Executive Summary

- Reforming the libel laws has wide support from the public, across civil society, the legal profession, and all the major political parties.
- The Libel Reform Campaign welcomes the Defamation Bill and believes it will deliver reform that will expand the space for freedom of expression in the UK, while allowing those who have been unfairly defamed to seek vindication.
- However, the Bill as it stands still has some unnecessary complexity that could be abused by litigants wishing to censor legitimate free speech
  - The public interest defence clause should be amended so that the court examines the defendant's decision to publish, not their belief. This change would deliver an effective and robust public interest test.
  - The clause relating to website operators must be amended so that it is not in conflict with existing E-Commerce regulations.
- The Libel Reform Campaign supports the inclusion of a clause that places higher hurdles on corporations wishing to sue for defamation.
- The Libel Reform Campaign supports the cross-party agreement to remove the clauses relating to arbitration and press regulation. This issue is distinct from libel law reform and is being addressed in other legislation.
Introduction

The Defamation Bill returns to the House of Commons on 16 April 2013, for consideration of amendments made in the House of Lords.

The Bill is the culmination of a three-year collaboration between the public, civil society groups, and politicians to reform the out-of-date libel laws. More than 60,000 people signed a petition calling for reform, and more than 100 organisations including medical and scientific bodies, author's associations, human rights NGOs, consumer groups and parenting forums joined the Libel Reform Campaign. In the last parliament, 243 MPs signed EDM 423, calling for change, and the three main political parties made general election manifesto commitments to reform the libel laws.

Throughout this process, the Libel Reform Campaign has called for changes that would protect free expression, particularly on matters of public interest, while ensuring access to redress for those whose reputations are unfairly damaged. The key to achieving this is to ensure that the new laws are clear and simple. Reducing the complexity of the law reduces the time and cost of being involved in a libel action for both claimants and defendants. The new law should prevent wealthy companies and individuals from using the libel laws to censor investigative journalists, scientists and bloggers.

The Libel Reform Campaign welcomes the Defamation Bill which will reform our stifling libel laws. However, there are certain aspects of the Bill that are still too complex, and may offer a haven for vexatious litigants. In the sections below we offer a commentary on some of the House of Lords’ amendments to be considered by the House of Commons, and present recommended amendments to the legislation to ensure that a fair and workable law is enacted.

Public Interest Defence - Clause 4 of the Defamation Bill and Lords amendment 3

A clear and strong public interest defence to defamation is vital for open discussion in society and has been described by Minister of State for Justice Lord McNally as ‘the heart of the Bill’. It would allow citizens to criticise, question and participate in debate on matters that affect them without the stifling fear that a legal action would be ruinous. Lords amendment 3 needs to be amended to deliver this.

‘The public interest’ is a well established legal concept and is not equivalent to ‘what interests the public’. The current common law public interest defence, the Reynolds defence, requires a defendant to prove that they acted responsibly in publishing their statement, assessed by a
checklist of ten factors. The complexity and uncertainty of the Reynolds defence makes it expensive and onerous to use. The world’s leading science journal Nature recently spent £1.4m using the defence. Since Nature did not know how the checklist of factors was going to be applied nor which factor was going to be most important in court they had to ensure that they fulfilled all ten criteria. The public interest defence in the draft Defamation Bill was initially a version of the Reynolds defence. This was substantially revised by the House of Lords. The Libel Reform Campaign considers Clause 4 an improvement on the original clause and on the common law. However, it still contains a measure of uncertainty. It needs a small but significant change to simplify the law and litigation.

Clause 4 is now centred on a test of the reasonable belief of the defendant that the publication was in the public interest. The uncertainty about how a belief will be tested gives claimants the potential to begin protracted and expensive litigation over a defendant’s state of mind and intentions and there is a risk that judges will introduce an onerous Reynolds-like checklist of factors to ascertain this. Instead, the decision made by the defendant to publish should be scrutinised against public interest concerns.

We recommend the following changes to amendment 3 of the House of Lords codicil:

- leave out “reasonably” and insert “could reasonably have”
- leave out “believed” and insert “decided”

so that Clause 4 Subsection (1)(b) of the Defamation Bill would read:

“It is a defence to an action for defamation for the defendant to show that the defendant could reasonably have decided that publishing the statement complained of was in the public interest.”

The introduction of these changes would mean a judge would have to consider whether the decision to publish could reasonably have been made and would not have to ascertain the defendant’s state of mind. It removes the risk of protracted arguments about a defendant's belief and motives.

These changes would bring into law the best of case law. Lord Brown in the Flood decision said that in deciding whether a public interest defence could be used a judge must decide one question, “could the defendant, given whatever they knew and whatever they had done to guard as far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?”

This change clarifies the law. It would give defendants confidence that they understand what they will be asked to show if the case goes to court. The change has the support of leading council as well as wide support across civic society. Everybody, defendants and claimants, would be in a much clearer position about their rights and protections, and this means disputes could be resolved more quickly and cheaply. It would deliver the clear, strong and accessible law the Government has promised.
Non-natural persons - Lords amendment 2

This amendment introduces a new clause that places some restrictions on corporations and other non-natural persons’ ability to use the libel laws. The Libel Reform Campaign strongly supports the inclusion of this clause in the Defamation Bill. Currently corporations can use the inequality of arms between them and individuals to bully critics into silence. This new clause stipulates that corporations must show actual financial harm before they can start a libel suit. It also prevents private companies performing public functions from suing for libel which would bring them in line with restrictions already placed on public bodies.

Proposals to limit the ability of corporations to sue in libel have been extensively scrutinised by Parliament. Both the the Culture, Media and Sport Select Committee (2010), and the Joint Scrutiny Committee (2011), have made considered recommendations to limit corporations use of libel laws. The issue was debated extensively in the House of Commons Public Bill Committee (June 2012), and the House of Lords Grand Committee (December 2012), as part of the legislative process.

Companies do not have feelings

Reputation is personal. In human rights law, it is derived from the Article 8 right to a private life. The protection of reputation is designed to preserve an individual’s ‘psychological integrity’, which cannot apply to companies and other non-natural persons.

Large corporations use the libel law to bully their critics

A law originally designed to protect people has become a weapon for corporations seeking to protect their brand and profits. The Joint Scrutiny Committee on the Draft Defamation Bill, chaired by Lord Mahwinney and composed of members from all three main political parties, examined this issue extensively. The report of the committee made the following recommendations:

It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss. However, we do not believe that corporations should lose the right to sue for defamation altogether

... we favour the approach which limits libel claims to situations where the
corporation can prove the likelihood of "substantial financial loss". This approach will provide greater protection to freedom of speech but will not, in our view, remove necessary protection for the reputation of corporations.

This recommendation is reflected in subsection 3 of the new clause. The joint committee also made the following recommendation:

There is one additional and significant restriction on corporate libel claims that we endorse: corporations should be required to obtain the permission of the court before bringing a libel claim. This would encourage robust and decisive action by the courts to prevent trivial and abusive litigation from being commenced at all, let alone continued for years.

This recommendation is reflected in subsection 2 of the new clause.

The House of Commons Culture, Media and Sport Select Committee also recommended changes to the law. Reporting in 2010, the committee cited the 'mismatch in resources between wealthy corporations and impecunious defendants' and that a corporation to prove actual damage to its business before an action could be brought.'

Corporations have other ways to protect their reputation

The Culture, Media and Sport Committee also suggested that 'corporations could be forced to rely on the existing tort of malicious falsehood where damage needs to be shown and malice or recklessness proved.' This recognises the fact that corporations do have other means to defend their brands. As well as malicious falsehood, the simple ‘declaration of falsity’ law may also be used to prevent the spread of lies or inaccuracies. Laws governing advertising, competition and business practices govern what one company may say about its competitor. And through their PR and Marketing teams, a company may use its own right to free expression to counter negative publicity.

For small businesses, the reputation and activities of the company are inextricably linked to that of the managers and owners. In such cases, the owner is never barred from suing for libel in person. 'Substantial financial loss' is also relative to the size of the company.

The state should not sue its citizens

Subsection 4 of the new clause codifies the long-established Derbyshire principle which established that government bodies should be open to uninhibited public criticism and therefore do not have the right to sue for libel. Subsection 4 also extends this to private contractors delivering public services.
Operators of Websites - Lords amendments 8-11

Clause 5 concerns operators of websites. The clause seeks to minimise the activities of ‘reputation managers’ who issue legal threats to web hosts, who have no knowledge of the content, rather than the authors of the content themselves. It seeks to prevent website operators from being held liable for content they host, when they do not have any editorial control over that material.

At the same time, the clause addresses anonymous comments and posts, and lays out a simple process by which claimants can request the removal of defamatory material, and the responsibilities and obligations of a web host in such circumstances.

A crucial issue debated in the House of Lords (but never voted upon) concerned the information a claimant should provide to a website operator in a ‘notice of complaint’. The Bill requires at subsection (4)(b) that the claimant state “why it is defamatory of the complainant”. This is an insufficient threshold for a complaint... because many defamatory statements are nevertheless lawful (for example, they may be defamatory and true). By contrast, existing E-Commerce regulations ask for the claimant to also set out why the statement is also unlawful. The disparity between these two pieces of law will create uncertainty and confusion. The Defamation Bill and the E-Commerce regulations must be reconciled before the Bill becomes law.

This may be achieved by amending the Bill as follows.

Page 3, line 37, after “complainant” insert “and wrongful”

Page 3, line 37, at end insert “including—
(i) why any facts in the statement complained of are untrue; and
(ii) why any opinions in the statement complained of are unsupportable; and
(iii) why the statement has caused or is likely to cause serious harm to the reputation of the claimant”

The amendments do not ask claimants to litigate a defamation case in their notice of complaint, but they do ask for basic factual information to be set out. Claimants with a legitimate complaint will not find this added criteria too onerous. However, this extra requirement should discourage vexatious ‘reputation management’ claims against web hosts.
Arbitration Service - Lords amendments 1, 15 and 16

These amendments to the Defamation Bill, tabled by Lord Puttnam, make provisions for an Arbitration Service, in a form similar to some of Lord Justice Leveson’s recommendations on press regulation. This concept was not scrutinised by the joint committee chaired by Lord Mawhinney, nor at earlier stages of the Bill’s passage through the House of Commons and the House of Lords.

The Prime Minister, in a speech to the House of Commons on 18 March 2013 on the Royal Charter for Press Conduct, said:

    The Defamation Bill will proceed. Its clauses relating to the Leveson report will be reversed by all three parties voting together, so it can now go through the House.  

( Commons Hansard 18 March 2013, Col. 635)

In light of this statement, we expect all three main parties to vote against the inclusion of this new clause and schedules into the Bill. The Libel Reform Campaign supports this move.

The Libel Reform Campaign

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<tr>
<th>English PEN</th>
<th>Index on Censorship</th>
<th>Sense About Science</th>
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</thead>
<tbody>
<tr>
<td>Contact:</td>
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