



Human Rights Act Reform: The Implications for Freedom of Expression

Joint Submission by English PEN, ARTICLE 19 and Index on Censorship to the Ministry of Justice's Consultation

English PEN is one of the world's oldest human rights organisations, championing the freedom to write and read. We are the founding centre of PEN International, a worldwide writers' association with 145 centres in more than 100 countries. With the support of our members – a community of readers, writers and activists – we protect freedom of expression whenever it is under attack, support writers facing persecution around the world, and celebrate contemporary international writing with literary prizes, grants, events, and our online magazine PEN Transmissions.

ARTICLE19 is an international human rights organisation which works around the world to protect and promote the right to freedom of expression and information. With an international office in London and regional offices in Tunisia, Senegal, Kenya, Mexico, Brazil and Bangladesh, and other regional programmes and national offices, ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally

Index on Censorship is a nonprofit that campaigns for, and defends, free expression worldwide. Since 1972 Index on Censorship has published work by censored writers and artists in an award-winning quarterly magazine, and in addition promotes debate, supports those persecuted for their free expression, and monitors threats to free speech. Index on Censorship believes that everyone should be free to express themselves without fear of harm or persecution – no matter their views.

Introduction

1. English PEN, ARTICLE 19 and Index on Censorship welcome the opportunity to present their observations on the Ministry of Justice's consultation *Human Rights Act Reform: A Modern Bill of Rights*. We are three leading human rights organisations that promote and defend the right to freedom of expression worldwide, including in the United Kingdom. As such, our submission will focus on the implications of the Government's proposal to replace the Human Rights Act 1998

(HRA) with a Bill of Rights on the right to freedom of expression and information.

2. Our position can be summarised in simple terms: we reject the Government's proposal to abolish the HRA. In providing individuals in the UK with the ability to directly enforce their rights under the European Convention on Human Rights (ECHR) before UK courts, the HRA has strengthened the protection accorded to freedom of expression and other human rights in the UK. We are therefore very concerned about the implications that replacing the HRA with a new Bill of Rights could have on these protections. The specific proposals presented by the Government in its consultation document have only reinforced those concerns.
3. Given that the consultation paper proposes, *inter alia*, that the substance of the rights protected in the Bill of Rights might differ from those in the ECHR and that UK courts will not be required to follow the case law of the European Court of Human Rights (ECtHR),¹ a new Bill of Rights bears a real risk that the UK courts will diverge in its application from ECtHR jurisprudence. This could result in a lower, or at least different, scope of protection under the Bill of Rights, which in turn might require individuals to go to the ECtHR to seek the protection that UK courts are today able to provide them through the HRA. We fail to see how this could benefit the human rights protection of individuals in the UK and have seen no compelling argument from the Government that could justify such a drastic step.
5. The Government has prominently claimed that replacing the HRA with a Bill of Rights would strengthen freedom of expression. As organisations specialising in freedom of expression we believe that the contrary is true. The HRA has not weakened but strengthened the right to freedom of expression in the UK. We therefore urge the Government to reconsider replacing the HRA and instead work with human rights experts and civil society organisations on ways to enhance protection of freedom of expression in a meaningful way.
6. As this submission will detail, a far more effective way to achieve the Government's purported goal to improve freedom of expression in the UK would be to introduce a law to provide for early dismissal of so-called Strategic Lawsuits Against Public Participation (SLAPPs) and to review and revise a number of legislative proposals that this same Government has introduced, in particular:
 - a. The proposed reform of the Official Secrets Act, which could see journalists and their sources treated like spies;
 - b. The draft Online Safety Bill which attempts to regulate all online interactions in the UK and which would result in far-reaching censorship by online providers;
 - c. The proposed Police, Crime, Sentencing and Courts Bill which would give wide discretion to police authorities to crack down on peaceful protest and empower the Home

¹ Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, December 2021, pages 95 to 97.

Secretary to define "serious disruption" - enabling them to stop any protest they do not agree with; and

- d. The Higher Education Bill, which could compound tensions on campus and discourage student unions and university providers from hosting provocative speakers.²
6. In addition, we have repeatedly called upon the Government to reform its extensive surveillance powers and anti-terrorism laws (in particular the Investigatory Powers Act 2016 and the Terrorism Act 2000) to comply with international freedom of expression standards. Instead, this Government continues to make them more repressive:
- a. In 2019, it passed the Counter-Terrorism and Border Security Act, which, *inter alia*, introduced vaguely defined terrorism-related offences that effectively risk prohibiting certain opinions.³
 - b. In 2020, the Government increased the range of public bodies who can access communications data - which includes data about individuals' web browsing, email and phone activity - under the Investigatory Powers Act 2016.
7. If it is indeed the Government's intention to strengthen freedom of expression in the UK, we strongly encourage it to consider these and other recommendations in our submission. Repealing the HRA is not one of them.

Repealing the HRA risks significantly weakening the protection of human rights and freedom of expression in the UK

8. There is a legitimate concern that repealing the HRA would weaken the protection of human rights and freedom of expression in the UK. The HRA has been a crucial instrument for individuals in the UK to effectively benefit from the implementation of the ECHR on a domestic level, not least through Sections 2 and 3 of the HRA. The Government explains in some detail why it takes issue with both these provisions and why they should be revised.
7. Section 2 of the HRA provides that UK courts need to take into account, *inter alia*, any judgment, decision, declaration or advisory opinion of the ECtHR. The Government argues that UK courts have largely interpreted Section 2 as an obligation to follow any jurisprudence of the ECtHR. That is wrong. In particular:
- a. The House of Lords has confirmed that Section 2 of the Human Rights Act does not make ECtHR decisions directly binding as a matter of domestic law on the courts;⁴

² For more details see English PEN's briefing on the free speech implications of the Higher Education Bill, available at: <https://www.englishpen.org/wp-content/uploads/2021/09/English-PEN-Briefing-on-the-HE-Bill-1.pdf>.

³ The Act provides that a person commits an offence if it "expresses an opinion or belief that is supportive of a proscribed organisation; and in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation".

⁴ *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, paragraph 105.

- b. It is not possible for a UK court to follow a judgment of the ECtHR which conflicts with primary legislation⁵ or domestic precedent⁶;
 - c. UK courts have declined to follow ECtHR judgments where they considered that they were wrong, because the ECtHR had misunderstood some aspects of UK law⁷; and
 - d. UK courts have further declined to follow ECtHR case law where they disagreed with its reasoning.⁸
8. Of relevance in this context is the margin of appreciation doctrine of the ECtHR, which allows States some latitude as to how they apply some of the so-called qualified rights⁹ under the ECHR, including the rights to private and family life and freedom of expression, to account for the particularities of each jurisdiction. The ECtHR has in particular acknowledged that States enjoy a wide margin of appreciation in relation to certain social issues on which there is no consensus within the member States of the Council of Europe, including in cases brought against the UK (concerning for instance cruelty to animals in the pursuit of sport¹⁰; protection of public morals¹¹; or the regulation of fertility treatments¹²). In *Axel Springer*, a case brought against Germany, the ECtHR explained that in the context of Article 10 of the ECHR States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression was necessary and that it was not the ECtHR's task to take the place of the national courts but rather to review whether the decisions taken pursuant to their power of appreciation were compatible with the ECHR.¹³
9. Where the ECtHR has held that a matter fell within the States' margin of appreciation, UK courts have used the latitude they were granted. To name just one example, in *re P and others*, the House of Lords found that it was within its margin of appreciation to decide whether legislation which excluded unmarried couples from being eligible to adopt children was compatible with the ECHR.¹⁴

⁵ Human Rights Act 1998, Section 6(2).

⁶ *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, paragraphs 43 to 44 (making reference to the margin of appreciation accorded by the ECtHR to the decisions of national authorities); *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 paragraphs 59 to 67 ("As a matter of principle, it should be for this House, not for the Court of Appeal, to determine whether one of its earlier decisions has been overtaken by a decision of the ECtHR. As a matter of practice, as the recent decision of this House in *Animal Defenders* [2008] 2 WLR 781 shows, decisions of the ECtHR are not always followed as literally as some might expect.").

⁷ Attorney General's Reference (No. 69 of 2013) (McLoughlin) [2014] EWCA Crim 188, paragraphs 28 to 29.

⁸ *Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2017] UKSC 36, paragraphs 32 to 37; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, paragraph 90.

⁹ Unlike absolute rights (such as the right not to be subjected to torture) qualified rights can be restricted in some circumstances and within limits (there must be a legal basis for the restrictive measure, the measure must be necessary to pursue a legitimate aim, and the measure must be proportionate to the legitimate aim served thereby).

¹⁰ *Friend and Countryside Alliance and others v UK*, Nos 16072/06 and 27809/08, paragraph 50.

¹¹ *Handyside v UK*, No 5493/72, paragraph 57.

¹² *Evans v UK*, No 6339/05, paragraph 82.

¹³ *Axel Springer AG v Germany*, No 39954/08, paragraphs 85 and 86.

¹⁴ *Re P and others* [2008] UKHL 38, [2008] 3 WLR 76, paragraph 38.

10. While the above shows that UK courts have been willing to depart from ECtHR case law where they found this to be appropriate, it is also clear that any clear and consistent jurisprudence of the ECtHR has been followed by UK courts, if it was not found to be inconsistent with fundamental aspects of UK law.¹⁵ We submit that this should be welcomed rather than criticised, as it means that individuals have been able to directly benefit from the rich body of human rights jurisprudence developed over the course of six decades.
11. The Government suggests different ways to change the mechanism under Section 2, including that the new Bill of Rights protections should not necessarily be considered to have the same meaning as the corresponding rights in the ECHR; that UK courts are not required to follow the case law of the ECtHR; or that UK courts have regard to the text, including the *travaux préparatoires* of the ECHR. If the UK's enforcement of the ECHR is decoupled from ECtHR jurisprudence, this will remove the ability of individuals to rely directly on the ECHR on a domestic level - and likely result in an increased number of cases brought against the UK before the ECtHR as the ECtHR could offer a different interpretation to the UK courts. Requiring too much emphasis on the original text of the ECHR would also limit the possibility for the UK courts to take into account the contemporary context and changing circumstances since the ECHR came into force.
12. We further have to disagree with the Government's criticism of Section 3 of the HRA, which requires UK courts to interpret legislation in a way which is compatible with the ECHR "so far as it is possible to do so".¹⁶ First, the Government is significantly overstating the way in which UK courts have applied Section 3. The independent panel tasked with the Independent Human Rights Act Review (IHRAR) found that Section 3 was in fact only rarely applied by UK courts and that "judicial restraint could properly be said to have been exercised in the use of section 3"¹⁷. This suggests that there has been anything but a "significant constitutional shift" as portrayed by the Government.¹⁸
13. That Section 3 has not been used in the radical manner suggested by the Government does not take away from its importance as a protective tool insofar as it requires UK judges to approach human rights issues in the way intended by the ECHR. By requiring a human rights compliant interpretation of legislation, Section 3 can, and indeed should, play an important role in

¹⁵ *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45; [2011] 2 AC 104, paragraph 48 ("Where, however, there is a clear and consistent line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.").

¹⁶ If it is not possible to give effect to the legislation in question in a way that is compatible with the rights under the ECHR, the court may make a declaration of incompatibility as provided by Section 4 of the HRA (such declaration would not affect the validity, continuing operation or enforcement of the incompatible provisions).

¹⁷ The Independent Human Rights Act Review, December 2021, paragraph 81.

¹⁸ Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, December 2021, paragraph 117.

mitigating problems caused by imprecise or vague wording, which can lead to laws being stretched beyond the purpose intended by Parliament.

UK law has developed to be more protective of freedom of expression as a result of the Human Rights Act

14. The Government has put particular emphasis on its argument that repealing the HRA would enhance the protection of freedom of expression in the UK. To support this point, the Government presents a one-sided account of the ECtHR and UK courts' case law and completely ignores the positive impact the HRA has had on free expression in the UK. While we welcome the Government's concern for freedom of expression, we suggest that there are more useful ways in tackling this issue than engaging in the revision of well-established human rights instruments and have provided recommendations to that end.
15. The UK has been bound by the international obligations enshrined in the ECHR since the latter came into force in 1953. Before the HRA was enacted, however, courts and public authorities in the UK were not bound to observe the ECHR as a matter of domestic law. Indeed, the ECtHR issued judgments in a number of high-profile cases brought against the UK, which positively influenced the development of the law of freedom of expression.¹⁹ However, ECtHR proceedings (which could only be initiated after exhaustion of all domestic remedies) were (and still are) excessively lengthy - for example, the case of *Goodwin v UK* took over five years, which is the average time most actions will typically take until the ECtHR judgment is issued.²⁰ In addition, litigating before the ECtHR is costly. As pointed out in the IHRAR, even back in 1997, the average legal costs of conducting ECtHR proceedings was estimated to be £30,000, making them difficult to afford for many individuals.²¹
16. Ever since the passage of the HRA, fewer individuals in the UK have applied to the ECtHR. As the number of applications has declined since the HRA's enactment, so has the number of adverse findings against the UK.²² This is unsurprising, given the direct enforceability of the ECHR at the national level and that UK authorities are to take account of the full body of ECtHR jurisprudence. Indeed, as a result of Sections 2, 3 and 6 of the HRA,²³ UK legislation and case law have developed in a manner that has enhanced protection of freedom of expression rights:
 - a. Rebalancing the protection of reputation and freedom of expression in defamation cases: The Defamation Act 2013 sought "to modify some of the common law rules

¹⁹ See, for example, *Goodwin v United Kingdom*, No. 17488/90 or *The Sunday Times v United Kingdom*, No 13166/87.

²⁰ European Court of Human Rights, Annual Report 2021, page 8.

²¹ The Independent Human Rights Act Review, December 2021, paragraph 22.

²² The Independent Human Rights Act Review, December 2021, paragraph 51 (with reference to Ministry of Justice, *Responding to human rights judgments – Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020*, pages 9 to 10).

²³ Under Section 6 of the HRA, it is unlawful for a public authority to act in a way which is incompatible with the ECHR (subject to a limited number of exceptions).

which were seen unduly to favour the protection of reputation at the expense of freedom of expression”.²⁴ The modifications in the Defamation Act 2013, which aimed at bolstering the protection of freedom of expression in defamation cases, were significantly influenced by the HRA. More specifically, the Defamation Act 2013, *inter alia*, reflected case law that had been influenced by the HRA in a number of aspects, including: the *Reynolds* defence, which is designed to protect journalists when reporting on matters of public interest²⁵; the defence of “honest opinion”, which protects those who made statements of opinion based on facts²⁶; and the requirement that there needs to be a “real and substantial tort”.²⁷

- b. Enhancing the protection of journalistic sources and material: In *Breen v Police Service of Northern Ireland* the county court recognised, with reference to Article 10 of the ECHR, that the concept of confidentiality of journalistic sources was recognised under law.²⁸ In *R (on application of Miranda) v. Secretary of State for the Home Department*, the Court of Appeal ruled that the stop power under Schedule 7 to the Terrorism Act 2000 was incompatible with Article 10 of the ECHR in relation to journalistic material as it lacked sufficient legal safeguards against its arbitrary exercise.²⁹
- c. Protecting the right to protest: In *Director of Public Prosecutions v Ziegler and Ors*, the Supreme Court set aside an order directing convictions against protestors, who disrupted deliveries to an international arms fair, under section 137 of the Highways Act 1980, finding that the protections of Article 10 and 11 of the ECHR extended to protest which takes the form of intentional disruption.³⁰
- d. Restricting perception-based recording of non-crime incidents: In *Miller v The College of Policing*³¹, the Court of Appeal ruled that guidance requiring police forces to record incidents perceived to be ‘motivated by a hostility or prejudice against a person’ as ‘non-crime hate incidents’, irrespective of any evidence of ‘hate’, encouraged conduct which violated Article 10 of the ECHR.

17. These are just a few examples of how the HRA has positively influenced the protection of freedom of expression in the UK. Of course this does not mean that we consider that legislators and courts always protect freedom of expression as Article 10 requires. But it is undeniable, and there is ample evidence, that the requirement for public authorities and courts to take account of the ECHR and ECtHR case law has resulted in a net positive for freedom of expression in the UK.

²⁴ *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27, paragraph 1.

²⁵ *Reynolds v Times Newspapers Ltd*, [2001] 2 AC 127.

²⁶ *Spiller v Joseph* [2010] UKSC 53.

²⁷ *Jameel (Yousef) v Dow Jones and Co Inc* [2005] EWCA Civ 75.

²⁸ *In the matter of an application by D/Inspector Justyn Galloway, PSNI, under paragraph 5 Schedule 5 of the Terrorism Act 2000 and Suzanne Breen* [2009] NICty 4, paragraph 33.

²⁹ *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6, paragraph 119.

³⁰ *Director of Public Prosecutions v Ziegler and Ors* [2021] UKSC 23, paragraphs 62 to 70.

³¹ *Miller v The College of Policing* [2021] EWCA Civ 1926, paragraph 106.

The tension between freedom of expression and privacy law

18. The Government's account of how the HRA has weakened freedom of expression in the UK, in particular as weighed against the right to respect for private life, is misleading. The Government suggests that "the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy".³² This broad statement is evidenced by one single case - *ML v Slovakia*³³- in which the ECtHR found that reporting about a deceased priest's convictions for child sexual abuse and public indecency could interfere with his mother's right to respect for private life. The Government further insinuates that because of the HRA, the UK would be under an obligation to prioritise the right to privacy over freedom of expression.
19. While we recognise that the ECtHR judgment in this instance was problematic for freedom of expression, the Government's misrepresentation of the relevance of this judgment for UK purposes is equally questionable:
- a. Cases requiring a balancing act between Articles 8 and 10 of the ECHR, such as *ML v Slovakia* are highly fact-sensitive and exceptional. In particular in defamation of the dead cases, the ECtHR has indicated that Article 8 of the ECHR will be engaged only when defamatory statements have "directly affected" privacy rights of living family members.³⁴
 - b. There is no consistent case law by the ECtHR regarding the defamation of deceased individuals.³⁵
 - c. There is no positive obligation under the ECHR to protect the reputation of deceased individuals.
 - d. The margin of appreciation doctrine applies in cases concerning Articles 8 and 10 of the ECHR, which means that the UK would be given significant latitude to strike a different balance in similar cases in consideration of its national context.
20. It is clear that the ECHR does not give primacy to either freedom of expression or privacy, but the ECtHR will always have to balance these rights on a case-by-case basis. While we have taken issue in the past with the way the ECtHR has struck that balance in specific cases, it is our view that the court has not shown a systematic preference to give more weight to Article 8. Indeed, the ECtHR has given more weight to freedom of expression over the right to privacy in various occasions, including:

³² Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, December 2021, paragraph 206.

³³ *ML v Slovakia*, No 34159/17.

³⁴ *Putistin v Ukraine*, No 16882/03, paragraph 37; *Kunitsyna v Russia*, No 9406/05, paragraph 42.

³⁵ See for example *Yakovlevich Dzhugashvili v. Russia*, No 41123/10, paragraphs 23 to 24 (the ECtHR ruled that Dzhugashvili could not rely on his grandfather's (Stalin's) right under Article 8 because it is non-transferable in nature).

- a. In *Axel Springer AG v Germany*³⁶, the ECtHR ruled that Germany had violated the applicant's right to freedom of expression when it fined a magazine and prohibited further publication of articles concerning the arrest of an actor for cocaine possession, dismissing the argument that said actor's reputation and privacy should be weighed higher than freedom of expression.
 - b. In *Couderc v France*³⁷, the ECtHR held that the French courts had violated Article 10 of the ECHR by issuing a damages award and publication order against a magazine, which had published an article on the unrecognised child of the Prince of Monaco. The ECtHR found that the story was in the public interest and that the French courts had failed to properly balance the privacy interests of the Prince with the privacy and freedom of expression rights of his son and of his son's mother.
 - c. In *Tønsbergs Blad AS and Haukom v Norway*³⁸, a newspaper and its editor had been convicted of defamation in a private prosecution brought by a prominent businessman for publishing an allegation that he might have been in breach of permanent residence requirements. Although the story was inaccurate and the allegations concerned aspects of said businessman's private life, the ECtHR found a violation of Article 10, as the matter was of legitimate public interest and the newspaper had taken sufficient steps to verify the truth of the disputed allegation.
 - d. In *White v Sweden*³⁹, the ECtHR found that defamatory information which was published in good faith and which is in the public interest does not violate an individual's right to reputation under Article 8 of the ECHR.
21. Of course the above list contains just a few of the large number of decisions in which the ECtHR has had to balance Article 8 and Article 10 and an equally long list could be produced showing that the ECtHR struck the balance in favour of Article 8 in a specific case. The point is that some ECtHR decisions have been struck in favour of freedom of expression, others in favour of the right to privacy. These cases are all highly fact-specific, the balancing exercise varies from case to case and the ECtHR does not apply general presumptions to its considerations. In addition, there is a wide margin of appreciation given to the UK in its interpretation of both Article 8 and 10, allowing for UK courts to strike a balance that is appropriate in the national context.
22. We do not deny that the HRA has had an impact on the development of the law of breach of confidence as it relates to personal or private information. In *Campbell v MGN Ltd*⁴⁰, the House of Lords recognised that the development of the common law with respect to invasion of privacy had been spurred by the enactment of the HRA. It then rejected the need for a confidential relationship to bring an action for breach of confidence when it comes to personal information with Lord Nicholls taking the view that "the essence of the tort is better

³⁶ *Axel Springer AG v Germany*, No 39954/08.

³⁷ *Couderc and Hachette Filipacchi Associes v France*, No 40454/07.

³⁸ *Tensbergs Blad AS and Haukom v Norway*, No 510/94.

³⁹ *White v Sweden*, No 42435/02.

⁴⁰ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

encapsulated now as misuse of private information”.⁴¹ This expansion of the protection of privacy in the law of breach of confidence has at times produced decisions which were problematic from a freedom of expression perspective.

23. As free speech organisations, we have expressed our concern in the past about judicial overreach in the context of privacy. We have in particular been very critical of the use of super-injunctions - an order preventing the public disclosure of information on a particular issue as well as any disclosure of the fact that legal proceedings are in progress. However, while we maintain that super-injunctions are highly problematic from a freedom of expression perspective, it is also true that the use of privacy injunctions have dramatically dropped since they peaked in 2011 and 2012. For example, in the first six months of 2021, there were only three proceedings where the High Court considered an application for a new interim privacy injunction.⁴²
24. The decrease in the number of privacy injunctions is not least due to the fact that in recent years courts have appeared to be far less willing to grant super-injunctions (other factors are certainly the difficulty of actually enforcing these injunctions in the digital age). In particular, courts have taken account of public interest defences and Article 10 of the ECHR in a number of prominent cases, for example in *Ferdinand v MGN Ltd*⁴³. In other words, the common law developed in a way that gave greater emphasis to freedom of expression as intended under the HRA. This is not to ignore recent judgments which were disquieting from a freedom of expression perspective to say the least, including the recent ruling of the Supreme Court that a person under criminal investigation cannot be named by the media before being charged, dismissing an appeal by financial news agency Bloomberg.⁴⁴ However, while the courts might occasionally get the balance wrong between privacy and freedom of expression, and while close scrutiny is necessary in each one of those cases, we strongly maintain that the Government’s plan to do away with an established human rights mechanism and its demonstrably protective effect on freedom of expression is misguided.
25. Beyond these legitimate cases, we all-too often see spurious legal threats or lawsuits being filed in the name of privacy rights⁴⁵. So-called SLAPPs - abusive lawsuits designed to silence critical speech - are generally meritless, but the very prospect of protracted litigation can often be enough to force a retraction. High-profile privacy cases with large damage awards, such as those mentioned above, are here invoked to intimidate others into withdrawing legitimate articles on matters of public interest - regardless of whether the principles in question can be applied to

⁴¹ Ibid, paragraph 14.

⁴² Ministry of Justice, *Civil Justice Statistics Quarterly: April to June 2021*.

⁴³ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).

⁴⁴ *Bloomberg LP v ZXC* [2022] UKSC 5.

⁴⁵ See Foreign Policy Centre, *Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world*, November 2020, available at <https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf>.

the facts in dispute. The *outcome* is generally beside the point: it is the litigation *process*, with all its associated costs, that is the main focus of SLAPPs.

26. SLAPPs are, however, abusive. They result not from problems with the substantive law but from gaps in procedural protection. Numerous laws are used as vehicles for SLAPPs, with defamation the most common SLAPP tool. Indeed, privacy rarely appears alone in retaliatory legal letters: most often it is invoked alongside defamation, data protection, or copyright claims. The multitude of laws referred to in this way underscore the fact that SLAPPs are a problem of legal procedure rather than legal substance.
27. The best remedy to the SLAPP problem is, therefore, procedural: specifically, the introduction of an early dismissal mechanism, sanctions against those who pursue SLAPPs, and cost protections for those targeted. More information on measures needed to fight SLAPPs can be found in the proposals of the UK Anti-SLAPP Working Group⁴⁶.
28. That said, there is a deeper structural problem that is fueling the rise of these privacy SLAPPs: uncertainty in the law. Journalists and other public watchdogs now have to deal with a disjointed myriad of laws with implications for privacy and free speech: the common law torts of breach of confidence and privacy, the Data Protection Act 2018, and associated issues such as copyright and harassment. These have developed in a piecemeal fashion without any consistency or coherence, and it may therefore be that these laws can be consolidated, codified, or otherwise clarified in a single independent privacy law. Without a full analysis of how these laws interrelate, however, it is difficult to lay out exactly what this should look like. We recommend that a full government enquiry should, therefore, be launched to explore this question in detail.
29. It is worth emphasising, however, that most of these laws either precede the HRA or were passed independently afterwards. Without downplaying the problems caused over the years by the piecemeal growth of privacy in UK law, the HRA has at least required that these various laws be interpreted in a way that is consistent with regional human rights standards. In the case of *Ashdown v. Telegraph Group Ltd*, for example, the Court of Appeal acknowledged that cases could arise where freedom of expression would come into conflict with the Copyright Act - and that in these circumstances "the court is bound... to apply the [copyright] Act in a manner that accommodates the right of freedom of expression"⁴⁷.

⁴⁶ See the UK Anti-SLAPP Working Group's Proposals for Procedural Reform, available at <https://fpc.org.uk/wp-content/uploads/2021/11/UK-Anti-SLAPP-Law-Proposals-for-Procedural-Reform.pdf>; for a broader overview of the measures needed to fight SLAPPs, including the need to expand eligibility for legal aid, see the UK Anti-SLAPP Working Group's Policy Paper, available at: <https://www.ecpmf.eu/wp-content/uploads/2021/07/Policy-Paper-Countering-legal-intimidation-and-SLAPPs-in-the-UK.pdf>.

⁴⁷ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142; [2001] 4 All ER 666; [2001] 3 WLR 1368.

Strengthening freedom of expression in the UK

Section 12

30. The potential codification of privacy law is one of a number of ways that freedom of expression could be strengthened in the UK. In relation to press freedom, the Government proposes that this extra layer of protection be secured through a reformed Section 12 of the HRA.
31. One way Section 12 could be made more robust would be to tighten the wording of Section 12(3), adopting a heavy presumption against prior restraint similar to that recognised by the US Supreme Court⁴⁸. As discussed in paragraph 13 above, however, privacy injunctions that restrain publication on matters of public interest have not been an issue for a number of years. That UK courts would themselves develop a presumption against prior restraint is unsurprising, given the emphasis placed by the ECtHR on news as a “perishable commodity” - and the need that is therefore said to arise for “the most careful scrutiny” by the Court.⁴⁹
32. The strong words used by the ECtHR above are taken from the 1991 case of *Observer and Guardian v. The United Kingdom*, better known as the Spycatcher case. The case was brought against the UK government’s attempts to prevent the publication of Peter Wright’s book “Spycatcher”, which was due to be serialised in newspapers. While the ECtHR recognised that Wright had breached his duty to keep state secrets confidential, it found that the government’s attempts to keep banning the book following publication in the USA were excessive and violated the papers’ right to freedom of expression.
33. The Spycatcher case was decided over 30 years ago and yet still provides a strong benchmark in cases involving prior restraint. Moreover, since the case was decided the ECtHR has continued to develop its case law in relation to prior restraint and the use of injunctions more generally: in the 2001 case of *Association Ekin v. France*, for example, the Court held that prior restraint required a legal framework that ensured “both tight control over the scope of bans and effective judicial review to prevent any abuse of power”⁵⁰. By decoupling the meaning of rights protected by the proposed new Bill of Rights from this evolving Strasbourg jurisprudence, applicants to UK courts will no longer be able to directly benefit from such standards.
34. We would, furthermore, question the Government’s assertion that Section 12 has “not had any real effect” on the way issues relating to freedom of expression have been determined by the courts.⁵¹ Section 12(3) established a new merits test that applies in every hearing for an interim injunction to restrain publication, creating a “higher threshold” for the issuance of injunctions

⁴⁸ *New York Times Co. v United States*, 403 U.S. 713 (1971).

⁴⁹ *Observer and Guardian v The United Kingdom*, No 3585/88, paragraph 60.

⁵⁰ *Ekin Association v France*, No 39288/98.

⁵¹ Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights*, December 2021, paragraph 213.

against the media than the *American Cyanamid* guidelines applied in other circumstances⁵². In each case the court has had particular regard to the need to protect freedom of expression.

Source Protection

35. A second lesson from the Spycatcher case is that the threat of injunctive relief to freedom of expression emanates primarily from the state, as opposed to private actors. Following the embarrassment of the Spycatcher affair, the UK government sought to toughen up its secrecy laws with the Official Secrets Act 1989 (OSA). Since then, there have been a number of high-profile examples of abuse: in 2018, for example, two investigative journalists were arrested in Belfast in relation to the suspected theft of a confidential report containing information about a 1994 loyalist massacre in Loughinisland, Northern Ireland, and the failed police investigation into the murders. The journalists were accused of unlawful disclosure of information under the OSA, questioned for 14 hours, and subject to raids on their homes. After a judicial review, Belfast's high court quashed the search warrants, finding that the journalists acted in "a perfectly appropriate way in doing what the NUJ required of them, which was to protect their sources"⁵³.
36. In the Spycatcher case the threshold for proportionality was raised further by the ECtHR because the press was said to act as the "public's watchdog"⁵⁴. The ECtHR has long-since recognised the essential role "public watchdogs" play in a democratic society, and accorded special protection to journalists and others who assume this function⁵⁵. In particular, press freedom has been called a "basic condition" of journalism and indispensable to the public watchdog role of the press⁵⁶. Despite this crucial democratic role, the Official Secrets Act 1989 contains no public interest defence, and proposals made by the Law Commission for such a defence to be introduced were explicitly rejected by the Government in last year's consultation on "legislation to counter state threats"⁵⁷.
37. Indeed, far from instituting new safeguards against abuse, the Government's proposals for reform would actually *compound* the threats posed to press freedom by the OSA. The proposals recommend prosecution for those who make "unauthorised disclosures", which would include

⁵² *Cream Holdings Ltd v Banerjee & Others* [2004] UKHL 44, paragraph 15 ('Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a 'serious question to be tried' or a 'real prospect' of success at the trial').

⁵³ Dr Paul Lashmar, *Official Secrets Act: UK government has a long history of suppressing journalism to hide its misdeeds*, City Law School, 5 August 2021, available at: <https://www.city.ac.uk/news-and-events/news/2021/08/official-secrets-act-uk-government-has-a-long-history-of-suppressing-journalism-to-hide-its-misdeeds>.

⁵⁴ *Observer and Guardian v The United Kingdom*, No 3585/88, paragraph 59.

⁵⁵ ECtHR, *Guide on Article 10 of the European Convention on Human Rights, Chapter V., The role of "public watchdog": increased protection, duties and responsibilities*, Updated 30 April 2021, available at: https://www.echr.coe.int/documents/guide_art_10_eng.pdf.

⁵⁶ *Goodwin v United Kingdom*, No 17488/90, paragraph 39.

⁵⁷ Home Office consultation on legislation to counter state threats, 13 May 2021.

government sources speaking to journalists, and increasing prison penalties from two years to 14 years. Far from protecting public interest disclosures, the proposals implicitly conflate investigative journalism with espionage activities by hostile foreign states⁵⁸. If the Government were serious about source protection, it would start by abandoning these deeply concerning proposals.

38. Revoking or watering down the HRA would only increase the exposure of journalists and their sources to government abuse. Throughout its history, the ECtHR has consistently established higher standards on source protection than the UK courts, helping to expand the scope of protection available to journalists in the UK⁵⁹. Indeed, the direct application of the ECtHR through the HRA was said in the case of *Shayler* to require “rigorous scrutiny” of any application for disclosure under the OSA⁶⁰.

Court Guidance

39. While our groups focus on freedom of expression, we are sensitive to the fact that human rights are interconnected and indivisible. The exercise of some rights are necessarily limited by other rights. The ECtHR has been engaging in the balancing act necessary to resolve these tensions for the last 54 years, and we do not believe that divergence with the jurisprudence of the ECtHR will therefore strengthen the protection of freedom of expression in the UK.
40. We are particularly concerned with the proposal that particular weight be given to “public interest considerations”. This is not a qualification under Article 10, and is ambiguous and wide-reaching enough to stretch to all sorts of laws. The result would be a narrowed scope of protection, providing authorities with wide discretion to pursue policies that victimise minorities in the name of an undefined “public interest”.
41. Where guidance is merited, it is because certain forms of speech are not being given *enough* value relative to government legislation – or indeed, relative to the privatised censorship of SLAPPs. A statutory affirmation of the right to public participation could, for example, strengthen protection for the law in circumstances which are not directly covered by the HRA (e.g. where the rights in question are being threatened by a private party). Another means of advancing the same goal could be to institute a generally applicable public interest defence that extends to all legislation impacting acts of public participation.
42. Since these measures go beyond the standard *vertical* application of human rights, however, it would make sense that this would be introduced in separate legislation – ideally within the framework of an anti-SLAPP law as described above. Similarly, guidance would be helpful in

⁵⁸ Ibid.

⁵⁹ ECtHR Factsheet, *Protection of Journalistic Sources*, December 2021, available at: https://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf.

⁶⁰ *R v Shayler* [2001] EWCA Crim 1977, paragraph 36.

influencing the way judges interpret procedural law, which is itself often weaponised to silence speech – but it would first make sense for Parliament to reform these procedures to minimise opportunities for abuse. It would then be for the judiciary to draft its own guidance on how these procedures – and an affirmed commitment to public participation – be applied in practice, ensuring the independence of the judiciary is preserved.

Recommendations

43. In light of the above analysis we would make the following recommendations:

- 1) Abandon plans to repeal the HRA or to rewrite the law in such a way as to prevent the direct application of the European Convention on Human Rights.
- 2) Consider the implications for freedom of expression of a number of legislative proposals introduced by the Government, and review accordingly the following:
 - a) The proposed reform of the Official Secrets Act
 - b) The draft Online Safety Bill
 - c) The proposed Police, Crime, Sentencing and Courts Bill
 - d) The proposed Higher Education Bill
- 3) Reform anti-terrorism and surveillance legislations and policies (including the Terrorism Act 2000, the Investigatory Powers Act 2016 and the Counter-Terrorism and Border Security Act 2019) to make them compliant with international freedom of expression standards.
- 4) Introduce a new UK Anti-SLAPP Law to provide procedural protections against abusive lawsuits targeting critical speech. This should include:
 - a) An early dismissal mechanism to filter out abusive lawsuits
 - b) A system of sanctions to deter the use of SLAPPs
 - c) Protective measures to minimise the damage caused to those targeted
 - d) An affirmative right to public participation and/or a universally applicable public interest defence
- 5) Launch an enquiry into how the myriad of laws with implications for freedom of expression and privacy can be consolidated, codified or otherwise clarified into a single independent privacy law.