The Rt Hon Lord Mawhinney  
Chair  
Joint Committee on the Draft Defamation Bill  
Scrutiny Unit, 7 Millbank  
London SW1P 3JA  

25th May 2011  

Dear Lord Mawhinney  

The Libel Reform Campaign was set up by Index on Censorship, English PEN and Sense About Science to obtain major changes in the English libel laws to better protect free expression. We have enclosed our response to the Joint Committee on the Draft Defamation Bill’s call for evidence.

The Libel Reform Campaign welcomes the government’s commitment to reforming English libel law. The UN Human Rights Committee, the House of Commons Culture, Media and Sport select committee, and the Ministry of Justice working group on libel all raised significant concerns over the negative impact of libel on free speech. All three main political parties made a commitment to libel reform in their general election manifestos, and the coalition agreement included a pledge to libel reform. This consensus for reform provides a unique opportunity to overhaul these failing laws. This opportunity must not be wasted with a partial codification of the existing common law.

We are delighted that the Committee is now considering the draft Defamation Bill and related matters in detail. In this submission we set out our answers to your questions regarding the Bill. Each organisation behind the Libel Reform Campaign – Sense About Science, Index on Censorship and English PEN – will separately submit short additional evidence showing the impact of the current law on scientists, investigative reporters and authors, respectively.
The purpose of libel law is to give individuals redress where their psychological integrity has been violated by an ungrounded attack on their reputation. Several lawyers and legal academics have argued powerfully for the social importance of reputation as an aspect of the Article 8 right to privacy. Some even say that they believe in free speech, but that reputation is as or more important. This seems difficult to sustain. Certainly, the great historical arguments in favour of free speech are hard to translate into terms that would protect reputation. Imagine Voltaire saying: “I may not agree with [your reputation], but I will defend to the death your right to protect it”. It seems unlikely.

Or in the words of the preamble to the Universal Declaration of Human Rights: “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want [and the right to protect their reputation] has been proclaimed as the highest aspiration of the common people”. Not four freedoms but five? No: reputation, whilst indeed protected under the UDHR, has never been one of the public’s primary concerns.

There is a good reason for this. Reputation is important, but it does not have the fundamental character of free speech to democracy, to the pursuit of knowledge, or to self-expression. Individuals whose reputations are unjustifiably damaged deserve the right to vindication. But to valorise reputation too highly risks creating precisely the situation we find ourselves in now, where free speech has to defend itself against attacks which may or may not be motivated by a genuine desire to protect one’s reputation.

The challenge is to balance the law in such a way that speech which can be justified in terms of its public interest value, its truthfulness, or its expressive value as honest opinion is not prevented, whilst unjustifiably damaging speech is deterred.

The need to find this balance is understood by the 55,000 signatories to the Libel Reform Campaign’s online petition; the 249 MPs who signed EDM 423 calling for libel reform in the last Parliament; and the 60 organisations which have backed our general calls for reform – including the Royal College of General Practitioners, Amnesty International, the Publishers Association, the Royal Statistical Society, the University and College Union, Mumsnet and Christian Aid.

We have identified the following four areas where the draft Defamation Bill currently falls crucially short of the public’s expectations from reform:

- **The law chills speech on matters of public interest and expressions of opinion on matters in the public realm.** The draft Bill includes an approximate codification of the common law Reynolds defence for responsible publication. This has been shown to be impracticable for many contemporary authors and publishers, including NGOs, scientists
and online commentators. We believe that, where genuine public interest can be demonstrated (rather than merely statements which may interest the public), and where any errors of fact are promptly corrected, the burden of proof in this defence should be shifted to the claimant, who should prove malice or recklessness on the defendant’s part. And in order to avoid legal uncertainty, we believe that the ‘public interest’ test should be removed from the defence of honest opinion.

- **The law is used by corporations and other non-natural persons to manage their brand.** The draft Bill does not include measures to prevent non-natural persons from suing in libel. Whilst non-natural persons may benefit from some human rights, they cannot benefit from Article 8’s protection of psychological integrity. Their ability to sue in libel should be tightly restrained, as recommended by the Culture, Media & Sport select committee. We propose four remedies that would be more appropriate for non-natural persons than suing in libel for damages.

- **The law does not reflect the nature of 21st-century digital publication.** Without tackling the role of online intermediaries, the law encourages private censorship by bodies which are neither authors nor traditional publishers. The Bill must be revised to allow judicial oversight of threatened libel actions against online hosts and intermediaries, by requiring claimants to obtain a court order against such a secondary publisher where the original author or publisher of a statement cannot be identified or contacted.

- **The law allows trivial and vexatious claims.** The substantial harm test in the draft Bill does not raise the bar sufficiently high to prevent time-wasting and bullying claims by litigants who are not interested in justice. We recommend that this test should be considerably strengthened, to prevent vexatious use of the law to silence legitimate criticism. A high threshold should not prevent claims from individuals whose psychological integrity has been violated by a libellous statement.

As Justice Minister Lord McNally has said, the law as it stands is “not fit for purpose”. There are other areas in the Bill where we wish to see improvements but we are particularly concerned that, without these changes, the Government’s stated ambition of turning English libel law from a “laughing stock” into an “international blueprint for reform” will fall flat.

These substantive legal reforms must be accompanied by changes to procedure – on which we will submit further evidence – and costs. The cost of defending a defamation action has a significant chilling effect on freedom of expression. Defendants are routinely left tens of
thousands of pounds poorer after a libel action, even after a successful defence as in the cases of Dr Simon Singh and Dr Ben Goldacre/the Guardian; and it is not uncommon for even successful defendants to be left £100,000 out of pocket.

In our submission to the Government’s consultation on the Jackson review of costs in civil litigation we proposed a maximum recoverable uplift of 25% on Conditional Fee Agreements (CFAs), in an attempt to reduce the chilling effect of costs on defendants without preventing claimants from launching an action; we also argued that Part 36 offers ought to be incentivised for defendants against claimants; and that there should be no increase in damages for claimants who obtain a judgement no better than their Part 36 offer. Without the availability of CFAs for both claimants and defendants, alongside meaningful procedural reforms, including staged maximum recoverable costs, the Article 8 and 10 rights of all those without deep pockets may be infringed. An outline of our Jackson submission is available here: http://tiny.cc/8070i.

We would be happy to discuss our evidence with you at any point.

This submission has been prepared by the organisations leading the Libel Reform Campaign, English PEN, Index on Censorship and Sense About Science, and Dr Evan Harris, Parliamentary advisor to the Libel Reform Campaign.

Signed:

Jonathan Heawood
Director
English PEN

Tracey Brown
Managing Director
Sense About Science

John Kampfner
Chief Executive
Index on Censorship

Enc.

For correspondence, please contact Mike Harris: mike@libelreform.org 07974 838468 or Síle Lane: slane@senseaboutscience.org 020 7490 9590, 07719 391814
Libel Reform Campaign
Evidence to Joint Committee on the Draft Defamation Bill

Clause 1: definition of defamation; a ‘substantial harm’ test

Should there be a statutory definition of ‘defamation’? If so, what should it be?

1. Clause 1 should include a definition of ‘defamation’ or a statutory interpretation of ‘defamation’ to replace arcane definitions in case law. This would deter the bringing of trivial cases which restrict free expression in the area of parody or ridicule or where there is no real damage to reputation. We will submit supplementary detail on this.

2. The need for this definition is clear from the following examples:

   • In Thornton v Telegraph Media Group Ltd [2010] EWHC 1414 QB, Tugendhat J set out the definitions of defamation from the last 200 years and concluded that some of those definitions were, taken on their own, not sufficiently damaging to be defamatory. In that case, concerning the practice of a professional writer, the judge ruled that not all slights on professional skill or competence were defamatory.

   • In Berkoff v Burchill [1996] 4 All ER 1008 the claimant was able to sue in libel for a description (“hideously ugly”) which in the context of the article (and in any context these days) could not be said to concern character, conduct, professional competence, or a state of health which should amount to defamation.

   • Criticisms of products produced by someone should not ordinarily be seen as giving rise to a claim in libel. Rodial, the manufacturer of a ‘boob-job’ cream that claimed to deliver breast augmentation from topical application, threatened libel action against a consultant plastic surgeon who criticised the claim.

   • Mumsnet have demonstrated that they were in receipt of letters from a putative claimant claiming that parodic insults on a discussion forum were defamatory. It needs to be made clear that insulting public figures, for example by hyperbole, in the context of comedy or parody does not give rise to a libel action.

What are your views on the clarity and potential impact of the ‘substantial harm’ test, including its relationship to other elements of the current law such as the presumption of damage in libel claims?

3. The test must be made meaningful and effective in order to deter trivial and hopeless claims and to avoid unnecessary frontloading of costs for the claimant and defendant. The current drafting is inadequate because:
• It provides less of a hurdle than the existing common law.
• The test is not yet effective enough to counteract any greater potential for front-loading of costs.
• It is a missed opportunity since a meaningful threshold of harm test would be effective at deterring weak and vexatious claims.

4. In addition to our proposal to narrow the definition of defamation (see question 1 above), we have four proposals to bring this test into an effective harm test.

I. The test should be ‘serious and substantial’ (because substantial in law merely means non-trivial or negligible, while serious means that it is serious enough to bring before a court). Existing case law talks of serious harm as the test, and a substantial harm test could end up being a lower test than is available in common law.

II. Harm to reputation from publication in the jurisdiction must be judged having regard to the extent of publication elsewhere as set out in Lord Lester’s Bill (clause 13 (2)). This would protect authors or publishers domiciled in the EU (so not covered by clause 7 of this Bill) from claimants with a reputation elsewhere in circumstances where the majority of publication is outside England and Wales such that the proportion here does not cause serious and substantial harm. This would have protected Dr Peter Wilmshurst from a prolonged and potentially ruinous libel action from a US corporation for remarks made to a Canadian journalist in the USA and which appeared on a Canadian website with little readership in this country.

III. The clause should incorporate the common law stipulation (Jameel v Dow Jones [2005] EWCA Civ 75) that no case should proceed where:
   a. there is no real prospect of vindication, or
   b. the vindication obtained – such as it is – is likely to be disproportionate to the cost of achieving it.
This provision has been more effective than the serious harm threshold in allowing weak cases to be struck out. It responds to the ECHR Article 10 requirement that interference with freedom of expression should be proportionate.

IV. There should be mandatory strike out, as proposed in the Lester Bill, in the event of the claim not passing the ‘serious and substantial’ test. The current discretionary approach leaves open the threat that frivolous or hopeless cases might proceed. This means such cases could still have a chilling effect on legitimate expression due to uncertainty.
Clause 2: Responsible publication in the public interest

Will the responsible publication defence overcome the concerns associated with the existing Reynolds defence? If not, what changes should be made?

5. The responsible publication defence does not overcome the concerns associated with the existing Reynolds defence. The Reynolds defence is unpredictable because there is uncertainty about how the list of circumstances that establish the defendant’s responsibility will be applied when a case reaches court. The courts’ recent efforts to discourage the application of the circumstances as an exhaustive list are, and would continue to be, undermined by the inherent presumption that publication is irresponsible unless the defendant can prove otherwise.

6. The public interest defence needs to be as simple and clear as possible and to reflect the importance of free speech on matters of public interest. Protection of free speech in an open society recognises that open debate and the search for truth requires the publication of uncertain or one-sided material and that the law should err on the side of publication. The public interest defence needs to be available and of benefit to writers such as Dr Simon Singh and Dr Ben Goldacre (who were both seeking to discuss misleading claims in health care) which is not the case under the current common law, nor under the proposed statutory defence.

7. We recommend a new approach which protects genuine public interest statements while providing safeguards to ensure that statements which cannot be shown to be true but which were made in good faith on a matter of genuine public interest are corrected.

The defendant should show that the publication was on a matter of public interest. If it passes that hurdle then the defence should only be defeated if the claimant is able to show that the publication was malicious or reckless (grossly negligent).

8. This would be combined with a number of safeguards and measures to protect those who are the subject of statements that cannot be shown to be true:

I. A narrower definition of public interest to make clear that this is not about salacious gossip. The current Press Complaints Commission (PCC) definition (see Appendix 1) is narrower and would serve the purpose of giving the PCC more status as a guide to good practice. As this is the definition used by the press it provides an accepted benchmark.

II. To benefit from the defence in this form the defendant must be willing to publish a correction or explanation for those statements it accepts cannot be justified. We fully accept the view that there is no public interest in unjustified statements going
uncorrected. This is analogous to an ‘offer of amends’ procedure and would greatly incentivise early resolution of cases where the public interest was clearly engaged and there was no malice but factual statements were wrong (or opinions unjustified) or could not be shown to be true.

III. If a defendant seeks to defend the original publication and chooses not to print a correction or explanation (see above), the burden should be on the claimant to show, having regard to the nature and context of publication and publisher, that publication was irresponsible. This would make the defence more effective than the existing common law Reynolds defence.

IV. In further recognition that there is no public interest in the propagation of false information, claimants should be able to obtain a declaration of falsity from the court in all cases where they can prove a defamatory allegation of fact to be false. A free-standing declaration of falsity could be sought as an alternative to a libel action but should also be an option within any libel case where a defence of justification/truth fails or is not attempted.

We believe that this combination of a stronger public interest defence with a free-standing remedy of a declaration of falsity would achieve the desired rebalancing of the law in favour of free speech and the public interest, while allowing a discursive remedy where falsehood is proved. This free-standing remedy has been proposed or supported by those on both sides of the libel debate.

9. The claimant could still seek a declaration of falsity in the event that the public interest defence succeeds but the facts supporting the defence are proved to be wrong.

10. Along with this approach, we believe that it is desirable, for clarity, to abolish the common law Reynolds defence.

11. If the common law of Reynolds remains we recommend that the statutory changes closely mirror the common law list to prevent extended and expensive legal argument on any differences.

Should the meaning of ‘public interest’ be defined or clarified in any way, particularly in view of the broader meaning of this term in relation to the existing fair/honest opinion defence?

12. See previous section for our answer to this.
Clause 3: Truth

What are your views on the proposed changes to the defence of justification? In particular, would it be appropriate to reverse the burden of proof in relation to individuals or companies?

13. The Libel Reform Campaign has accepted that there is no consensus for a reversal of the burden of proof in libel (but see below for our approach for companies and other non-natural persons). Instead we have recommended that the defences in clause 2 and for internet publishers and intermediaries are improved and that chilling and trivial claims are prevented by our proposals for companies and the strengthening of the harm threshold test in clause 1.

14. The current drafting of clause 3 is not satisfactory for the following reasons:

I. Changing the defence from ‘justification’ to ‘truth’ implies a narrowing of the defence because it suggests that what is necessary is to demonstrate the ‘whole truth and nothing but the truth’ of the statement, when in fact the existing case law and the proposed statute considers a statement justified when the ‘substantial truth’ of a defamatory imputation is demonstrated.

II. The defence of truth should not fail only because one meaning alleged by the claimant is not shown to be substantially true, if that meaning would not materially injure (see sub-paragraph 3 here) the claimant’s reputation in the light of what the defendant has otherwise shown to be substantially true. This was provided for in clause 5(3) of Lord Lester’s Bill.

III. There is possible confusion between the language here (‘materially injure’) and the language in clause 1 (‘serious and substantial harm’). We suggest that the language should be consistent.
Clause 4: Honest opinion

What are your views on the proposed changes to the existing defence of honest comment? Should the scope of the defence be broadened?

15. The common law fair comment defence has not afforded sufficient protection to the expression of honestly held opinions. Seven directors of Sheffield Wednesday Football Club launched a libel action after critical comments were posted on the Owlstalk internet forum. The directors viewed the comment “What an embarrassing, pathetic, laughing stock of a football club we’ve become” as defamatory. In order to better protect such expressions of opinion we support the change of name of the defence.

16. However, we believe that the public interest test should be removed, for the following reasons:
   I. Public interest is very broadly defined in the common law defence. It means, effectively, not ‘private’. As such it is redundant because privacy law covers publication on matters of a private nature (medical records etc).
   II. The transposition of the term into statute causes confusion with the narrower use of the term ‘public interest’ in clause 2 (public interest defence).
   III. People should be free to express an opinion, without risk of liability, on any matter in the public realm, not just matters in the public interest.
   IV. The inclusion of a public interest requirement might cast doubt on the availability of the defence to opinions published in the context of a work of art or literature (e.g. a memoir, or a novel, play or poem with some resemblance to real figures).

17. The new condition 3, an “honest person could have held the opinion”, is not clear and would limit the practical value of the defence. It is not clear from the proposed drafting whether this means that an honest opinion requires the defendant:
   I. to be aware of the pre-existing fact or privileged material at the time of the comment; or
   II. to make any reference, even in general terms, if it is not already obvious from the context (e.g. theatre or restaurant review), to the underlying fact or privileged material.

18. If neither is required this may not deliver fairness for an individual defamed. The Libel Reform Campaign believes that there are far better ways to rebalance the law towards defendants (see our suggestions on clause 1 and clause 2 in particular) than making complex and uncertain revisions to the fair comment (honest opinion) defence at the point in its evolution where its ground rules have been made clearer.
19. The Supreme Court has clarified the ingredients of the defence in its recent judgement in *Spiller v Joseph [2010] UKSC 53*. If it is the intention of condition 3 to cover the existing position as set out in *Spiller v Joseph*, this should be made clear. Otherwise it may also lead to extensive and complex new case law which would add to expense.

**Is its relationship to the responsible publication defence both clear and appropriate?**

20. See answer to previous question on the different connotations of ‘public interest’ in the two clauses.

21. The responsible publication defence covers statements of fact and opinion. This is sensible as it prevents prolonged argument on whether statements are factual or are opinion. Defendants should, as usual, be able to rely on either defence (rather than choose one at an early stage) for statements of opinion, as the draft bill allows.

22. Lord Lester’s Bill allowed statements of honest opinion based on matters covered by the public interest defence to benefit from the honest opinion defence, whereas the draft bill allows the defence only for statements of honest opinion made on the basis of facts shown to be substantially true or which are privileged in the conventional sense. Statements of opinion on matters already determined to have ‘public interest privilege’ should be able to benefit from the honest opinion defence.
Clause 5: Privilege

Are the proposals to extend the defences of absolute and qualified privilege appropriate and sufficient?

23. In order to give clear protection to peer-reviewed academic publications such publications should be included under statutory qualified privilege. This would effectively prevent threats of libel action interfering with this form of publication. This is consistent with the inclusion of reports of scientific conferences because researchers are professionally obliged to report the findings of their research. Furthermore, such publications are subject to explanation and contradiction, which has been a requirement of part 2 of the schedule.

24. We recommend that statutory qualified privilege should extend to fair and accurate copies of, extracts from, or summaries of the material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired.

25. In both of these cases, we see no reason why the narrow historical basis for existing statutory qualified privilege should restrict valuable and effective law reform in this area where the forms of publication covered are sufficiently discrete.
Clause 6: Single publication rule

Do you agree with replacing the multiple publication rule with a single publication rule, including the ‘materially different’ test? Will the proposals adequately protect persons who are (allegedly) defamed by material that remains accessible to the public after the one-year limitation period has expired?

26. We welcome the introduction of a single publication rule. We agree that it should not apply where the manner of subsequent publication is materially different. The single publication rule should still apply to republication by a different publisher which does not materially alter the manner of publication.

27. However, we remain concerned about the position of archives. Those who publish material online as part of an archive are not exercising editorial control. They should therefore benefit from the protections available to secondary publishers, in the absence of a court ruling declaring any specific material to be defamatory or libellous. We outline these protections in our answers to the consultation question on the internet.

28. We are also concerned about the position of open access online scholarly publishing. It is now a common practice for journal content that is published initially on a subscription basis to be made publicly available after a period of time – often more than a year. This is a desirable practice as it enables scientific and medical advances to be accessible to developing countries that cannot afford subscriptions. This practice would place such a form of publication at risk of being considered materially different and not protected by the single publication rule. There should be a specific exemption in the definition of a materially different manner to cover the narrow circumstances of scholarly journals being converted into an open access form.
Clause 7: Jurisdiction – ‘Libel tourism’

Is ‘Libel tourism’ a problem that needs to be addressed by the draft Bill? If so, does the draft Bill provide an effective solution? Is there a preferable approach?

29. Libel tourism is indeed a problem. Its extent cannot be measured in final judgements because the vast majority of defendants are forced to settle early because of the inequality of arms and the inadequacy of the current libel laws. In addition, overseas claimants are able to use the threat of libel proceedings to intimidate publishers into unjustified self-censorship and into taking down material from the internet.

30. We support this clause, therefore, as it tackles the problem of non-EU defendants being inappropriately sued in London courts.

31. We recognise that EU law means that this clause and the provisions behind it only apply to non-EU defendants and that this provides no restrictions on the ability of ‘libel tourists’ to sue in England and Wales where the defendant is domiciled in the EU. We believe that this requires further action to deal with bullying claims and have recommended this in our response to clause 1.
Clause 8: Jury trial

Do you agree that the existing presumption in favour of trial by jury should be removed? Should there be statutory (or other) factors to determine when a jury trial is appropriate?

32. We recognise the merit of improving access to justice for both sides through lower costs. One way this can be facilitated is reducing the need for extensive pre-hearings on what can later be put before a jury and through early resolution of non-jury trials. We support the right to a jury trial being retained under the circumstances described in the consultation.
Consultation issues

Does the current law provide adequate protection for internet service providers (ISPs), online forums, blogs and other forms of electronic media?

33. The internet is the front line for free speech today. We are witnessing an unprecedented revolution in communication. However, under the current law internet intermediaries (including ISPs, search engines, web hosts, social networks and discussion boards) are not adequately covered.

- Some entities such as search engines and mere conduits are exempt from liability in almost all circumstances although this is not clear in the statute.
- Other intermediaries such as those who host user-generated content or blogs are forms of secondary publisher (some are the online version of bookshops, providing a platform but having no relationship at all to content), and do not have the information or resources to check the material against claims. They should not be liable to the same degree as primary publishers such as authors or editors. However currently they are especially vulnerable to vexatious threats from claimants, for whom they are easier targets than the authors who may be willing and able to defend the publication.

34. It is therefore essential that the defamation bill modernises the law in order to provide the necessary protection for freedom of expression online. Without this reform, the most significant development in freedom of speech in 600 years will be disabled by what has been dubbed the privatisation of censorship, as published material is removed on the basis of threats and fear with no judicial oversight.

35. The main problem under the current law is that parties who were not responsible for composing, writing, editing or approving allegedly defamatory content may be sued for libel. There is pressure to censor in response to the threat of a libel action, with the result that content is removed, often an entire website rather than the offending comment. Powerful interests regularly threaten internet intermediaries because this is an effective tool of ‘reputation management’ that is, getting rid of unwanted criticism, such as about a product or service.

36. This problem has been recognised for many years:
   There is a strong case for reviewing the way that defamation law impacts on internet service providers. While actions against primary publishers are usually decided on their merits, the current law places secondary publishers under some pressure to remove material without considering whether it is in the public interest, or whether it is true. These pressures appear to bear particularly harshly on ISPs, whom claimants often see as “tactical targets”. There is a possible conflict between the pressure to remove material, even if true, and the emphasis placed upon freedom of expression under the European Convention of Human Rights.
Although it is a legitimate goal of the law to protect the reputation of others, it is important to ask whether this goal can be achieved through other means.


37. However, the problem is not adequately recognised in that part of the consultation document which discusses the existing arrangements.

38. It cannot be right that those without editorial control of publications, and who are not in a position to judge the material complained of, are forced to censor material for fear of liability. The author has no opportunity to justify or defend their words and no proper access to the protections in clauses 1, 2, 3, 4 and 5 of this Bill. It can lead to disproportionate interference with the primary publisher’s right to free speech, which is contrary to Article 10 ECHR.

39. An appropriate scheme such as our ‘court-based liability gateway’ (below) would have the following properties:
   - Ensure that authors and editors (so called primary publishers) are primarily responsible for their words
   - Provide more certainty to online secondary publishers, such as web hosts and other internet intermediaries, and indeed to off-line secondary publishers, such as booksellers
   - Encourage post-publication moderation of user-generated content by being clear that this does not bring liability
   - Be fair and low cost to those defamed
   - Be manageable by the courts and straightforward in legislative terms
   - Align English law properly with the provisions of the E-Commerce Directive and ensure that English law is updated with regard to search engines and other developments on the internet

40. A broad outline of such a scheme might be as follows:
   I. A claimant must obtain a court authorisation in order to apply potential liability to a secondary publisher such as a web-host or internet intermediary. (This would be regardless of whether a claimant has asked the web-host or intermediary to remove the allegedly defamatory material on an informal discretionary basis and it has not been removed.)
   II. In the application for that authorisation the claimant must specify:
      a. the words or matters complained of and the person (or persons) to whom they relate
      b. the publication that contains those words or matters
      c. why the claimant considers the words or matters to be defamatory
      d. the details of any matters relied on in the publication which the claimant considers to be untrue
e. why the claimant considers the words or matters to be harmful in the circumstances in which they were published
f. whether and when they contacted any primary publisher (either directly or via others) to request that material be removed and what the response of the primary publisher was, and
g. whether and when they contacted any secondary publisher to request ‘take down’ on a voluntary, discretionary basis (this is merely to aid the court in deciding any further notice period)

III. Potential liability of secondary publishers should flow, without prejudice to decisions or pleadings in later proceedings, only from the issue of an initial court decision, that on the basis of the information available to the court:
   a. the publication passes the serious and substantial harm test in clause 1
   b. the material is not obviously a privileged publication
   c. a cause of action in libel will not be prevented either
      • by virtue of the clause 7 provisions regarding the appropriate forum for defendants who are not EU domiciles;
      • by limitation under the single publication rule; or
      • any other basis;
   d. the alleged web-host or intermediary is not exempt from liability under existing law (e.g. mere conduits under the E-commerce directive)
   e. the alleged secondary publisher is not already liable by virtue of being a primary publisher
   f. primary publishers have been contacted and have not come forward to defend the publication, and
   g. the most appropriate (proximal) intermediary is the subject of the application (i.e. the one who can remove the words not just the website)

41. This scheme can be delivered at a level below the High Court and on the basis of a written application, and the respondent can join proceedings via an appeal. Further details of options for such a scheme are being supplied in a separate response to this consultation, together with an analysis of what changes are required to update English law. Our primary concern is that the scheme would remove the problems of automatic removal of material and privatised censorship described.
What are your views on the proposals that aim to support early-resolution of defamation proceedings? Do you favour any specific types of formal court-based powers, informal resolution procedures or the creation of a libel tribunal?

42. We are strongly in favour of early resolution of defamation proceedings. Claimants and defendants want quick and cheap resolution of cases. Only bullies want protracted proceedings. For example the US medical device company NMT Medical used prolonged and potentially ruinous proceedings to try to silence cardiologist Dr Peter Wilmshurst.

43. We are currently conducting research into a range of options to resolve both preliminary issues and the entirety of an action through early determination and/or forms of ADR under a steering group chaired by Sir Stephen Sedley. These alternatives to a High Court trial are crucial in reducing the costs of a libel action, facilitating access to justice, and restoring legal certainty for both claimants and defendants. We welcome the Government’s proposal for some form of early resolution procedure within the Court system but alongside this, careful consideration must be given to whether the High Court is the most suitable forum for all defamation disputes.

44. We note the Government is, separately, consulting on increasing the exclusive jurisdiction limit of money claims so that all civil cases worth under £100,000 must be issued in the County Courts. The average amount of damages in libel cases falls well below this. We believe it is worth considering whether defamation actions may be started in the County Courts, where specialist judges may be appointed. The proposed early resolution hearing will not be about legally complex issues that need to be argued over by Queen’s Counsel in front of a High Court judge. If a case is particularly complex the powers to transfer to the High Court remain. This procedure could be set alongside a requirement for the parties to try to use alternative forms of dispute resolution, either before or after the early resolution hearing.

45. In addition, we agree with most of the considerations raised in Annex D of the Government’s consultation. We would urge the Government to strengthen the Pre-Action Protocol – and its policing – whether or not these measures are adopted.

46. The proposed procedure needs to be activated early on in a case. Costs will not be reduced if significant amounts of work have been done pre-proceedings, or if it takes six months after the issue of the claim for the hearing to take place.

47. Clear trigger points are needed so that the issues to be resolved at the early hearing are identified quickly, and this leads to a hearing being automatically listed. To provide such clarity, specific defamation forms could be developed for the claim and defence.
48. Once the hearing has taken place and a decision has been made on preliminary issues, the parties should be given the opportunity to settle the case without need for a full hearing on the issues, or at least to narrow the issues in dispute. We believe that serious consideration ought to be given to whether the parties should be required to try to solve the remaining issues through the use of alternative dispute resolution at this point. If, after a specified period, the case has not settled, the parties could be required to serve a statement of issues in dispute, allowing the Court to make appropriate directions.

49. Court fees could be staged appropriately so that there is a lower fee to pay to issue the claim and deal with the early hearing, and further fees payable if the case needs to progress.

50. We would also urge the Government to ensure that the early hearing is used as an opportunity to ensure that cases are carefully managed by the courts. Whether the new hearings take place in the High Court or County Court, they would benefit significantly from case management to prepare the matters for trial. The Court could also exercise its powers to control the costs of the parties at this stage.
Is there a problem with inequality of arms between particular types of claimant and defendant in defamation proceedings? Should specific restrictions be introduced for corporate libel claimants?

51. There is a problem with inequality of arms between wealthy and powerful claimants and defendants. The law as it stands gives more power to those who already hold the most power in society.

52. In addition there is a problem, not identified in the consultation document, with organisations using threats of libel actions and lengthy proceedings to close down criticism of their products or practices.

53. Well-known examples of corporate bodies and other organisations using the libel law to silence criticisms include:
   - McDonalds who sued two campaigners in the McLibel Case
   - NMT Medical, an American medical devices company, who sued British cardiologist Dr Peter Wilmshurst for whistle-blowing comments he made to a Canadian journalist in the USA and then again when the Today programme covered the issue 2 years later
   - The British Chiropractic Association who sued Dr Simon Singh for his comments on the lack of evidence for the efficacy of spinal manipulation for childhood asthma and colic
   - GE Healthcare who initiated proceedings against Danish radiologist Henrik Thomsen for comments he made about the safety of an MRI contrast medium
   - Israeli lie detector manufacturer Nemesysco who threatened to sue an academic journal for publishing a critical review of their technology, which was under review by the UK Department of Work and Pensions and in use by local authorities across the UK
   - Rodial Ltd, a cosmetics company, who threatened to sue a plastic surgeon for comments she made in the Daily Mail about the validity of claims that a skin cream could cause breast enhancement
   - Trafigura who sued Newsnight for libel over reports on the impact of dumped toxic waste in West Africa

54. Restrictions should be introduced for corporate claimants and other non-natural persons. While non-natural persons, including companies, are entitled to some human rights protection – for instance, media companies enjoy some Article 10 protection because they are the means through which individual citizens are able to receive and impart information and ideas – they do not have psychological integrity or a family life to protect, and cannot therefore benefit from the development of an Article 8 ‘right to reputation’ in Strasbourg case law.
55. We believe it is reasonable and appropriate to treat non-natural persons (including corporate bodies) in a different way from natural persons. Non-natural persons do need a remedy for damage to reputation with respect to Article 10 (2).

56. We believe that all non-natural persons suing in libel should have to show actual (or likely) financial harm and show malice or recklessness. Non-natural persons also have other means with which to vindicate their reputations:

I. Malicious falsehood. This requires a claimant to show actual financial harm (special damage), that a statement was false, and to demonstrate that the defendant was motivated by malice or was reckless as to the truth of the statement. It could be placed on a statutory footing, and could involve a reversal of the burden of proof in the malice test when a case involves two companies.

II. Libel actions by company directors (or equivalent) in their own name which pass the serious and substantial harm threshold; this clearly preserves a cause of action for serious defamation relating to allegations of misconduct and defamation of small (and family) businesses and other organisations synonymous with an individual.

III. As suggested above under the public interest defence (clause 2) a free-standing remedy of obtaining a declaration of falsity should be made available for this purpose (they are currently only available under a summary judgement or via an application under section 6 of the Human Rights Act). Where actual (or likely) financial damage has also been demonstrated the courts should have the discretion to require publication of the declaration.

IV. Other remedies have recently been made available – such as the Business Protection from Misleading Marketing Regulations 2008 (BPRs) which came into force on 26 May 2008 and deal with false advertising claims amongst other issues.

57. This would bring private entities into line with public authorities who are currently barred from using libel by the Derbyshire principle. We support the Derbyshire principle being brought into statute and made applicable to all non-natural persons who perform a public function when the allegedly defamatory statement relates to that function. It is important that state services which are increasingly delivered by private bodies are not able to use the threat of libel action to prevent comment by citizens. It is also important to avoid discrimination: private contractors delivering public services should not be given greater protection than public bodies doing the same.
Overarching issues

Do the proposals in the draft Bill and Consultation strike an appropriate balance between the protection of free speech and the protection of reputation? What is the relationship between privacy and reputation?

58. The Libel Reform Campaign welcomes the government’s commitment to reforming English libel law. The UN Human Rights Committee, the House of Commons Culture, Media and Sport select committee, and the Ministry of Justice working group on libel all raised significant concerns over the negative impact of libel on free speech. All three main political parties made a commitment to libel reform in their general election manifestos, and the coalition agreement included a pledge to libel reform. This consensus for reform provides a unique opportunity to overhaul these archaic laws. This opportunity must not be wasted with a partial codification of the existing common law.

59. We are delighted that the Committee is now considering the draft Defamation Bill and related matters in detail. In this submission we set out our answers to your questions regarding the Bill. Each organisation behind the Libel Reform Campaign – Sense About Science, Index on Censorship and English PEN – will separately submit short additional evidence showing the impact of the current law on scientists, investigative reporters and authors, respectively.

60. The purpose of libel law is to give individuals redress where their psychological integrity has been violated by an ungrounded attack on their reputation. Several lawyers and legal academics have argued powerfully for the social importance of reputation as an aspect of the Article 8 right to privacy. Some even say that they believe in free speech, but that reputation is as or more important. This seems difficult to sustain. Certainly, the great historical arguments in favour of free speech are hard to translate into terms that would protect reputation. Imagine Voltaire saying: “I may not agree with [your reputation], but I will defend to the death your right to [protect] it”. It seems unlikely.

61. Or in the words of the preamble to the Universal Declaration of Human Rights: “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want [and the right to protect their reputation] has been proclaimed as the highest aspiration of the common people”. Not four freedoms but five? No: reputation, whilst indeed protected under the UDHR, has never been one of the public’s primary concerns.

62. There is a good reason for this. Reputation is important, but it does not have the fundamental character of free speech to democracy, to the pursuit of knowledge, or to self-expression. Individuals whose reputations are unjustifiably damaged deserve the
right to vindication. But to valorise reputation too highly risks creating precisely the situation we find ourselves in now, where free speech has to defend itself against attacks which may or may not be motivated by a genuine desire to protect one’s reputation.

63. The challenge is to balance the law in such a way that speech which can be justified in terms of its public interest value, its truthfulness, or its expressive value as honest opinion is not prevented, whilst unjustifiably damaging speech is deterred.

64. The need to find this balance is understood by the 55,000 signatories to the Libel Reform Campaign’s online petition; the 249 MPs who signed EDM 423 calling for libel reform in the last Parliament; and the 60 organisations which have backed our general calls for reform – including the Royal College of General Practitioners, Amnesty International, the Publishers Association, the Royal Statistical Society, the University and College Union, Mumsnet and Christian Aid.

Will the draft Bill and Consultation proposals adequately address the problems that are associated with the current law and practise of defamation? If not, what additional changes should be made?

65. We have identified the following four areas where the draft Defamation Bill currently falls crucially short of the public’s expectations from reform:

- **The law chills speech on matters of public interest and expressions of opinion on matters in the public realm.** The draft Bill includes an approximate codification of the common law Reynolds defence for responsible publication. This has been shown to be impracticable for many contemporary authors and publishers, including NGOs, scientists and online commentators. We believe that, where genuine public interest can be demonstrated (rather than merely statements which may interest the public), and where any errors of fact are promptly corrected, the burden of proof in this defence should be shifted to the claimant, who should prove malice or recklessness on the defendant’s part. And in order to avoid legal uncertainty, we believe that the ‘public interest’ test should be removed from the defence of honest opinion.

- **The law is used by corporations and other non-natural persons to manage their brand.** The draft Bill does not include measures to prevent non-natural persons from suing in libel. Whilst non-natural persons may benefit from some human rights, they cannot benefit from Article 8’s protection of psychological integrity. Their ability to sue in libel should be tightly restrained, as recommended by the Culture, Media & Sport select committee. We propose four remedies that would be more appropriate for non-natural persons than suing in libel for damages.
• **The law does not reflect the nature of 21st-century digital publication.** Without tackling the role of online intermediaries, the law encourages private censorship by bodies which are neither authors nor traditional publishers. The Bill must be revised to allow judicial oversight of threatened libel actions against online hosts and intermediaries, by requiring claimants to obtain a court order against such a secondary publisher where the original author or publisher of a statement cannot be identified or contacted.

• **The law allows trivial and vexatious claims.** The substantial harm test in the draft Bill does not raise the bar sufficiently high to prevent time-wasting and bullying claims by litigants who are not interested in justice. We recommend that this test should be considerably strengthened, to prevent vexatious use of the law to silence legitimate criticism. A high threshold should not prevent claims from individuals whose psychological integrity has been violated by a libellous statement.

66. As Justice Minister Lord McNally has said, the law as it stands is “not fit for purpose”. There are other areas in the Bill where we wish to see improvements but we are particularly concerned that, without these changes, the Government’s stated ambition of turning English libel law from a “laughing stock” into an “international blueprint for reform” will fall flat.

**Are there any other issues relating to defamation that you would like to raise?**

67. These substantive legal reforms must be accompanied by changes to procedure – on which we will submit further evidence – and costs. The cost of defending a defamation action has a significant chilling effect on freedom of expression. Defendants are routinely left tens of thousands of pounds poorer after a libel action, even after a successful defence as in the cases of Dr Simon Singh and Dr Ben Goldacre/the Guardian; and it is not uncommon for even successful defendants to be left £100,000 out of pocket.

68. In our submission to the Government’s consultation on the Jackson review of costs in civil litigation we proposed a maximum recoverable uplift of 25% on Conditional Fee Agreements (CFAs), in an attempt to reduce the chilling effect of costs on defendants without preventing claimants from launching an action; we also argued that Part 36 offers ought to be incentivised for defendants against claimants; and that there should be no increase in damages for claimants who obtain a judgement no better than their Part 36 offer. Without the availability of CFAs for both claimants and defendants, alongside meaningful procedural reforms, including staged maximum recoverable costs,
the Article 8 and 10 rights of all those without deep pockets may be infringed. An outline of our Jackson submission is available here: http://tiny.cc/8070i.

69. We would be happy to discuss our evidence with you at any point.

This submission has been prepared by the organisations leading the Libel Reform Campaign (English PEN, Index on Censorship and Sense About Science) and Dr Evan Harris, Parliamentary advisor to the Libel Reform Campaign.

Signed:

Jonathan Heawood
Director
English PEN

Tracey Brown
Managing Director
Sense About Science

John Kampfner
Chief Executive
Index on Censorship

On behalf of the Libel Reform Campaign

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For correspondence, please contact Mike Harris: mike@libelreform.org 07974 838468 or Síle Lane: slane@senseaboutscience.org 020 7490 9590, 07719 391814
Appendix 1 – PCC Editors’ Code on public interest:

1. The public interest includes, but is not confined to:

i) Detecting or exposing crime or serious impropriety.

ii) Protecting public health and safety.

iii) Preventing the public from being misled by an action or statement of an individual or organisation.