available here

[http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37\\_en.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf)

<sup>5</sup> *S and Marper v United Kingdom* [2008] ECHR 1581 : the Grand Chamber found an interference with the right to privacy by storing a person's DNA in a database, even where it is never accessed or analysed. See also Case C-293/12 *Digital Rights Ireland*, the Grand

8. Clauses 188 and 190-191 of the Bill enable the Secretary of State to issue national security notices in secret to telecommunications providers, replacing but essentially replicating the existing power under section 94 of the Telecommunications Act 1984. This power has been used to justify existing practices of bulk-collection of sensitive personal data, and the bulk acquisition warrants in Part 6 indicate that this practice will not change.

### **Impact on human rights organisations**

9. The UK Investigatory Powers Tribunal found that the UK's Government Communications Headquarters (GCHQ), the body which provides intelligence and information to the British government and armed forces, had intercepted and unlawfully retained private communications of Amnesty International and the Legal Resources Centre, a South African NGO.<sup>6</sup> This finding contradicts assurances made by the Interception of Communications Commissioner that "the interception agencies do not engage in indiscriminate random mass intrusion."<sup>7</sup>
10. By seeking to maintain bulk interception and data retention capabilities, the UK government is contributing to a global chilling of free expression, in particular among at-risk human rights organisations working under dangerous conditions.

### **Protection of sources**

11. The protection of journalistic sources, a basic condition of media freedom, is threatened by the provisions of this Bill. In many instances, anonymity is the precondition upon which information is conveyed by a source to a journalist (or human rights organisation). This may be motivated by fear of repercussions which might adversely affect their physical safety or job security. When sources cannot be sure of protection, the public loses its right to know critical information.<sup>8</sup>
12. Section 61 of the Bill on the acquisition of communications data "for the purpose of identifying or confirming a source of journalistic information" (clause 61(1)(a)) imposes a low threshold for interference, requiring only "reasonable grounds" that a list of requirements were satisfied. This falls short of the requirement under Article 19 of the ICCPR that any interference must be necessary and proportionate.
13. Furthermore, the Bill lacks safeguards to protect other confidential relationships, for example between a doctor and patient, or lawyer and client.
14. In January 2016, the Court of Appeal declared in its judgment of *R(Miranda) v Secretary of State for the Home Department* that 'the stop power conferred by para 2(1) of Schedule 7 is incompatible with article 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise'.<sup>9</sup> The judgment also recommended that Parliament actively create greater protections. This Bill is a missed opportunity to address an issue which has been explicitly identified by the courts.

### **Oversight and accountability**

15. The "double-lock" procedure for oversight and accountability (clauses 19, 90, 109, 123, 138 and 155), whereby the judicial commissioner, post-fact, reviews a decision of the Secretary of State on "the same principles as would be applied by a court on an application for judicial review", is inadequate.
16. This is in direct contradiction with international and European standards, which establish that surveillance powers must be independently authorised, for example by a judge.<sup>10</sup> Conventional

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Chamber of the Court of Justice of the European Union ("CJEU"), at para 14, where it was held that the blanket retention of communications data was a disproportionate interference with the rights to privacy and data protection under Articles 7 and 8 of the EU Charter of Fundamental Rights, involving as it did an "interference with the fundamental rights of practically the entire European population".

<sup>6</sup> UK Investigatory Powers Tribunal, *Liberty and others v. GCHQ*, [2015] UKIPT rib 13\_77-H

<sup>7</sup> 2013 Annual Report of the Interception of Communications Commissioner, at para 6.6.2, available at <http://www.iocco-uk.info/docs/2013%20Annual%20Report%20of%20the%20IOCC%20Accessible%20Version.pdf>

<sup>8</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, focussing on protection of sources, available here: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/70/361](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361)

<sup>9</sup> *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6 at para 119 - available here:

<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/miranda-v-home-sec-judgment.pdf>; 3rd Party Intervention by ARTICLE 19, English PEN, Media League Defence Initiative, and Liberty available here [https://www.article19.org/data/files/medialibrary/38226/R-\(Miranda\)-v-SSHD--Court-of-Appeal--Written-Submissions--Free-Speech-Interveners--FINAL.pdf](https://www.article19.org/data/files/medialibrary/38226/R-(Miranda)-v-SSHD--Court-of-Appeal--Written-Submissions--Free-Speech-Interveners--FINAL.pdf); Terrorism Act 2000 available here <http://www.legislation.gov.uk/ukpga/2000/11/contents>

<sup>10</sup> European Court of Human Rights, *Klass v Germany* [1980] 2 EHRR 214; *Digital Rights Ireland*, *op. cit.*

judicial review principles are not adequate to protect fundamental rights in this context, as decisions on necessity and proportionality will only be overturned if “no reasonable person could have arrived at such a decision”.

### **Equipment interference**

17. Equipment interference (hacking), would be authorised through a warrant under Part 5 Chapter 3 of Part 6 of the Bill. Ordered by the Secretary of State, it is only subject to the flawed “double-lock” oversight described above.
18. Hacking is a serious intrusion into a person’s private life, involving access to private information without permission or notification, breaching the integrity of the target’s security measures. The seriousness of this measure should require judicial authorisation to ensure the necessity and proportionality of such measures, which should only ever be used exceptionally and as a last resort.

### **Encryption and anonymity**

19. Despite the Government’s assurances that the Bill would protect encryption, it is apparent that powers provided through Clause 189(4)(c) are sufficiently broad to enable the Secretary of State to make regulations requiring operators either to remove encryption services upon request, or to reduce the effectiveness of encryption. This would fundamentally undermine the use of end-to-end encryption and therefore the security of our online communications and transactions. In practice, it is equivalent to a government ‘backdoor’.
20. Without the implementation of this Bill, it is to be noted that the legislation already in place, RIPA and the Data Retention and Investigatory Powers Act, remains extremely problematic for human rights, limiting the rights to privacy and freedom of expression in a comparable manner.<sup>11</sup>

### **Internet Connection Records**

21. The indiscriminate generation and retention of Internet Connection Records, as proposed by the Bill, is a violation of the right to privacy and will have a chilling effect on freedom of expression.

### **Counter-Extremism and Safeguarding Bill**

22. A Counter-Extremism and Safeguarding Bill is expected to be introduced in 2017, in line with the Conservative party’s 2015 election manifesto commitment to introduce measures to “deal with online radicalisation and propaganda” and to “tackle all forms of extremism, including non-violent extremism.”<sup>12</sup> Although a proposed draft bill has not yet been finalised or published, the government has indicated that the Bill will put forward a number of new powers that could pose serious challenges to freedom of expression, in particular for persons belonging to minority religions or those with dissenting views.
23. It is still not clear how new legislation could deal with the problem of defining “extremism” as a basis for restrictive measures, in a way that would not threaten free speech. The government has previously defined “extremism” broadly as “the vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs”. The continued lack of a clear definition risks restricting any political expression that does not reflect mainstream or popular views.
24. Concerns have been expressed by the UK Parliament’s Joint Committee on Human Rights:  
*The Government gave us no impression of having a coherent or sufficiently precise definition of either ‘non-violent extremism’ or ‘British values’. [...] We are concerned that any legislation is likely either: (a) to focus on Muslim communities in a discriminatory fashion (which could actually increase suspicion and even opposition to the Prevent agenda); or (b) could be used indiscriminately against groups who espouse conservative religious views (including evangelical Christians, Orthodox Jews and others), who do not encourage any form of violence.*<sup>13</sup>

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<sup>11</sup> See Civil Society opposition here <http://www.statewatch.org/news/2014/jul/uk-briefing-on-the-Data-Retention-and-Investigatory-Powers-Bill.pdf>

<sup>12</sup> Conservative Manifesto 2015, p63, available here <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>

<sup>13</sup> Joint Committee on Human Rights, Counter-Extremism: Second Report of Session 2016–17 at para 108, available here <http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/105/105.pdf>

25. A case for the necessity of new powers to safeguard national security or public order has not been made. Britain already has a host of laws to tackle the incitement of terrorist acts, as well as racial and religious hatred. The government has previously been criticised for the broad definitions of “terrorism” in existing legislation, and the potential scope of existing expression-based offences is very broad.<sup>14</sup>
26. The government has been unclear about the nature of a “new civil order regime” to combat “non-violent” extremist activities. Three types of order have been proposed: Banning Orders, Closure Orders, and Extremism Disruption Orders. These civil orders would be imposed on individuals whose behaviour falls short of breaking the criminal law, and may impose severe restrictions on their liberty and conduct that would otherwise be lawful, including expression. Civil orders are imposed on the basis of a lower evidential standard than criminal penalties, broadening the scope for their misapplication, but breach of a civil order is a criminal offence.
27. The UK Parliament’s Joint Committee on Human Rights has recommended against civil orders in its 2nd Report on Counter-Extremism.<sup>15</sup>

*The UK government must make a clear case for the necessity of any new powers to tackle “non-violent extremism”, including by adopting a clear definition of key terms in a manner that will not jeopardise freedom of expression, in particular for minorities, and ensure transparency and full and effective public participation in this process.*

## Defamation in Scotland and Northern Ireland

28. The law on defamation in the UK had been widely criticised for failing to adequately protect freedom of expression: the UN Human Rights Committee found that the “*practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work.*”<sup>16</sup>
29. Reforms to defamation law in England & Wales in 2013 were welcome, but the benefits of these reforms have not been extended to Northern Ireland, and only very limited reforms have extended to Scotland. Protections of freedom of expression are therefore now applied inconsistently throughout the UK.
30. The Defamation Act 2013 introduced within the jurisdiction of England and Wales a ‘serious harm’ threshold to civil claims to prevent trivial claims (section 1), a new public interest defence (section 4) and a ‘single publication rule’ (section 8).<sup>17</sup> It also expanded qualified privilege to include reports of international court proceedings, documents issued by legislatures or governments (and their agencies) anywhere in the world (section 7), international conferences, and peer reviewed academic papers (section 6).
31. However, responsibility for defamation law in Scotland and Northern Ireland lies with the devolved administrations.
32. In Northern Ireland, the Executive gave no explanation for its decision not to pass a ‘legislative consent motion’ after the passage of the Defamation Act 2013, which would have given effect to the law in its jurisdiction.
33. In November 2013, the Executive asked the Northern Ireland Law Commission to consult on the issue, but due to the abolition of the Commission in April 2015, its report was significantly delayed. The report by Dr. Andrew Scott was only published by the Department of Finance in July 2016, and makes several recommendations for substantial reform.

<sup>14</sup> See, inter alia, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Human Rights Committee, at para 14, available here [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGBR%2fCO%2f7&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGBR%2fCO%2f7&Lang=en); Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emerson, February 2016, at para 35, available here:

[http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65\\_AUV.docx](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A.HRC.31.65_AUV.docx)

<sup>15</sup> The UK Parliament’s Joint Committee on Human Rights has recommended against civil orders in its [2nd Report on Counter-Extremism](#) (22 July 2016)

<sup>16</sup> CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT Sixth periodic report, [CCPR/C/GBR/CO/6](#), 30 July 2008, available at [http://ccprcentre.org/doc/HRC/UK/6cycle/CCPR:C:GBR:6\\_E.pdf](http://ccprcentre.org/doc/HRC/UK/6cycle/CCPR:C:GBR:6_E.pdf)

<sup>17</sup> Defamation Act 2013, available here <http://www.legislation.gov.uk/ukpga/2013/26>

34. In Scotland, the only reforms from the Defamation Act 2013 that apply in Scotland are those giving privileged status to peer reviewed articles (section 6) and reports from academic conferences (section 7).
35. The Scottish Law Commission has carried out [a consultation exercise](#) on whether to enact further reform, but has yet to publish its report or recommendations; it is expected to do so in late 2017. It is unclear whether the Scottish Parliament will be prompted to consider reforms.

## Media Regulation

### Public service broadcasting

36. The process around the Royal Charter for the continuance of the British Broadcasting Corporation (the BBC Royal Charter) may allow direct government interference in BBC editorial decision-making. The new framework for the BBC departs from the previous in significant ways, with the replacement of the current dual structure with a unitary board, and the BBC falling under the jurisdiction of communications regulator Ofcom.

### Press regulation

37. The legislative underpinning of the new self-regulation mechanisms, introduced after the inquiry into the culture, practices and ethics of the British press ('Leveson Inquiry'), established elements of co-regulation of the press which are without precedent in the UK.
38. The Royal Charter on self-regulation of the press (Royal Charter) established a Press Recognition Panel to give official recognition to self-regulatory bodies of the press. A degree of uncertainty results from the newly-established recognition mechanism and new legal provisions.
39. Section 40 creates the possibility of a media defendant having to bear all legal costs of a lawsuit with no limitation, potentially threatening the financial viability of small media actors. The complex definition of 'relevant publishers' at Section 41 may leave actors unable to discern whether the law applies to them. The courts' interpretation and application of these new provisions needs to be monitored carefully.
40. The UK government has created a situation where it can exercise direct influence over the press. In particular, the former Secretary of State for Culture, Media and Sports has chosen to delay the commencement of the Section 40 of the Crime and Courts Act 2013, apparently in response to private representations made by the press industry who do not want to take part in an independent and effective self-regulatory system. The Government can thus use the deployment of the new system as a threat. The evolution of the new system of self-regulation is, by virtue of being directly under the influence of a Government minister, potentially undermining public trust in the system.

## Social Media Prosecutions

41. Criminal communications offences in the UK have a broad scope which is cause for concern, evidenced by the large number of social media postings which result in action by the police, including arrests, charges, and prosecutions.
42. Section 127 of the Communications Act 2003<sup>18</sup> and Section 1 of the Malicious Communications Act 1988,<sup>19</sup> create offences of sending electronic communications that are "grossly offensive", "indecent", or of an "obscene or menacing character". Section 127 of the Communications Act makes it an offence to send a false message "for the purpose of causing annoyance, inconvenience or needless anxiety to another."
43. The broad scope of these provisions, and their potential to encroach upon freedom of expression, was recognised by the Court of Appeal, in reversing the conviction of Paul Chambers for a tweet in 2010.<sup>20</sup>
44. The 2016 amendments to the Crown Prosecution Service's (CPS) Guidelines introduced the requirement for police to seek specific authorisation to charge suspects under this category of communications offence.<sup>21</sup>

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<sup>18</sup> Available at: <http://www.legislation.gov.uk/ukpga/2003/21/section/127>

<sup>19</sup> Available at: <http://www.legislation.gov.uk/ukpga/1988/27/section/1>;

<sup>20</sup> Chambers v DPP [2012] EWHC 2157 (Admin)

45. The guidelines, and public consultation which led to their adoption, though a positive development, do not address the underlying lack of clarity in the law, which remains vague and subject to arbitrary interpretation. Furthermore, protecting individuals from “gross offence” is not consistent with the requirement of a ‘legitimate aim’ for restricting expression under Article 19 of the ICCPR.
46. The police and Crown Prosecution Service do not publish detailed, disaggregated statistics regarding communication offences committed through social media,<sup>22</sup> adding to the difficulty of assessing the extent of restrictions on freedom of expression online in the UK, and the potential chilling effect of the CPS Guidelines.

## **Freedom of Information**

47. Proposals to amend the Freedom of Information Act 2000 (the FOI Act) may substantially limit the right to information in the UK. The government-appointed Independent Commission on Freedom of Information (ICFI) reported in March 2016 that the FOI Act had ‘enhanced openness and transparency’ and that there was ‘no evidence that...the right of access needs to be restricted’.<sup>23</sup> Nevertheless, the ICFI has made proposals which would, if enacted, limit the right of access.

## **Ministerial Veto**

48. The UK Supreme Court has imposed significant restrictions on the circumstances in which the Act’s ministerial veto could be used against decisions of a court or tribunal.<sup>24</sup> It also questioned whether decisions of the Information Commissioner should be vetoed as opposed to appealed against.<sup>25</sup>
49. The UK Supreme Court has imposed significant restrictions on the circumstances in which the ministerial veto against disclosure decisions of the Information Commissioner or upper tribunal can be exercised. The decision means Ministers are not currently able to block disclosures simply because they disagree with them.
50. The ICFI recommended, however, legislation to re-establish a ministerial right to veto decisions taken by the Information Commissioner, a recommendation which the government has accepted.
51. If the veto power is revised in this way, it may be used more frequently, and the scope for abuse widened, potentially protecting Ministers from disclosures they find embarrassing.

## **Changes to the appeals structure:**

52. The Information Commissioner enforces the FOI Act, with a right of appeal available to a First-tier Tribunal (FTT).
53. The ICFI proposed the abolition of the right to appeal to the FTT against the Information Commissioner’s decisions. The government has not yet indicated whether it will accept this recommendation. 20% of appeals are wholly or partly successful: the removal of this appeal right would significantly undermine requesters’ rights under the Act.

## **Costs**

54. The UK government has also proposed introducing charges for tribunal appeals: £100 for an appeal determined solely on the papers, and £600 for an oral hearing.<sup>26</sup> Many appeals would not be brought if the proposed charges were introduced, in particular where brought by private individuals or civil society organisations.

## **Private actors exercising public functions**

55. The government promotes the contracting-out of public services to commercial or independent providers, but has not been prepared to extend the FOI Act to ensure that the right to information is

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<sup>21</sup> Crown Prosecution Guidelines on prosecuting communications sent by social media: [http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/)

<sup>22</sup> July 2014: the House of Lords Communications Committee [report on Social Media and Criminal Offences](#) noted that there were “at present no statistics which indicate the balance of offences committed online and by traditional means” (at paragraph 19) and recommended that police forces and CPS compile such data.

<sup>23</sup> Independent Commission on Freedom of Information. Report, March 2016

<sup>24</sup> UK Supreme Court, R (on the application of Evans) and another (Respondents) v Attorney General (Appellant); available at: [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2014\\_0137\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2014_0137_Judgment.pdf)

<sup>25</sup> See <https://www.cfoi.org.uk/2015/03/welcome-for-supreme-courts-ruling-on-the-ministerial-veto-in-prince-charles-case/>

<sup>26</sup> Court and Tribunal Fees. The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals, paras 124-127

preserved when services are contracted out. In practice, the government is able to escape its disclosure obligations through private contracting.

### **Data protection and the role of Information Commissioner**

56. The Information Commissioner does not, in practice, enforce the right of individuals to access and correct personal information held by public and private bodies, as she is empowered to by the Data Protection Act 1998. Instead, individuals must resort to the courts to exercise their rights, which is prohibitively expensive. This is a serious limitation on the privacy rights protected by Article 17 of the ICCPR.<sup>27</sup>

### **Freedom of Peaceful Assembly**

57. The UK Government has not adequately addressed the recommendations of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association.<sup>28</sup> Recommendations made after the 2013 country-visit, and renewed during the 2016 follow-up visit, called for the adoption of a legal framework to protect and promote assembly and association rights, shifting from the current public order, and therefore restrictive, focus.<sup>29</sup>

### **Offensive expression in protests**

58. Section 4A of the Public Order Act 1986 criminalises intentional “insult” or “abuse” that causes “alarm” or “distress”, while section 5 criminalises “threatening” or “abusive” expression, without requiring intent or actual harm. Together, these provisions may be used to target expression in the context of peaceful assembly, including through threat of arrest, even where there is little or no threat to public order.

### **Protests around Parliament**

59. We remain concerned that Part 3 of the Police Reform and Social Responsibility Act 2011 imposes a de facto blanket prohibition on forms of protest of an extended duration, by banning the use of tents or other “sleeping equipment”. These bans do not require an individualised assessment of the necessity and proportionality of a restriction, failing to comply with international human rights standards.

### **Protests on private land**

60. Offences of “aggravated trespass” and around “trespassory assemblies” under sections 68 and 69 of the Criminal Justice and Public Order Act 1994 and sections 14 A – C to the Public Order Act 1986, are used to limit protests on private land, even where access to these spaces is essential to be within sight and sound of the intended audience of a protest. This is an increasing concern given the trend of privatisation of spaces that are functionally public. Property rights should not be prioritised over the exercise of rights; the use of sweeping civil injunctions to restrain individuals from entering these spaces is also a concern.

### **Local criminal restrictions on protest**

61. The Anti-Social Behaviour, Crime and Policing Act 2014 empowers local authorities to designate public space protection orders to criminalise actions, including protests, whenever “activities carried on in a public place within the authority’s area have had or are likely to have a detrimental effect on the quality of life of those in the locality.” This has a low evidential threshold, without a need to consider any impact on assembly and expression rights. Powers to issue injunctions for the vaguely-defined purpose of preventing “nuisance and annoyance” may also be used to arbitrarily prohibit legitimate protest.

### **Surveillance**

62. The gathering and retention of intelligence on protesters in the UK’s “National Domestic Extremism Database”, including those who have not engaged in any criminal activity, remains a concern. The labelling of individuals or groups exercising their democratic rights as “extremists”, and the practice

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<sup>27</sup> See HR Committee General Comment 16.

<sup>28</sup> See: <http://freeassembly.net/reports/united-kingdom-follow-up/>

<sup>29</sup> See: <https://www.article19.org/resources.php/resource/38346/en/uk-calls-for-protection-of-right-to-protest>

of monitoring and logging these individuals' conduct, stigmatises protesters and chills the exercise of assembly and expression rights. Though entries to the database are regularly reviewed according to specified criteria and potentially removed, without reasonable suspicion of criminal conduct, these entries should be deleted and the practice of collecting further records ceased. Similarly, the abuse of Section 60 of the Public Order Act 1986 powers to request (but not compel) protesters to provide personal details through the use of intimidating tactics undermines the rights of protesters.

### **'Spy Cops'**

63. The embedding of undercover police officers within political protest groups in the UK has been a serious cause for concern, and reforms to end this practice, ensure accountability and redress for abuses, and prevent their reoccurrence, have been insufficient. Following revelations of the actions of 'Spy Cops' such as Mark Kennedy, an HMIC Report and a Judicial Inquiry into Undercover Policing were announced in 2014 and 2015 respectively, though there has been as yet no outcome to either. MPs had been reluctant to reveal the names of undercover police officers or further details on the investigations. The Metropolitan Police Service maintain a 'neither confirm nor deny' principle, meaning protesters may not be able to find out whether a complaint in relation to an undercover officer has been upheld.

## **Freedom of Association**

### **The Lobbying Act**

64. The Transparency of Lobbying, Non Party Campaigning and Trade Union Administration Act 2014 (Lobbying Act) was passed on 30 January 2014, despite concerns around the process leading to its adoption and the nature of the regulations it places on the activities and spending of 'non-party campaigners', including civil society organisations.
65. The Act supposedly seeks to ensure that no single individual or organisation can have an undue influence over an election, creating requirements for registration and new spending limits. In practice it forms a restriction on the freedom to participate in political affairs, including on crucial public interest issues around elections, as well as restricting the ways in which organisations can work in coalition.
66. There has been confusion around which activities constitute those that can "reasonably be regarded as intending to influence" election outcomes, what exact limits are on spending in practice, and sanctions imposed. This lack of clarity in the Act's provisions is already having a "chilling effect" on civil society organisation in the UK.<sup>30</sup>

### **Trade Union Act**

67. The Trade Union Act 2016 restricts strike activity and industrial action in the UK, undermining the freedom of expression and association rights of unions and union members.
68. This law tightens already-tough picketing rules, creating additional bureaucracy and excessive penalties. For example, the new law will double the period of notice for industrial action from 7 to 14 days' notice, absent contrary agreement from the employer, thus undermining unions' power within labour disputes and effectiveness of industrial action, as it gives employers more time to mitigate the impact of industrial action.
69. The Act also creates a new regulator ('Certification Officer') with powers to investigate trade unions speculatively (without receipt of a complaint or reasonable suspicion of an infringement of the Act), including to have access to confidential documents and membership lists, with the power to impose fines of up to £20,000 for violations of the law. It is feared that access to membership lists and the potential for large penalties will inhibit the functioning of trade unions, with consequences not just for freedom of association but also the safeguarding of workers' rights.

## **The Human Rights Act**

70. The system by which human rights are protected in the UK has come under threat from the Conservative manifesto pledge to scrap the Human Rights Act, and replace it with a 'British Bill of

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<sup>30</sup> See Commission on Civil Society and Democratic Engagement report <http://civilsocietycommission.info/wp-content/uploads/2013/09/FINAL-Civil-Society-Commission-Report-no4-Sept-2015.pdf>



Rights'. Despite controversy and delay in the development of this promise, the UK Justice Secretary has confirmed that the Human Rights Act will be replaced.

71. The contents or processes associated with this new Bill of Rights, or how it would be developed, remains unclear, though the need for a replacement has not been established, and the idea has been met with great resistance by much of UK civil society.
72. The Human Rights Act gives effect to the rights of the European Convention on Human Rights, obliging all public bodies in the UK to act in accordance with those rights, and giving the judiciary the power to declare legislation 'incompatible' with the Convention. The Act also provides for compensation from national governments for victims of rights' violations.
73. The Government must not diminish its responsibilities or those of public bodies, or the level of accountability provided by the Human Rights Act.

## **Recommendations**

74. In light of these concerns, we call upon Member States to put forward clear and strong recommendations to the Government of the UK including:

### **Surveillance and Investigatory Powers Bill**

75. The UK Government must:
  - i. Uphold commitments made during the last UPR session to protect human rights in policies and activities relating to counter-terrorism;
  - ii. Repeal RIPA;
  - iii. Halt the process of the Investigatory Powers Bill, which must undergo a fundamental reconsideration, ensuring the effective protection of the rights to freedom of expression and privacy;
  - iv. Enact a legislative framework which brings clarity, transparency, and human rights protections to their surveillance and investigatory powers;
  - v. Desist from bulk surveillance and bulk communications interference, which are inherently disproportionate interferences with the human rights to privacy and freedom of expression;
  - vi. Protect journalistic sources, encryption, and the right to anonymity online; and
  - vii. Address human rights issues surrounding Schedule 7 of the Terrorism Act.

### **Proposed Legislation on "Extremism"**

76. The UK Government must:
  - i. Open a consultation to inform and limit the definition of 'extremism' in UK legislation;
  - ii. Uphold commitments made during the last UPR session to protect human rights in policies and activities relating to counter-terrorism, by making sure the proposed Bill does not undermine the human right to freedom of expression;
  - iii. Make a clear case for the necessity of any new powers to tackle "non-violent extremism"; and
  - iv. Ensure transparency and full and effective public participation in the process of introducing new measures.

### **Defamation Law**

77. The devolved administrations in Northern Ireland and Scotland must:
  - i. Legislate to ensure that freedom of expression is protected throughout the UK, either by incorporating the Defamation Act 2013 into Northern Ireland and Scotland, or by bringing forth new legislation which addresses the chill on freedom of expression enabled by the existing, outdated law.

### **Media Regulation**

78. The UK Government must:
  - i. Ensure the continuing editorial independence and autonomy of the public service broadcasters under the new BBC Charter;
  - ii. Abstain from interference in the deployment of the new legal framework on press regulation; and

- iii. Monitor the application of the new provisions of the Crime and Courts Act for compliance with international standards on freedom of expression.

### **Social Media Prosecutions**

79. The UK Government must:

- i. Bring criminal communications legislation into line with human rights standards, by limiting their scope and addressing the lack of clarity; and
- ii. Amend s1 of the Malicious Communications Act and repeal s127 of the Communications Act, to decriminalise electronic communications that are “grossly offensive”, “indecent”, or of an “obscene or menacing character”.

### **Freedom of Information**

80. The UK Government must:

- i. Not legislate to implement the ICFI’s recommendation to re-establish the ministerial veto over the Information Commissioner’s decisions;
- ii. Reject the ICFI’s recommendation that the right to appeal to the FTT against the Information Commissioner’s decision be abolished;
- iii. Not proceed with plans to introduce charges for appealing to the FTT;
- iv. Extend the FOI Act to private actors providing public services; and
- v. Urge the Information Commissioner to enforce subject access rights under the Data Protection Act.

### **Freedom of Peaceful Assembly**

81. The UK Government must:

- i. Properly address the recommendations of the UN Special Rapporteur following his 2013 country-visit;
- ii. Amend section 4A of the Public Order Act 1986 to ensure that freedom of expression during protests is protected;
- iii. Amend Part 2 of the Police Reform and Social Responsibility Act 2011 to lift the blanket ban on ‘sleeping equipment’;
- iv. End the use of the Criminal Justice and Public Order Act 1994 and the Public Order Act 1986 to prevent protests on private land;
- v. Amend the Anti-Social Behaviour, Crime and Policing Act 2014 to ensure that the imposition of sanctions requires a consideration of the rights to freedom of expression and freedom of assembly;
- vi. End the practice of surveillance and data retention regarding peaceful protesters; and
- vii. Create accountability and transparency around undercover policing which constitutes an interference with the right to protest, and introduce a consideration of necessity and proportionality into the implementation of such measures.

### **Freedom of Association**

82. The UK Government must:

- i. Amend the Lobbying Act to create clarity;
- ii. Amend the Trade Union Act to ensure protection of the freedom of expression and association; and
- iii. Limit the powers of the ‘Certification Officer’ to restrict the use of surveillance and punitive measures.

### **Threat to the Human Rights Act**

83. The UK Government must:

- i. Commit to remaining a signatory to the European Convention on Human Rights;
- ii. Abandon its plans to repeal the Human Rights Act 1998; and
- iii. Ensure that reforms to domestic human rights legislation do not weaken human rights commitments.