Dear Member of the House of Lords

Please find enclosed a briefing for the **Second Reading Debate of the Defamation Bill 2012 on Tuesday 9 October 2012** in the House of Lords.

The libel reform campaign, nearly 100 organisations and our 60,000 supporters including leading names from science, the arts and public life, have been calling for legislation to reform the libel laws since December 2009. The government published the Defamation Bill in May 2012. It contains welcome proposals on a single publication rule and some measures to reduce libel tourism. But the Bill does not contain measures to limit corporations’ use of the laws; clear provisions for online hosts and intermediaries; nor a new and effective public interest defence. Until it contains a strong public interest defence scientists, human rights NGOs, consumer groups, authors and doctors will continue to be silenced.

At the report stage and third reading debate in the House of Commons on 12 September 2012, MPs unanimously said they hoped that the House of Lords would make the substantial changes the Bill needs to protect discussions on matters of public interest.

This briefing document sets out the Libel Reform Campaign’s proposals on each clause in the Defamation Bill including explanations for additional clauses needed. The appendices include letters, statements and articles in support of reforms to include a strong public interest defence from human rights groups, scientists, science publishers, authors and academics; and extracts from the Commons third reading debate.

Please do get in touch if you plan to speak at the second reading debate. We can supply more information on our proposals and on recent libel cases.

The Libel Reform Campaign

**English PEN**          **Index on Censorship**          **Sense About Science**

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INTRODUCTION

Freedom to criticise is the cornerstone of democratic argument and debate, whether in newspapers, scholarly journals or online.

Our libel laws are widely recognised as a chill on that freedom: all three parties committed to reforming the legislation in their election manifestos and the government reaffirmed that promise in the coalition agreement. As the Defamation Bill comes to the House of Lords for its second reading, this is an historic opportunity to deliver laws that will safeguard free speech and modernise legislation that is no longer fit for the 21st century. The final shape of the Bill will not only have an impact on the press, but on anyone who writes or shares information – online and offline.

Our libel laws have been criticised by the UN Committee for Human Rights and led to new legislation in the United States to protect American citizens from being sued in the UK. Libel actions against scientists and science writers, including Dr Simon Singh, Dr Peter Wilmshurst, Dr Ben Goldacre and Professor Richard Dawkins, have further galvanised public and political opinion, as evidence that libel actions may be used to silence comment and criticism that is clearly in the public interest. Sixty thousand people have signed a petition calling for reform, while 100 civil society organisations have demanded change.

There is therefore broad political and public consensus to reform the law of defamation. The government now has a commitment to deliver, safeguarding the space for freedom of expression and discussion in the public interest.

The Libel Reform Campaign is asking the government to fulfil its promise of reform by ensuring that the Bill includes:

- An effective public interest defence that works for everyone
- An effective early hurdle to stop trivial cases chilling free speech
- Restrictions on corporations and other ‘non-natural persons’ using libel law to deter legitimate debate and criticism
- More protection for internet hosts and intermediaries while ensuring that authors are made answerable for their words

The passage of the Bill in the House of Lords offers an important chance to hold the government to its pledge. We cannot afford to miss this opportunity.
**THE DEFAMATION BILL**

- Lord Lester of Herne Hill introduced a Private Member’s Defamation Bill in May 2010.
- A Draft Defamation Bill was published by the government in March 2011. It was given pre-legislative scrutiny by a Joint Committee chaired by Lord Mahwinney and was subject to a separate public consultation.
- The Defamation Bill was introduced to Parliament on 10 May 2012.

**What is in the Defamation Bill?**

The Libel Reform Campaign welcomes the Defamation Bill’s proposals on:

- A new ‘serious harm’ test to increase the common law threshold, in order to weed out trivial and vexatious cases (Clause 1)
- Clarification of and improvement to the defence of comment, replacing the defence of ‘fair comment’ with one of ‘honest opinion’ (Clause 3)
- An additional protection for some articles in a limited number of peer-reviewed academic publications (Clause 6)
- A single publication rule, preventing perpetual liability due to internet publication (Clause 8)
- Measures to protect foreign defendants from inappropriate actions brought in London (Clause 9)
- Streamlining procedure by restricting the use of juries in most cases (Clause 11)

However, the Libel Reform Campaign is concerned about the following clauses and omissions from the Bill:

- Clause 1 does not introduce an effective early hurdle to stop trivial cases chilling freedom of expression
- Clause 4 codifies the existing common law’s ‘Reynolds Defence’ and does not represent an effective and affordable public interest defence
- Clauses 5 and 10 do not provide sufficient protection for internet hosts and intermediaries nor an adequate, affordable and rapid remedy for aggrieved persons
- There are no provisions placing any restrictions on corporations, who do not have the same Article 8 rights as ‘natural persons’, from using libel laws to deter legitimate debate and criticism

On the following pages we offer a commentary on each clause, and highlight those areas where the Bill does not yet deliver on the reforms promised by the government and demanded by the public and civil society.
CLAUSE 1 – SERIOUS HARM

We welcome this Clause, which seeks to raise the threshold required to win damages. However, on its own this Clause merely represents a potentially higher threshold at trial, it does not represent an early hurdle which would prevent trivial cases progressing. The Bill needs amending to ensure both the seriousness of and extent of publication of a defamatory statement are taken into account, and that trivial cases are subject to early strike out without costing the innocent defendant time and money.

The law has allowed trivial and vexatious claims to proceed at huge expense. This been a huge chill on freedom of expression, as defendants may back down, rather than face costly proceedings, even if the claim has no real merit.

The Libel Reform Campaign welcomes Clause 1. It does – as the government has made clear – seek to raise the threshold of seriousness of harm from 'substantial' in the leading Thornton case.

However, we do believe that Clause 1 could be improved in the following ways.

The courts have generally taken a dual approach when looking at whether a case should proceed, considering (a) the seriousness of the damage caused by the defamatory statement; and (b) the extent of the publication. This distinction is not made explicit in Clause 1, and should be clarified. We propose that in addition to Clause 1, the Bill should include a strike-out provision, so that cases that do not pass the Thornton hurdle (seriousness of the damage caused) or the Jameel hurdle (extent of publication) are not allowed to proceed.

The Bill needs to include a clear and early hurdle, allowing judges to strike out trivial claims at an early stage in the case (before costs mount). When considering this the court would assess not only whether the harm of the statement is capable of reaching the seriousness level, but also whether the extent of publication (ie have enough people read the words?) amounts to a real and substantial tort. Such a provision would also prevent libel tourism (where a publication mainly outside the jurisdiction, with a claimant whose reputation is also mainly outside the jurisdiction, is the subject of a libel dispute in the London High Court).

When considering the extent of a publication, the law should also take account of where the publication has taken place. The corresponding clause in Lord Lester’s Defamation Bill included a short but essential provision:

No harmful event is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused substantial harm to the claimant’s reputation having regard to the extent of publication elsewhere.
This would discourage claimants from bringing cases in London, when the damage to their reputation, and most of the publication, have taken place outside the jurisdiction of the London courts (or the EEA due to Treaty rights).

In the second reading debate, Secretary of State Kenneth Clarke said that ‘the hurdle is raised a little’ by Clause 1. Other Ministers and Ministry of Justice officials have made it clear that their intention is to raise the hurdle. This ought to be re-stated in the parliamentary debates and stated in the explanatory notes in a clear manner.

It must be noted that Clause 1 is not sufficient to reduce the need for a new public interest defence or to restrict the ability of corporations and other non-natural persons to sue in libel (see later commentary).
CLAUSE 2 – TRUTH

*We welcome this clause, but recommend it be renamed 'Substantial Truth'*

Truth is the oldest defence in libel – as stating the truth ought to be a justification, even if it does damage to an individual’s reputation.

Over time, case law has evolved so that statements are justifiable if they are found to be *substantially* (rather than in *totality*) true. As the defence of justification (as it was called) is one of the original defences in libel, getting this clause right is important.

The wording of this Clause is satisfactory, but a few issues require clarification.

Whilst the explanatory notes to the Defamation Bill provide guidance on the intention of this Clause, the naming of the defence could prove misleading. It should be renamed ‘Substantial Truth’.

Changing the name of the defence from ‘justification’ to ‘truth’ implies a narrowing of the defence. It could be suggested that it is necessary to demonstrate the ‘whole truth and nothing but the truth’ of the statement. The Joint Committee on the draft Bill took this view (paragraph 38 of the Joint Committee Report, published 12 October 2011).

We also recommend that Clause 5(3) of Lord Lester’s Bill be included:

> A defence of justification does not fail only because a particular meaning alleged by the claimant is not shown as being substantially true, if that meaning would not materially injure the claimant’s reputation having regard to the truth of what the defendant has shown to be substantially true.

This means that when there is only one defamatory imputation in a statement, the defence of truth should not fail only because the meaning alleged by the claimant, and found by the court, is not shown to be substantially true, if that meaning would not seriously injure the claimant’s reputation in the light of what the defendant has otherwise shown to be substantially true in respect of a different, but less defamatory, meaning.
CLAUSE 3 – HONEST OPINION

We welcome this clause, but recommend that aspects of common law qualified privilege be included in the list of privileged statements and that the intention of the statute is made clearer.

The common law fair comment defence has not afforded sufficient protection to the expression of honestly held opinions. In recent years, people posting opinions on web forums such as Mumsnet, Legal Beagles, CarerWatch and Sheffield Wednesday’s Owlstalk have been sued for posting an opinion.

The publication of honestly held opinion is an important part of the right to freedom of expression. In order to protect such expressions of opinion more effectively we support the inclusion of this defence in the bill.

We note that common law qualified privilege is missing from the list of ‘privileged statements’ in subsection (7), and this is an error because some publication under common law privilege is to the world at large – for example ‘reply to attack’ privilege – and this should not now be excluded as a basis for an honestly held defamatory opinion.
The common law ‘Reynolds Defence’ is expensive, complex and uncertain and is not an effective public interest defence. Clause 4 merely codifies this defence. Not surprisingly, a codified version of an ineffective defence is not an effective defence. By the nature of any codification in the short term the defence becomes even more expensive and uncertain as the courts decide what the differences are between the statute and the old common law authorities.

Clause 4 would not protect those discussing medical or scientific claims. It would be available to large media corporations but of no use to small publishers and individual citizens. This is not the reform promised by government and demanded by supporters. An additional defence should be introduced giving protection to public interest reporting, when a publisher offers a prompt and prominent clarification.

This clause of the Defamation Bill codifies the existing and inadequate ‘Reynolds Defence’ for responsible publication. It is not a public interest defence.

The 1999 House of Lords judgment in Reynolds vs Times Newspapers Ltd has become the case law that established a defence for responsible publication on a matter of public interest. In the judgment, Lord Nicholls suggested ten criteria that could be used to measure whether a publication had been responsible (see Appendix C). Although these criteria were ‘illustrative’, they have nevertheless come to be seen as a list of requirements to be satisfied. There remains uncertainty about how this list will be applied when a case reaches court. This makes the existing Reynolds Defence highly unpredictable, and therefore very expensive. It is only likely to be used by large media companies, with uncertain and costly outcomes even for them.

If Clause 4 of the Defamation Bill becomes law, running a public interest defence will be similarly costly. Smaller, regional newspapers, specialist magazines, academic publishers, independent journalists, and individual citizens will have no access to a public interest defence, only wealthy media corporations will be able to. This outcome is not the government’s stated intention, and it is not what the public and civil society have demanded.

The public interest defence needs to be clear and simple, available to writers such as Dr Simon Singh and Dr Ben Goldacre (who were both seeking to discuss misleading claims in healthcare), to consumer groups such as Which? magazine and Citizens Advice, to human rights organisations and to those commenting on internet forums such as parenting forum Mumsnet, consumer advice forum Legal Beagles and patient support forums.

We recommend an additional defence, inserted alongside Clause 4, which would protect genuine public interest statements made in good faith. The Clause would require that
public interest statements, which cannot be shown to be true, are promptly clarified or corrected with adequate prominence. Those publications that do not drag their heels in publishing a prominent correction would be protected from having to defend a libel action.

A modern libel law must be of use to small publishers, citizen journalists, and online forums as well as large media outlets. This new and simple public interest defence offers protection for this valuable new element in public debate. By correcting the record or offering a right of reply, these small publishers can avoid a lengthy court battle. This proposal also offers reform for claimants who have been unfairly libelled. The central concern of those who have been defamed is that the record is corrected promptly and prominently. This proposal delivers an appropriate remedy to the claimant, with no need for the expense of a full trial.

Such a defence already exists for many publications such as the reporting of any public meeting or press conference. This proposal would extend that protection to all public interest discussion.

**New Clause for public interest**

- Publisher receives initial complaint from aggrieved party
- Publication must not be malicious
- Publication must be in public interest

Publisher offers adequate right of reply (suitably prompt and prominent) and – where he/she is made aware of the lack of truth or basis for a defamatory comment – prompt and prominent correction and deletion.

**New clause comes into effect**

- Publisher protected from libel proceedings
- Claimant receives remedy by way of prompt and prominent clarification
- Dispute avoids High Court
- No lawyers need be involved
- Public interest story is corrected
- No damages awarded to claimant

Publisher refuses adequate right of reply or where appropriate a correction

**New clause does not apply**

- Publisher exposed to libel proceedings. They will have to rely on other defences (truth, opinion, Clause 4 responsible publication, qualified privilege) elsewhere in the law
- Claimant can obtain damages
This clause would not mean that publishers could write what they pleased and then avoid legal proceedings with the offer of a correction. The defence fails if the publisher published with a reckless disregard for the truth of the material. We believe this new clause will encourage reasonable explanation or clarification to be published when authors write something tendentious, and prompt and prominent correction when they get something wrong. A prompt and prominent correction presents serious reputational damage to the publishers, and is not an attractive prospect even for the tabloid newspapers that trade on sensation.

In the age of online publication, a prompt and prominent clarification, contradiction or correction is a remedy for non-malicious public interest publication. This is because very few readers will only see the original publication without seeing a later clarification, contradiction or correction in the next issue or immediately online.

**Amendments to Clause 4**

The additional public interest defence will provide a defence for those willing to provide a correction or clarification. There are occasions however where defendants will want to stand by their public interest publication – albeit at greater expense. The responsible publication defence as outlined in Clause 4 is thus necessary, either in its common law form as now or in a codified form. If the latter it needs to be amended to reflect the latest case law and to ensure it is viable in the long-term.

Clause 4 as it stands is already out of date as it does not take into account the most recent case law. In particular, the latest version of the Reynolds Defence as outlined by Lord Justice Brown in *Flood vs Times*. This should be included in the Bill either by deleting the entirety of the existing Clause 4 to keep the common law position; or, more suitably (to create legal certainty) by amending the existing Clause 4.

To strengthen Clause 4 we recommend that where matters of public interest are at stake, the claimant should be required to show that the publication (on a matter of public interest) was irresponsibly published.

We also believe the nature of the publication should always be taken into account. Small or solo publishers (such as bloggers) do not have the same resources as large newspaper groups, nor do they have the same levels of readership. In the digital era, a ‘publication’ can happen in many different forms. Different types of publication (for example, tweeting, blogging, newspaper articles or books) differ in reach and credibility. The law must allow judges to take this into account. This would be a common-sense change to Clause 4.
CLAUSE 5 – OPERATORS OF WEBSITES

This Clause is welcome in respect of:

- giving an additional defence to those website operators who are notified of defamatory material on the website but where they responsibly pass on the complaint to the actual author
- making clear that the act of moderating third party content, in itself, does not bring liability as an author or editor

However it is not currently acceptable because:

- its wording introduces confusion and undermines the existing protection of the E-Commerce Regulations (ECR) and the case law that flows from that. Unlike the defence under section 1 of the 1996 Act which is defeated when a website operator is given notice of ‘defamatory’ content, the 2002 Regulations and case law require the website operator to be given notice of ‘unlawful’ content. This is a higher threshold and has made section 1 of the 1996 Act increasingly unnecessary. The language of Clause 5 however reverts to the ‘defamatory’ term of the 1996 Act, which will result in website operators ignoring it (to rely on the ECRs) or (in ignorance of the ECR defence) wrongly believing they need to employ it
- the structure of the scheme creates work for lawyers and could be improved using an ombudsman or court-based online system to generate notices of unlawful content
- the government has failed to publish the regulations that will govern how this Clause is applied in law

Instead the Bill should mandate the introduction of a fast-track court-based (or ombudsman-based) procedure which

- does not require the use of lawyers to make a complaint;
- provides speedy remedy for complainants while deterring those with trivial or misplaced complaints;
- maintains the same level of protection for internet intermediaries from liability as is provided by the E-commerce directive;
- safeguards dissidents and whistleblowers and protects the reputation of those who post libellous statements anonymously.
In addition it is clear that there needs to be more clarity on which entities are publishers. We would like the statute to make clear that:

- **Publishers require a mental element in order to be liable in damages** (but still able to be party to disclosure order applications and take-down order applications). The opportunity should be taken to make clear in statute that entities performing ‘mere conduit’ functions are never liable.
- **Publishers should not be liable for damages** (but still able be party to disclosure order applications and take-down order applications) on notice when they are notable to edit the offending statement short of removing their hosting service to the website they host.
- **The presence of a bare link as a reference, without adoption of the defamatory contents therein, does not make a publisher liable for damages in libel** (but still able to be party to disclosure order applications and take-down order applications).

**The internet is the front line for free speech today.** We are witnessing an unprecedented revolution in communication. Unfortunately, the law has not kept pace with 21st century technological developments. Law, language and concepts from a previous era expose internet companies to a legal liability that they should not have to shoulder.

Internet intermediaries (such as ISPs, search engines, web hosts, social networks and discussion boards) host and deliver material that they have no responsibility for writing, editing or approving. The difference between providers of internet services and the creators of content is a universally accepted distinction.

However, there is no provision for these differing roles in the 1996 Defamation Act, which was written when the World Wide Web was only four years old (and still a hobbyists’ pursuit). The existing English law does not give adequate protection to these secondary publishers. They are therefore a soft target for reputation managers, who may threaten intermediaries with legal action. This is a form of privatised censorship as material may be censored without the agreement of a judge or the publisher of the material.

In recent years, internet intermediaries have received some protections from the 2002 E-Commerce Regulations which implement the E-commerce Directive. Under these regulations, hosts do not have to remove material unless they are informed that it is **unlawful**. However, English law has not kept pace with these regulations. Section 1 of the 1996 Defamation Act involves a lower threshold for liability of intermediaries (information that something is ‘defamatory’). Unfortunately, Clause 5 of the current Bill uses the out-dated threshold. This may have the effect of undermining the common law position which reflects the position in the E-commerce Regulations. At best it will lead to a situation where only those website operators unaware of the protection of the E-Commerce Regulations will seek to use the defence, while those who know about it will have no need to use the defence, resulting in frustration of its purpose which is to assist
complainants in contacting the author. There is potential for considerable confusion, which may be exploited by reputation managers.

A quick and inexpensive, web-based procedure where the claim is considered by an ombudsman or Master should be used to establish that content is unlawful and that no author is willing to defend the words.

Note: It should be remembered that this clause deals with defamation only. The terms of service of most widely used platforms and hosts prevents mere abuse and should be used. There are other laws and regulations dealing with unlawful materials (such as child pornography) and unlawful speech such as harassment or incitement. Parliamentary debates over Clause 5 should focus on the issue of defamation.
CLAUSE 6 – PEER-REVIEWED STATEMENT IN SCIENTIFIC OR ACADEMIC JOURNAL

This Clause offers protection to scholarly journals and is welcome. The inclusion of this Clause does not preclude the requirement for an improved public interest defence.

Scientists should be free to have open discussions about scientific research without the threat of being sued for libel. This Clause would give clear protection to peer-reviewed academic publications and is therefore welcome.

Scientific publishers frequently edit or exclude material because of the threat of libel proceedings. We welcome the inclusion of subsection 2 (the need for the statement to relate to a scientific or academic matter), and subsection 6 (the defence being lost by malice) as this reduces the potential for abuse of this clause.

However, this would not protect scientists or academics speaking out in the public sphere such as newspapers, blogs or at public protests. None of the most unjust cases like that of Dr Simon Singh, Dr Peter Wilmshurst and Dr Ben Goldacre would have benefited from this defence, as they were speaking or writing in commercial media outlets, not peer-reviewed journals.

The inclusion of this clause is welcome, but should not preclude the introduction of a true public interest defence (see our commentary on Clause 4), because it makes no difference to the sort of shocking cases involving the chill of scientific discussion that we see.
This is a welcome extension of qualified privilege. However, the Clause needs to be amended to include the reporting of documents circulated at a press conference, not just the press conference itself. The clause should explicitly reference local council meetings.

The public has a legitimate interest in reading reports of court cases, legislative processes, public company meetings and scientific or academic conferences. It is in the public interest that people can give an accurate report of these proceedings without risking a libel claim. This clause is therefore welcome.

Subsection 5 however recognises that press conferences ought to attract qualified privilege, but does not explicitly recognise that reports based on press releases published or circulated at a press conference should attract the same privilege. This was recognised in *Turkington and Others (Practising As Mccartan Turkington Breen) vs Times Newspapers Limited (Northern Ireland)* [2001] 2 AC 277, and ought to be included in this clause, which is designed to give as complete a picture as possible of circumstances now accepted to attract qualified privilege.

In recent years, there have been a number of defamation actions relating to the function of local government. This clause should explicitly include the reporting of local government meetings.

Clause 7 needs to:

- Expressly recognise that reports of papers published or circulated at proceedings listed in Clause 7 (5) attract the same qualified privilege as the reports of the proceedings themselves.
- In either the Bill itself, or the explanatory notes, ‘government functions’ should be stated to include local government functions.
CLAUSE 8 – SINGLE PUBLICATION RULE

This is a welcome and urgent provision which brings libel law into the 21st century. However, the clause should be modified to ensure that scholarly archives can be made public without being considered a ‘materially different’ publication merely by the act of being part of a publicly-accessible archive.

The existing law recognises each instance of publication as a distinct case of libel which may trigger a claim.

This legal principle is known as the multiple publication rule. It dates back to the 19th century.

The law has not been updated to acknowledge the mass production of newspapers or the invention of the internet. Therefore, each newspaper bought from an archive, or each click on a web link constitutes a new publication in law, and the limitation period starts afresh.

This new clause introduces a single publication rule and is an overdue update to the law. However, we believe the clause could be improved.

First, the republication of the same material by a third party should not automatically be considered a new ‘publication’ for the purposes of libel, if the re-publication is not in a materially different manner, which gives it more prominence.

We are also concerned about the position of open access online scholarly publishing and archives. It is now 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 practice as it enables scientific and medical advances to be accessible to developing countries that cannot afford subscriptions, although with Clause 8 as it stands this accessibility may be at risk of being considered ‘materially different.’ Likewise the compilation of archives from different sources may be considered a ‘materially different’ form of publication. An amendment to the Clause which protects the openness in which there is a public interest should be included in the Bill by explicitly granting that these archiving functions do not in and of themselves constitute a ‘materially different’ publication.
CLAUSE 9 – ACTION AGAINST A PERSON NOT DOMICILED IN THE UK OR A MEMBER STATE

We welcome this clause which goes some way to addressing the phenomenon of what is called ‘libel tourism’, but in reality only deals with what may be termed ‘libel kidnap’ where a non-EEA defendant is sued in London for a publication predominantly outside the jurisdiction.

However, the bill should be improved to offer better protections to defendants based in the EEA being sued by those with reputations outside the EEA for publication outside the EEA. See our suggested strike out provision discussed under Clause 1.

Libel laws and procedures in England and Wales make it more favourable for people to sue in this jurisdiction, even if the extent of the publication is minor compared to elsewhere, and in cases where the reputation of the claimant is mainly abroad. This enables overseas claimants to use the threat of libel proceedings to intimidate publishers into self-censorship and into taking down material from the internet.

We support this clause, but it therefore deals with half the problem: as it only tackles the problem of non-EU defendants being inappropriately sued in the High Court, as occurred in case of Rachel Ehrenfeld, the US academic sued in London by Khalid Bin Mahfouz, for a book almost entirely sold in the US.

The clause provides no restrictions on the ability of claimants to sue in England and Wales where the defendant is domiciled, or part-domiciled, in the EEA.

We are concerned that this clause would not have protected cardiologist 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 negligible readership in this jurisdiction.

This problem is solved by the inclusion of: Subsection 13 (2) of Lord Lester’s Bill in Clause 1 requiring the court to strike out claims where there has been no real or substantial tort in this jurisdiction.
CLAUSE 10 – ACTION AGAINST A PERSON WHO WAS NOT THE AUTHOR OR EDITOR

This is a welcome clause that protects booksellers from being attacked in libel claims. However, the government may need to clarify what constitutes ‘reasonably practicable’ when contacting an author or publisher.

Parties who are not responsible for content are often threatened with libel proceedings for distributing defamatory material or enabling it to be published. For example, individual branches of Waterstones bookshop were threatened with legal action for stocking Denying the Holocaust by Deborah Lipstadt (an exposé of Holocaust deniers) and Sleaze: The Corruption of Parliament by David Leigh and Ed Vulliamy.

This problem mirrors the issues faced by internet intermediaries (see Clause 5, above). It enables the privatised censorship of a publication without contacting the author and/or publisher responsible.

Clause 10 aims to ensure that the author, editor or publisher of the material concerned is the defendant in any libel proceedings unless it is not reasonably practicable for a claimant to take an action against one of these parties. We welcome the aim of this clause; how it will work in practice will depend on the interpretation of the courts as to whether it is ‘reasonably practicable’ to sue the author, editor or publisher.

In addition it would make sense for booksellers to be immune from damages in libel rather than entirely outside the jurisdiction of the court, as they may be necessary or consenting parties in an application for a take-down order.
CLAUSE 11 – TRIAL TO BE WITHOUT JURY UNLESS THE COURT ORDERS OTHERWISE

We welcome this Clause which has the potential to reduce costs significantly in libel actions.

Defamation claims can be hugely expensive. In a survey by the Publishers Association (published in evidence to the Ministry of Justice consultation on the Draft Defamation Bill) its members claimed that defending a libel case that reached the courts cost an average of £1.33million.

One of the procedural issues that can lead to high costs is the current presumption in favour of a jury. While there is still the likelihood of having a jury in a case, it can be difficult to predict the outcome, which makes it harder to reach a settlement. Recognition of this fact has resulted in most trials taking place before a judge alone. In 2010, there were no defamation jury trials, and only three in both 2008 and 2009. Defamation jury trials are an anomaly within civil litigation.

The long-standing 'single meaning rule' applies a single meaning to defamatory statements. Judges can determine the meaning of a statement as a preliminary issue if there is not going to be a jury, but if there is still the potential for a jury to hear the case, the judge will only decide the range of meanings the words are capable of bearing (leaving the actual single meaning as a jury question at trial). This affects most areas of case preparation and may mean that the case needs to be argued on several fronts. It drives up costs even though in all likelihood the case will not be heard by a jury.

Removing the presumption that a defamation trial will be heard by a jury unless the court directs otherwise will introduce certainty into proceedings and reduce costs.
CLAUSE 12 – POWER OF COURT TO ORDER A SUMMARY OF ITS JUDGMENT TO BE PUBLISHED

*We have concerns over this Clause*

We have concerns over this clause and its overall impact on press freedom. We are seeking legal advice to clarify our position which we will circulate at committee stage.

CLAUSE 13 – SPECIAL DAMAGE

*The Slander of Women Act 1891 is outdated and we welcome its abolition in this Clause.*

The Slander of Women Act 1891 and the concept that a person should be able to sue for slander in relation to certain allegations (set out at subsection 2 above) irrespective of whether the publication causes the person special loss are out dated. This Clause is therefore welcome.
ADDITIONAL CLAUSES NEEDED: CORPORATIONS

A corporate reputation is very different from a personal reputation. Corporations do not have feelings and their 'psychological integrity' is not damaged when they are unfairly criticised. They have, therefore, very different Article 8 rights to those of people. There are other ways a corporation can defend itself against criticism. Local councils cannot sue in libel, and this principle should at least be extended to private companies contracted to deliver public services.

The Defamation Bill does not include any measures to restrict corporations and other 'non-natural persons' use of the libel laws, an issue raised by MPs at the second reading of the Defamation Bill, and in the Public Bill Committee.

There is a problem with the inequality of arms between wealthy and powerful corporate claimants and defendants. This allows corporations to use the threat of a costly libel action and lengthy proceedings to close down criticism of their products or practices. The law as it stands gives even more power to those who already hold the most power in society, and stifles criticism or investigation of corporations and other organisations.

Non-natural persons do not have Article 8 rights in reputation, as they do not have feelings. So while they have some rights to reputation under Article 10 (2), the remedy does not need to be the same as those claimants with Article 8 rights. This has been made clear in European Court of Human Rights case law.

Non-natural persons also have other remedies to respond to criticism:

- using existing malicious falsehood legislation;
- libel actions by company directors (or equivalent) in their own name (especially relevant for small businesses) where the defamation causes serious reputational harm;
- a free-standing remedy of obtaining a declaration of falsity could be made available (see clause 12 above);
- other remedies have recently been made available, such as the Business Protection from Misleading Marketing Regulations 2008 (BPRs) which deal with false advertising claims amongst other issues.

In addition, the Derbyshire principle establishes that public bodies cannot sue in libel because of the importance of those who provide public services being open to criticism. However, while Derbyshire does provide some protection for those making criticisms of government bodies, the same is not true for private providers of public services who can still deter criticism by threatening a libel action. We support the Derbyshire principle being brought into statute alongside a clause on non-natural persons, and made
applicable to all non-natural persons who perform a public function when the allegedly
defamatory statement relates to that function.

It is wrong that private providers of public services can prevent criticism when public
sector competitors cannot do likewise.

There is widespread popular support for restricting corporations from using the libel law.

We believe that all non-natural persons suing in libel should have to show actual (or
likely) serious financial harm and show malice, dishonesty or reckless disregard for the
truth.
ADDITIONAL CLAUSES NEEDED: ALTERNATIVE DISPUTE RESOLUTION

As well as reform of the substantive law, the government and the judiciary must take action to reduce the cost of defamation disputes. We suggest increased use of mediation, arbitration and Early Neutral Evaluation. We also recommend early rulings on meaning, and proactive case management by the courts to limit costs.

Reform of the substantive law of libel is critically important to protect free speech and debate, as we have demonstrated. In addition, action must be taken to reduce the potential cost of libel actions through procedural reforms and changes to the funding arrangements for defamation disputes.

Libel cases in England and Wales cost more than 100 times the European average, take too long to resolve and often result in outcomes with which neither party is happy. There are alternative methods of dispute resolution which can help parties resolve disputes in a timely, cost-effective and fair manner. Alongside strong encouragement to promote their use, there needs to be reform of the court process by which a claim for defamation can be made or defended.

English PEN and Index on Censorship made detailed recommendations on the changes needed in the Alternative Libel Project (http://goo.gl/ofvee). In summary, these are:

- Increased use of mediation and arbitration.
- The introduction of Early Neutral Evaluation.
- Costs penalties for failing to use these three forms of alternative dispute resolution.
- The introduction of a hearing to determine the meaning of an alleged defamatory statement, with fixed limits on evidence, argument and costs.
- More robust case management.
- A change in costs rules including protection for a party from having to pay the other side’s costs in the event of losing, and the introduction of an overall costs cap.

With the exception of some of the rules on costs, these changes do not need to be made by primary legislation: they can be made through changes to the Civil Procedure Rules.

In its report on the draft Defamation Bill, the Select Committee said (at para 90) it did ‘not believe that the proposals the Government has brought forward so far will, in themselves, deliver the improvements to libel proceedings so as to make them genuinely within the grasp of the ordinary citizen’. Emphasising the need for procedural change, the committee urged (at para 91) the government to prepare a document setting out the rule changes required to implement the procedural changes the committee has recommended, to be published at the same time as the Defamation Bill.
In relation to costs, in the 3rd reading of the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) in the House of Lords, the Right Honourable Lord McNally gave a commitment to ensure there will be adequate powers, either under existing law or the future legislation, to create any cost changes that are needed to secure a level playing field and equality of arms. The Defamation Bill, as drafted, does not contain measures which will provide for this level playing field.

What needs to happen:

- The government should publish a document setting out its intended procedural rule changes as requested by the Joint Select Committee on the draft Defamation Bill.
- Additional clauses should be added to the Defamation Bill in relation to costs, to achieve equality of arms as the government has stated is its intention.
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APPENDIX A: LIBEL REFORM: LEGISLATIVE AND PARLIAMENTARY TIMELINE


- May 2010: Libel Reform included in all three of the major political parties at the 2010 General Election.


- 26 May 2010: Lord Lester of Herne Hill introduces a Private Member’s Defamation Bill. At the Second Reading debate on 9 July, Lord McNally of Blackpool (Minister of State) announced the Government would bring forth its own legislation. [http://services.parliament.uk/bills/2010-12/defamationhl.html](http://services.parliament.uk/bills/2010-12/defamationhl.html)


- A Joint Select Committee on the Draft Defamation Bill established under the Chairmanship of Lord Mahwinney of Peterborough.


- 9 May 2012: Libel Reform announced in Queen’s Speech

- 10 May 2012: Defamation Bill introduced in House of Commons [http://services.parliament.uk/bills/2012-13/defamation.html](http://services.parliament.uk/bills/2012-13/defamation.html)

- 12 June 2012: Second Reading Debate in House of Commons

- 19 June to 26 June 2012: Committee Stage in House of Commons

- 12 September 2012: Report Stage and Third Reading, House of Commons

APPENDIX B: QUOTES FROM MEMBERS OF PARLIAMENT FROM REPORT STAGE AND THIRD READING DEBATES, 12 SEPTEMBER 2012

Robert Flello MP
(Lab, Shadow Minister for Justice)
“This is an important subject and the law has not been amended since 1996. All the party manifestos wanted the law amended, but the undue haste of trying to get the Bill through Parliament—specifically clause 4—means that the amended Bill with its additional new clauses does not currently pass the test of good and effective potential legislation. In the spirit of trying to get a good result, I look forward to what the Minister has to say.”

Chris Grayling MP
(Con, Secretary of State for Justice)
“The issues that it addresses go to the core of what it means to live in a free and open society. The right to speak freely and to debate issues without fear of censure are a vital part of a democratic society. ... The Bill reflects our view that the law is out of kilter, and that our defamation regime is out of date, costly and over-complicated. It needs urgent reform so as to offer more effective protection for freedom of speech and to stop the threat of long and costly libel proceedings being used to stifle responsible investigative reporting and scientific and academic debate. We also need to stop powerful interests overseas with little connection to the United Kingdom using the threat of British libel laws to suppress domestic criticism as part of libel tourism. Equally, it is vital to ensure that people who have been defamed are not left without effective remedies when their reputation has been seriously harmed.”

Sadiq Khan MP
(Lab, Shadow Secretary of State for Justice)
“This Bill is the vehicle to bring our defamation law into the 21st century, making it fairer, simpler and cheaper so that public debate is encouraged, not stifled. Our emotional attachment to the Bill is therefore strong. That said, as it stands the Bill is a wasted opportunity. Blue moons come around more often than defamation reform: the most recent reform took place in 1996, and the one before that in 1952—even the Justice Secretary’s predecessor was not in Parliament then—so we should not expect the next opportunity to arise soon. We need to take full advantage of this window. Furthermore, there is political consensus: all three main political parties called for an update of our defamation law in our election manifesto. The absence of major policy differences should allow us to focus our energy on getting the Bill right and make the most of an infrequent opportunity. That is why we are so disappointed: we have not grasped that opportunity.

“The Bill has reached Third Reading without any major improvements or changes since it was first published back in May. The Joint Committee did some excellent work, and its members must be tearing their hair out because most of their hard work has been wasted. The Bill is deficient in several respects: it makes no specific provision on corporations bringing defamation proceedings; it deals inadequately with the treatment of website operators; and there is no definition of serious harm. To add insult to injury—or perhaps I should say injury to insult—the Bill risks making matters worse by codifying an earlier version of the Reynolds defence of responsible publication.

“We have other concerns. The Bill fails to provide a new and effective public interest defence. The Government still want to rely on
regulations to sort out the mess that is clause 5, but despite more than four months having elapsed since the Bill was first published, no regulations or draft regulations have been seen.”

On Clause 4 (Public Interest)

Simon Hughes MP (Liberal Democrat)

“The Reynolds defence no longer works. Everybody accepts that we must move on from that common-law position for all sorts of reasons. We are in the age of the citizen-journalist, and we need to adapt the rules to accommodate that. We need something that will work for conventional newspaper groups and new media organisations. The Reynolds defence has outlived its time. It will no longer be sufficient to have a checklist of tests in every court case. Perhaps we ought to debate again whether to have early strike-out clauses in order to get other kinds of cases out of the courts, too. We need a measure that sorts out at the beginning of proceedings, rather than the end, whether there is a public interest component.

“I hope we can persuade the Government that an appropriate public interest defence, plus a remedy for resolving disputes along the lines I have suggested, plus early strike-out is the right combination.”

Paul Farrelly MP (Lab)

“I want to say at the outset that I welcome the Bill’s recognition that responsible journalism should be protected, in the public interest. However, during the passage of the Bill we want to make sure that what is codified is not a step back from the current case law that has been largely welcomed, and we also do not want to give a charter for sloppy, frivolous, inaccurate or sometimes downright nasty journalism.”

Sir Peter Bottomley (Con)

“Those associating themselves with the new clause include Sense about Science, Which?, Citizens Advice, Mumsnet, Nature, the British Medical Journal, the Association of British Science Writers, Global Witness, the Society of Authors and the Publishers Association, and I am sure that many others would do so. If they believe that Parliament should pay attention to what is in the new clause, I agree with them, and I hope that there will be serious discussion about it in another place and before the Bill gets there.”

Helen Grant MP (Con, Parliamentary Under-Secretary of State for Justice)

“I recognise the wide range of opinions about clause 4 and the issues underlying them. This is a complex area about which there are well-argued and deeply held views on both sides of the House. The Ministry of Justice has a largely new ministerial team, but we are determined to get the legislation right and would therefore like to reflect further in light of the helpful points that have been raised by hon. Members in this debate and in Committee, and by stakeholders more generally. If we conclude that there is a better way forward, we will table appropriate amendments in another place.”

On clause 5 (Operators of Websites)

Jeremy Wright MP (Con, Parliamentary Under-Secretary of State, Ministry of Justice)

The current law in this area is unsatisfactory and has created a situation in which website operators, to avoid any risk of being sued, choose to remove material from sites they host on receipt of a complaint, whether or not material is actually defamatory. That chills free speech ... Including Clause 5 in the Bill will mean that the author of a statement is given the opportunity to defend it, rather than it simply being taken down on receipt of a
complaint. Should the need arise, complainants will be able to bring proceedings against those truly responsible for statements ... We stand by clause 5 but believe it can be approved.

**Helen Goodman (Lab, Shadow Minister for Justice)**

“We have not been shown the regulations in draft. The ministerial team has repeatedly said that this is a very complex area—we agree—and that it wanted a simple approach set out in the Bill, with the material fleshed out in regulations. When a Department takes that view, however, it is normal to bring forward the regulations. We made that point in Committee—almost three months ago—yet we have still not seen the regulations.

“It does not appear to be in line with the e-commerce directive... The lack of consistency with the directive will make the law unclear. The object of presenting legislation to the House is to clarify and improve the law, but it seems that a new source of confusion is being created, and I should like to hear what the Minister has to say about that.

“The Joint Committee recommended that the Department should produce guidance that was clear and simple to use. There is no clarity on clause 5. There is no guidance, there are no regulations, and the Government are not taking a strategic approach.”

**On the omission of provisions restricting the ability of corporations to sue in libel**

**Paul Farrelly MP (Lab)**

“The Bill does not address corporation suing, and we have heard from the hon. and learned Member for Harborough (Mr Garnier) about some of the anomalies regarding who can and cannot sue. I hope that those issues will be looked at afresh when the Bill proceeds to the other place. The Bill does not include an explicit early strike-out clause to ensure that actions with no merit, that are designed to chill and intimidate at maximum cost, do not proceed... as the Joint Committee on the draft Bill recommended.”
APPENDIX C: THE REYNOLDS DEFENCE

Lord Nicholls:

The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.

House of Lords, 28 October 1999
http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rey01.htm
APPENDIX D: PRESS RELEASE LIBEL REFORM CAMPAIGN - MPS ON LIBEL REFORM: ‘A CAUSE WHOSE TIME HAS COME’ 11 MARCH 2011

Today MPs and Peers responded to the Libel Reform Campaign’s blueprint for reform in advance of the publication of the Government’s defamation bill next week, saying this is a ‘once in a lifetime chance’ to radically reform the laws.

Lord Bach, Opposition Spokesperson for Justice, said that ‘reform of the defamation laws is clearly a cause whose time has come. This is a campaign that has massive support. I congratulate the Libel Reform Campaign on having got to this stage.’

His comments were echoed by other MPs and Peers.

David Davis, MP for Haltemprice and Howden, agreed that ‘we have a massive mandate for change here; there is no doubt about that. This is a once in a generation opportunity. If we get it wrong our children pay the consequences.’

Denis Macshane, MP for Rotherham, reiterated ‘this is not a once in a generation chance, but once in a lifetime. We cannot let this slip.’

Lord Willis of Knaresborough urged the campaign to continue to ‘use all of its might to make sure the Government’s bill is translated into real action.’

Lord Lester of Herne Hill said, ‘The problem for libel reform is we are not starting with a clean slate but with 300 years of case law.’

Julian Huppert, MP for Cambridge said ‘we want a system where the side that wins is the one with the truth not the one with the most cash.’

The meeting was chaired by Dr Evan Harris, former Lib Dem MP and who said, ‘We all accept the current libel laws are unacceptable. Everybody here wants next week’s Government draft defamation bill to match the contents of our blueprint and if it fails to do so will be urging MPs and peers to amend it.’

Parliamentarians today heard from a wide range of organisations from Mumsnet and Facebook to Which? and the journal Nature.

Martyn Hocking, editor of Which? magazine told MPs how money spent on lawyers holds back work protecting consumers. He warned that public interest should be at the heart of the Government’s reforms because ‘we’re getting to the point where even responsible media hesitate before publishing research or expert opinion for fear of being sued.’

Hosts of online discussions and social media sites told MPs the laws need to be modernised to accommodate the internet.

Richard Allan of Facebook said ‘we celebrate the fact that we have created a platform for people to speak freely. The current libel laws are an accident waiting to happen.’

Justine Roberts, co-founder and CEO of Mumsnet, said ‘current libel laws are simply out of date. They are analogue laws in a digital age. Wholesale reform of English defamation law must be a real priority for our parliamentary representatives.’

Dr Fiona Godlee, Editor-in-Chief of the BMJ spoke about the impact of the laws on medical publishing. She said ‘like all editors I am aware of articles softened or pulled because of libel threats. Science and medicine require independent and rigorous debate – not a ‘nice to have’ but a ‘must have’. The current libel laws are utterly against the interests of scientists and therefore the interests of patients and the public.’

Dr Philip Campbell, Editor in Chief of Nature said the libel laws impact on the reporting of issues including research misconduct. He said ‘either we chose not to cover a story because the impact is not worth the incredible effort and time it takes or we suffer by covering the story.’
Simon Singh, science writer and libel defendant, said, 'Scientists and science journalists who have been the victims of libel actions, including me, are anxious to see radical reform so that others do not have to suffer the same threats to their freedom of speech.'

Charmian Gooch of Global Witness told MPs about the impact of the laws on human rights campaigners: 'The need for libel reform affects NGOs working on a wide range of issues across all aspects of civic society. It is categorically not a tabloid issue.'

Naomi McAuliffe, Amnesty International UK said 'when we’re targeting companies, everything from reports to leaflets have to be checked by lawyers. This is not something that my colleagues across the world have to do; it is something we have to do in the UK. It is an expense our members should not have to pay and it is an expense that could otherwise be spent on exposing grave human rights abuses.'

Peter Noorlander, Media Legal Defence Initiative said 'we help journalists in countries such as Nepal or Ukraine defend libel cases in their countries. These journalists used to think of the UK as a safe haven for free speech - but increasingly they are threatened with libel suits in London which they cannot as a matter of practicality defend.'

Eric Metcalfe, JUSTICE spoke about the high cost of libel litigation. He said 'in the last 21 years the libel lottery has only grown worse. The high cost has become a real threat to freedom of expression in this country.'

Richard Mollet, Publishers Association said 'We look forward to reading the draft defamation bill, and recognise that its publication is a crucial step in reforming our current libel laws. The book industry should not be impeded by archaic laws which deny publishers the right to be truly independent and free to express opinion and ideas in the public interest.'

Tracey Brown, Sense About Science, responding to discussion about the national media, said 'We have some of the tightest libel laws in the world and people suffer unfair damage to their reputations. Why should those people have to use anti-free speech laws and spend 18 months and £200,000 to get a correction? We need other means to resolve inaccuracy quickly. Under new law we should be encouraged to ask “is it true?” rather than “will they sue?”'

Jonathan Heawood, English PEN said that the public interest is often best served by allowing open debate. He told MPs 'We would much rather live in a society characterised by noisy imperfection than perfect silence.'

MPs also heard a statement of support for the Libel Reform Campaign blueprint signed by Jonathan Ross, Marcus Brigstocke, Nick Ross, Dr Ben Goldacre, Dave Gorman, Joan Bakewell, Professor Nancy Rothwell, AC Grayling, Shappi Khorsandi and others.

On behalf of the signatories to the statement author and President of English PEN Gillian Slovo reiterated: 'We all believe that any individual whose reputation is damaged by a false and defamatory publication should have recourse to the law. But beyond that we need to protect freedom of expression and the rights of citizen critics, and to prevent powerful interests from shutting down discussion on matters in the public interest.'

Summing up the discussion John Kampfner, Index on Censorship said 'We have made it clear that libel reform is about active citizens, democracy at home, journalism here and abroad, and a stronger civil society. But we must remind ourselves that nothing has changed yet and the work is ahead of us to tell law makers all we have heard today.'
Dear Members of Parliament

There is broad agreement that England’s libel laws are unfair, outdated, complex and costly, and that as a result they chill free speech.

With the imminent publication of the Government’s draft proposals for reform we are writing to endorse the Libel Reform Campaign’s call for the essential reforms set out in their document ‘What should a Defamation Bill contain?’

We all believe that any individual whose reputation is damaged by a false and defamatory publication should have recourse to the law. But beyond that we need to protect freedom of expression and the rights of citizen critics, and to prevent powerful interests from shutting down discussion on matters in the public interest.

We ask you to ensure that, as the Government's draft proposals are scrutinised over the coming months, the final legislation matches the objectives of the Libel Reform Campaign.

Signed:

Gillian Slovo
Simon Singh
Dr Ben Goldacre
Dr Peter Wilmshurst
Jonathan Ross
Dave Gorman
Shappi Khorsandi
Marcus Brigstocke
Nick Ross
AC Grayling
Joan Bakewell
Professor Roger Penrose

Professor Nancy Rothwell
John Kampfner, *Index on Censorship*
Jonathan Heawood, *English PEN*
Tracey Brown, *Sense About Science*
Justine Roberts, *Mumsnet*
Martyn Hocking, *Which?*
Dr Philip Campbell, *Nature*
Dr Fiona Godlee, *BMJ*
Richard Allan, *Facebook*
Charmian Gooch, *Global Witness*
Eric Metcalfe, *Justice*
Naomi McAuliffe, *Amnesty International UK*
APPENDIX F: LETTER FROM VICE-CHANCELLOR OF CAMBRIDGE UNIVERSITY PROFESSOR SIR LESZEK BORYSIEWICZ TO JOINT COMMITTEE ON THE DRAFT DEFAMATION BILL, 9 JUNE 2011

Professor Sir Leszek Borysiewicz
FRS FRCI FMedSci
The Vice-Chancellor

Mr Chris Shaw
Clerk to the Joint Committee on the Draft
Defamation Bill
7 Mill Bank
London SW1P 3JA

By e-mail: defamationbill@parliament.uk

June 9, 2011

Dear Mr. Shaw,

Responding to the Government’s Draft Defamation Bill

I was privileged to be part of the Working Group on behalf of the Research Councils and the Chief Scientist’s Office. I believe that the draft has made considerable progress, but that there are still some concerns that will need to be considered from the perspective of the scientists who engage with these issues.

The most important, from my perspective, relates to the public interest defence. Here the opportunity for scientists and academics in general to make the statements that are naturally robust in debate between such individuals are still difficult when it comes to using this defence. The demonstration of “responsibility” is key and where burden of proof should lie is an important point.

The increasing importance of digital publication is a significant issue as this will becoming the main means of connection for many authors in the academic world, and the increasing role of online intermediaries such as web hosts is to be very carefully considered.

The primary author is the individual that has to be engaged in any attempt to remove such material rather than an intermediary, as is often the case today. This point will need to be strengthened and clarified.

I believe the work of the Working Group has made enormous progress and would be happy to contribute further if this is helpful to the Committee.

L. K. Borysiewicz

cc: Sir John Beddington

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APPENDIX G: STATEMENT BY RICHARD DUNSTAN SENIOR POLICY OFFICER, CITIZENS ADVICE, 11 NOVEMBER 2011

I work for Citizens Advice, the national body for Citizens Advice Bureaux. In 2009 and 2010, we were subjected to repeated threats of libel action when we sought to cast a light on a secretive, exploitative and quite possibly illegal practice called ‘civil recovery’.

This involves agents of household-name retailers such as Asda, Boots, Tesco and TK Maxx bombarding those who have been accused of shoplifting with legalistic letters demanding money as ‘compensation’ for the cost of dealing with the incident, and threatening civil court action (and associated extra costs) if the sum demanded is not paid promptly.

Fair enough, you might say – if you don’t want the fine, don’t do the crime. But one in four of the recipients are children as young as 11, and others have serious mental health problems. There is no obvious legal basis for such demands – which probably explains why the threatened court action never follows. And – most worryingly of all – many of the recipients are guilty of nothing more than an innocent mistake when doing their shopping.

For the practice has little if anything to do with combating the unquestionably serious problem of shoplifting. It is, of course, about making money for the agents, who cream off up to 40 per cent of any money paid. Like many of the worst aspects of life in modern Britain, the practice is an import from the United States, where it is very big business indeed and is known as ‘dunning’.

But for the practice to remain profitable, its victims have to be ignorant of the relevant law, and of the hollow nature of the threats of court action. And, frankly, life is just too short for most people to even begin to understand the Wild West we call the County Court system. So the agents did not want us shining a light into the shady world in which they operate. And, when we told them we wanted to publish a report, they threatened us with a legal action for defamation, on the grounds that we would be damaging their business.

Well, yes, if people know that there is no legal basis for the demand for £150 that they have just received, and that there is very little if any chance of the threatened court action following if they don’t pay up, then it will damage the agent’s bottom line. But that doesn’t make us guilty of defamation.

However, current libel law makes it very easy to issue a libel action, and very expensive to defend one, even if it is without foundation. So just the mere threat of a libel action forced us to spend thousands of pounds on legal advice – money that we could have put to much better use – and even then to self-censor, so that the report we eventually published was not as hard-hitting as it could and should have been. In short, the agents got off lightly.

It is wrong that those engaging in scurrilous practices can, simply by throwing the L-word around, shut down criticism by those working in the public interest. We need a clear, effective public interest defence, so that libel law cannot be used to stop us shining a light into the darker corners of corporate practice.
APPENDIX H: STATEMENT BY DR PETER WILMSHURST, 11 NOVEMBER 2011

I spent almost all my free time for 4 years and much money defending 3 defamation claims brought in England by an American medical device corporation, NMT Medical, for comments attributed to me at a conference in the USA and published on a US website. I was the principal cardiologist in the clinical research and my concerns about the trial have proved justified as confirmed by publications in medical journals. The defamation cases ended this year when NMT went into liquidation. NMT sued me to silence me and to silence other doctors. We now know that NMT discussed with their lawyers suing two other parties in the UK and verbal threats were made to another doctor. The action against me prevented others, with concerns about the safety of devices made by NMT, from voicing their concerns, including making known life-threatening problems with NMT’s devices. After NMT went into liquidation we discovered that other doctors had remained silent about the failures of NMT’s devices that have led to patients in this country needing emergency cardiac surgery because of device failures. Patients have suffered because the draconian defamation laws were used to silence doctors with legitimate concerns about medical safety. Parliamentarians recognise the dangers from these laws because they have reserved for themselves immunity in the form of Parliamentary privilege when speaking about matters of public interest. It is hypocritical for parliamentarians to expect ordinary citizens to speak out on matters of public interest and safety, when they do not allow ordinary citizen the same protection that MPs reserve for themselves to protect them from misuse of the defamation law.

Dr Peter Wilmshurst
Victory for responsible reporting

A High Court case highlights the inadequacies of England’s libel laws and should be used as an impetus for major reform.

For more than three years, Nature Publishing Group and Nature reporter Qairun Schiermeier have been fighting a libel claim brought by physicist and engineer Mohamed El Naschis. The defence cost around £1.5 million (US$2.3 million) in legal fees and gobbled up weeks of the time of several employees. Last week, a judge ruled that it was time and money well spent. El Naschis’s libel claim was so weak that the judge conceded not a single point to the plaintiff. The Nature article in question, her 91-page ruling declared, was “responsible journalism”, accurate in every key detail, and its publication was “of high order of public interest” (see page 149).

The judgment is welcome vindication for Schiermeier, Nature and for good journalism. It upholds the importance of stories that probe bad practices in science — in this case, El Naschis’s abuse of his position as editor of a journal to publish his own papers without peer review. But as Schiermeier says (see page 141), the legal victory has even more significance. It should give additional impetus and backing to a campaign to rewrite the antiquated libel laws of England and Wales, which contributed to making El Naschis’s feeble claim so difficult and expensive to fight.

Many in the United Kingdom rightly consider the libel laws a national embarrassment, and politicians have vowed to change them. At present, as Nature has pointed out before, the laws tip the scales too far towards the plaintiff — by forcing defendants to prove the truth of all allegations, rather than plaintiffs to prove the falsehood — that London has become a playground for foreign corporations and celebrities who seek to use the courts to burnish their reputations.

Powerful groups and individuals routinely use the threat of a libel suit to deter consumer and advocacy organizations from speaking out about bad products and practices. And the plaintiff-friendly law has had a chilling effect on scientific debate and on journalism. It means that publications such as Nature must perform a painful calculation every time an important but legally sensitive story comes along: is it worth the risk? Nature’s victory shows that you can win when your case is strong, but that takes more stamina and deeper pockets than many organizations can muster. And, as much as Nature was determined to fight for good journalism and free speech in this case, a fear of the libel laws has in the past forced us to not report stories that we knew to be true and in the interest of our readers and society.

Now some relief is in sight. The three major political parties in the United Kingdom support libel reform, and a bill to change the law is working its way through Parliament. The bill includes welcome measures, such as protection for peer-reviewed publications and for discussions at scientific conferences. But for journalism, such as Nature’s article on El Naschis, the reform does not go far enough. It extends the existing Reynolds defence, which gives limited protection for reporting that can be shown to be in the public interest and meets a series of other requirements. But winning a case on “Reynolds” — one of several grounds on which Nature prevailed — is expensive and difficult. Giving the public-interest defence broader scope would deter weak claims that stifle free speech and would allow judges to dismiss meritless complaints earlier in the process — to the benefit of all.

There is still time to make such a change. The bill will undergo fresh rounds of debate and revision later this year. The Libel Reform Campaign, which Nature supports, is urging lawmakers to add a clause that protects stories in the public interest from libel claims unless the reporters have published falsehoods recklessly or maliciously. Its website (www.libelfrom.org) gives readers in the United Kingdom a simple way to contact their member of Parliament to add their voice to the calls for greater reform.

At a time when the British press is under great scrutiny, and with some elements already in disgrace, no one wants to give reporters a licence to be irresponsible. The proposed clause would still allow truly aggrieved individuals to sue and win. But it would also force brave and principled reporters such as Schiermeier to expose misbehaviour — journalism that is clearly in the public interest — knowing that if their reporting is thorough and fair, they are unlikely to have to go through a similar ordeal.

Take a stand

Legal actions and oversight are necessary to keep the drug industry in line.

Pharmaceutical giant GlaxoSmithKline (GSK) agreed last week to settle criminal and civil claims by paying the US authorities a stunning US$3 billion. It is the largest drug industry settlement in history; the allegations include that the company ran illegal campaigns to promote the prescription of drugs for unapproved uses in children, and published “false and misleading” accounts of clinical studies.

According to the US complaint, GSK also lavished some doctors and academics with “sham consulting fees” and other payments, as well as gifts and attendance at luxury conferences in venues such as Bermuda and Jamaica — sometimes with sailing or deep-sea fishing thrown in — to encourage them to prescribe drugs for off-label uses (see go.nature.com/dbh8kl). Speakers could earn $1,000–2,500 per hour to talk at promotional events, with some negotiating “tip packs” of $12,000-worth of talks over two days. One speaker earned about $1.5 million between 2001 and 2003. Nice work if you can get it — and too many could. Andrew Witty, chief executive of GSK, last week
Dear Lord Mawhinney

Your Committee has established from many witnesses, including from the Secretary of State, that the Draft Bill amounts to ‘mere codification’ of the law, rather than significant reform. Witnesses on all sides have expressed concern that codification without reform will either achieve little or complicate the law of libel since established common law defences will be run in parallel with the new statutory defences.

All three main political parties committed to libel law reform (not codification) in their manifestos at the last general election, and this is what the Government stated its intention was. The political consensus for reform and the support across civic society mean that the Draft Bill presents a unique opportunity to overhaul our libel laws. It must not be wasted on a partial codification of the existing common law.

We would like to emphasise, whilst you are drafting your report, our support for the three priorities for reform.

1. **A public interest defence (clause 2) that reduces the inhibition of free speech on discussion of matters in the public interest.**

   The existing Reynolds defence has not been of practical use for authors, scientists, NGOs, and citizen journalists. We need a defence that is not ‘mere codification’, but which protects the public interest so citizens can defend themselves unless the claimant can show they have been malicious or reckless.

2. **A strong test of harm (clause 1) that reduces the chilling effect of trivial claims.**

   We need a strong hurdle that strikes out claims unless the claimant can demonstrate serious and substantial harm and that they have a real prospect of vindication. This would deter use of the law to silence legitimate criticism while allowing claimants damaged by defamatory statements to bring a case.

3. **A restriction on corporations’ ability to use the libel laws to silence criticism (consultation issue).**

   There is not a level playing field between individuals and well-resourced corporations in libel. Whilst corporations have plenty of ways they can vindicate their reputations (including using malicious falsehood, through libel actions by individuals, using anti-competitive practice law, or obtaining a declaration of falsity), they do not suffer the psychological harm that individuals do. Non-natural persons’ ability to sue in libel should be restricted to cases where they can show both financial harm and malice/recklessness.

These three concerns above are echoed by the UN Human Rights Committee and the Culture, Media and Sport select committee.

Signed:
Simon Singh, science writer, defendant BCA v Singh
John Kampfner, CEO Index on Censorship
Jonathan Heawood, Director English PEN
Tracey Brown, Managing Director Sense About Science
Dr Evan Harris, Libel Reform Campaign
Lord Macdonald of River Glaven QC, Warden-elect of Wadham College Oxford
Alastair Brett, Director Early Resolution CIC
Robert Dougans, libel lawyer, Bryan Cave LLP
Dr Eric Metcalfe, Director of Human Rights Policy, JUSTICE
Charmian Gooch, Director, Global Witness
Martyn Hocking, Editor-in-Chief, Which?
Justine Roberts, Co-founder & CEO, Mumsnet
Professor Colin Blakemore, President, Association of British Science Writers
Connie St Louis, Chair, Association of British Science Writers
Andrew Motion, Poet Laureate 1999 – 2009
Nick Ross, broadcaster
Ian Hislop, Editor, Private Eye
Dr Ben Goldacre, medical researcher and defendant Rath v Goldacre & the Guardian
Dr Peter Wilmshurst, cardiologist and defendant NMT Medical v Wilmshurst
Hardeep Singh, defendant His Holiness v Singh
Professor Francisco Lacerda, Fellow, Royal Swedish Academy of Sciences, victim of English libel law
Professor Stephen Curry, biophysicist and science writer
Dr Andrew Lewis, Quackometer.net
EDITOR'S CHOICE

Keep libel laws out of science

I hope all readers of the BMJ are signed up to organised scepticism. It’s not a blog but it could be. It’s one of the four principles of good science as articulated by Robert Merton nearly 70 years ago. The other three—communism, universalism, and disinterestedness—are no less important, but I had to turn to Wikipedia to remind me what they were. Merton defined organised scepticism as the requirement that scientific claims be exposed to critical scrutiny before they are accepted.

This wasn’t a new idea. Tony Delamothe reminds us (p 77) that the motto of the Royal Society translates as “Take nobody’s word for it,” showing its commitment “to withstand the domination of authority… and to verify all statements by an appeal to fact determined by experiment.”

Longstanding and essential thought it is, this principle is under serious threat. As Harvey Marcovich explains (p 61), people whose scientific claims are questioned are turning to the law to attempt to silence their critics rather than engaging in open scientific debate. England’s libel laws are particularly appealing to libel tourists around the world because they put the burden of proof on the defendant, who risks incurring huge costs.

Marcovich references several cases in which libel laws have been used to stifle scientific criticism, including the ongoing fight between science journalist Simon Singh and the British Chiropractic Association (BCA).

In an article in the Guardian last year, Singh made claims regarding the evidence base alleged to support the promotion of chiropractic treatments in certain non-skeletal conditions in children. As Singh explains on the website senseaboutscience.org.uk, the Guardian offered the BCA an opportunity to lay out their evidence rather than to sue him for libel. The BCA opted to sue.

But in response to our recent editorial by Evan Harris (BMJ 2009;339:b2254), the vice president of the BCA Richard Brown, has now presented the evidence (p 78). He writes, “There is in fact substantial evidence for the BCA to have made claims that chiropractic can help various childhood conditions” and lists 18 references. Readers can decide for themselves whether or not they are convinced. Edzard Ernst is not (p 79). His demolition of the 18 references is, to my mind, complete.

Weak science sheltered from criticism by officious laws means bad medicine. Singh is determined to fight the lawsuit rather than apologize for an article he believes to be sound. He and his supporters have in their sights not only the defence of this case but the reform of England’s libel laws. Despite the daunting odds, Marcovich is cautiously optimistic about the future for medical science. A US judge recently dismissed a device manufacturer’s lawsuit against a group of authors, concluding that the fight should take place “in the pages of the journal, not in court.” And last year when chiropractors threatened to sue over an article in the New Zealand Medical Journal, its editor Frank Fitzell spoke for all of us when he asked them to provide “your evidence not your legal muscle.”

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Grebisse BMJ2009;339:a2783

http://www.bmj.com/content/339/bmj.b2783
ABOUT THE LIBEL REFORM CAMPAIGN

The Libel Reform Campaign was founded by English PEN, Index on Censorship and Sense About Science in December 2009, with the aim of obtaining major changes to the libel laws.

The Libel Reform Campaign was launched in response to:

- A number of high-profile libel cases brought to the High Court, where science writers and doctors were sued for libel when they criticised certain medical treatments. These include the cases of BCA vs Simon Singh and NMT Medical vs Dr Peter Wilmshurst and led to the campaign among scientists to Keep Libel Laws Out Of Science
- A report by the UN Human Rights Committee which singled out the libel laws of England and Wales as damaging freedom of expression worldwide
- A research paper by the Oxford Centre for Socio-Legal Studies which suggested that fighting a libel case in the UK was up to 140 times more expensive than elsewhere in the world.
- The enactment of an anti-UK ‘Libel Terrorism’ Law (also known as Rachel’s Law) in the New York State Legislature, and the passing of legislation at the federal level.
- The publication of Free Speech is Not For Sale, the final report into a year-long libel inquiry by English PEN and Index on Censorship, which revealed how the libel laws were stifling the legitimate free speech of NGOs, historians, bloggers, investigative journalists and novelists

The campaign has been funded by thousands of members of the public, the Hargrave Foundation, the Open Society Institute, Kenneth Miller Trust and Nuffield Foundation.