

**Universal Periodic Review
English PEN Submission to the Office of the High Commissioner for Human Rights
Free Expression in the United Kingdom**

Introduction

1. PEN International is a worldwide fellowship of writers, promoting literature and freedom of expression. Established in 1921, PEN is one of the oldest human rights organisations in the world, and has observer status at UNESCO and ECOSOC. There are 140 Centres in 101 countries.
2. English PEN is the founding centre of PEN International. The organisation is a registered charity in England & Wales (number 1125610). Through its programmes, campaigns and research, English PEN promotes the freedom to write and the freedom to read in the UK and internationally.
3. This submission outline's English PEN's main concerns regarding the right to free expression in the United Kingdom, as guaranteed by Article 19 of the ICCPR, Article 10 of the ECHR, and Article 10 of the Human Rights Act 1998.

Libel

4. The UN Human Rights Committee Report 2008 on the United Kingdom¹, published on 30 July 2008, raised significant concerns regarding the law of libel:

[The UK's] practical application of the law 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...

5. Since this report was published, a number of high profile libel cases have reinforced the findings of the UNHRC. The cases of the British Chiropractic Association vs Dr Simon Singh², and NMT vs Dr Peter Wilmschurst are the best known examples where defendants had had their scientific criticisms vindicated by the courts, only after lengthy and costly court battles. A recent survey of members conducted by the Publishers Association,³ demonstrates how the current legal framework has imposed a culture of self-censorship on publishers.
 - All publishers surveyed had modified content or language before publication;
 - 40% of publishers had withdrawn a publication as a result of threatened libel actions;
 - A third had refused work from authors for fear of libel claims;
 - A third avoid publishing on particular subjects; and 60% of publishers avoid writing about particular companies or individuals who have previously sued for libel.

¹ <http://www2.ohchr.org/english/bodies/hrc/hracs93.htm>

² Case reference [2010] EWCA Civ 350; [2011] EMLR 1

³ 'The Publishers Association reveals enforced censorship in books due to libel claims' 15 March 2011

6. It is clear from these statistics and the emblematic cases mentioned that the current libel laws in England & Wales continue to significantly chill free expression and discourage legitimate investigative reporting in the public interest.
7. Following the launch of Libel Reform Campaign led by English PEN, Index on Censorship and Sense About Science, the British Government has acknowledged the threat to freedom of expression posed by outdated libel laws. Manifesto commitments by all three political parties in advance of the 2010 General Election resulted in the publication of a consultation and draft Defamation Bill on 15 March 2010.⁴ However, the published draft Bill contains insufficient protections for free expression. A report by the Parliamentary Joint Select Committee on the Draft Defamation Bill argued that the Government's proposals said

*... the changes to the defences available against libel claims, while welcome, do not always achieve the clarification sought. For a Bill that is overdue, the Government's current draft may be thought modest. It does not, in some important respects, strike a fair balance between the protection of reputation and freedom of speech.*⁵

8. To remedy these inadequacies, the Joint Select Committee's suggested:
 - Strengthening the draft Bill's test of "substantial harm" to require "serious and substantial harm";
 - Changing the defence of truth to be "substantially true".
 - Improving the new defence of "honest opinion" in libel;
 - Provide better protections for secondary publishers (for example, booksellers and ISPs) against libel threats;
 - Extend 'qualified privilege' to include reports of academic and scientific conferences and peer-reviewed articles appearing in journals; and
 - A court-based 'take down' procedure to prevent extra-judicial censorship by threats to ISPs and web-hosts.
9. The Committee also recommended procedural changes to the way court cases are managed, to reduce costs and improve access to justice.
10. English PEN broadly agrees with the Joint Select Committee's recommendations, and, through the Libel Reform Campaign, has offered further recommendations. These include:
 - A limit on the ability of corporations to sue for libel; and
 - A strengthened 'public interest' defence
11. If the draft Bill is not amended before it is brought to Parliament (early 2012) then a new law of Defamation will not sufficiently protect freedom of expression, and will still "discourage critical media reporting on matters of serious public interest". Investigative journalists, publishers and scientists will remain vulnerable to censorship through litigation, and the 'chill' on other writers and publishers will remain.

⁴ <http://www.justice.gov.uk/consultations/draft-defamation-bill.htm>

⁵ Joint Committee on the Draft Defamation Bill – First Report, 12 October 2011
<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>

‘Lyrical Terrorist’

12. In 2007, Samina Malik was found guilty under the Terrorism Act 2000 of possessing material likely to be of use to a terrorist. She had written poems in which she fantasised about ‘jihad’ and had downloaded weapons manuals from the Internet.
13. At her sentencing, Judge Peter Beaumont said he considered Malik’s offence to be “on the margin” of the crimes defined under the Terrorism Act. Her conviction was quashed at the Court of Appeal in June 2008.
14. Whilst English PEN’s members deplore Samina Malik’s ideology, we are deeply concerned about the implications of her prosecution. In the absence of involvement in any actual plot or conspiracy, the implication is that a person may be dragged through the Justice System, and possibly convicted, for what amounts to a ‘thought crime’. The Ministry of Justice must provide proper guidance to the Crown Prosecution Service and the Courts on Section 58 of the Terrorism Act, to ensure that there are no future prosecutions based on the reading or writing of propagandist material, however distasteful that material might be to the general public.

Twitter Joke

15. In 2010, 27 year old Paul Chambers was convicted of ‘menace’ for posting the following tweet:

Crap! Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky high!!

16. Chambers was not convicted under Terrorism legislation, but under laws meant to discourage nuisance callers. He is appealing his conviction in the High Court.
17. English PEN is concerned at the precedent set by this prosecution, which applies laws formulated in the 1930s to twenty-first century world of digital technology and social media. The context of Chambers’ joke, and the nature of the new digital publishing platform on which it was made, was not taken into account by Magistrates during the trial.
18. After the riots in many UK cities in August 2011, there were calls from politicians, including the Prime Minister, for tougher laws to proscribe speech on Twitter and other social networking sites, so the precedent set by the Chambers case has clear implications for the future.
19. Guidance on these matters must be given to local prosecutors, to ensure that the UK does not face a growing number of small prosecutions and convictions for short messages posted online – a development that would have the effect of significantly ‘chill’ free expression in the United Kingdom.

20.

Incitement to Racial and Religious Hatred

21. The 2008 Report of the Working Group on the Universal Periodic Review (23 May 2008) made a recommendation that the UK's laws on racial and religious practice be held as a good example by other countries:

20. That the example of the United Kingdom in issuing, in principle, a specific law dealing with incitement to racial and religious hatred, be emulated as a good practice in countries which have not done so, in implementation of article 20(2) of ICCPR and its stipulated purpose.

22. English PEN applauds this recommendation by the Working Group. In particular, we draw the Human Rights Council's attention to Part 3A of the Legislation, in particular, paragraph 29⁶:

Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

23. We note that some draft laws to proscribe incitement to religious hatred are drawn so wide, as to include legitimate political, satirical, literary or theological discussion of religion. This effectively criminalises blasphemy and any criticism of religion, which is contrary to the principles of Freedom of Expression. The clause above, present in the United Kingdom's Racial and Religious Hatred Act 2006, is essential to the proper protection of freedom of expression. The UN Human Rights Council should draw attention to this clause when citing the United Kingdom as an example of 'best practice' in this area.

The Human Rights Act 1998

24. Like many Human Rights organisation in the UK (and in particular, the British Institute of Human Rights), English PEN is seriously concerned about the lack of strong political leadership on human rights, and the patchy advocacy for the Human Rights Act 1998 (HRA) among elected politicians.
25. We join the BIHR in urging the UN Human Rights Council to recognising the constitutional importance of the HRA, and expressing concern that the British Government's own Commission examining a 'British Bill of Rights' makes no reference to the Human Rights Act.

⁶ <http://www.legislation.gov.uk/ukpga/2006/1>