

Missing the wood (with no excuses): the Defamation Bill 2012

Alastair Mullis and **Andrew Scott** argue that the Defamation bill misses the mark and reeks of a Government unprepared to do the hard-thinking necessary to produce a media law fit for our contemporary society.



The Defamation Bill is to receive a second reading in the House of Commons on 12 June. In preparation, Lord McNally has been repeating the mantra that the reforms will introduce a better balance between free speech and the protection of reputation in the law of libel. The inference to be drawn is that the substantive law is currently weighted in favour of reputation. Any casual observer of the ballyhoo and passing frenzy that has characterised discussion of this issue over the past 24 months would no doubt nod assent.

As we demonstrated in a recent paper ([‘The Swing of the Pendulum’](#) (2012) NILQ, 63(1), 27-58), however, this conclusion is simply divorced from reality. Every change to the law of libel in recent decades has promoted free speech. The law is not now particularly at fault. Very notably, none of the *cause célèbre* cases that are cited as evidence of the problems with the law – Simon Singh’s case; Hardeep Singh’s case; Peter Wilmhurst’s case; Henrik Thomsen’s case – culminated in a loss before the courts. Libel tourism, as a curial phenomenon, has been proven by the Ministry of Justice’s own research to be all but a figment of the imagination.

The Defamation Bill manifestly misses the mark. The problem with libel has always been and remains the harm caused by threats and bullying in the shadow of the law. Such threats rely on the fear of the cost of embroilment in libel proceedings, not on the expectation that a case would necessarily be lost. The chilling effect that costs create persists; signal instances can be easily cited. It can bite either before publication to deter criticism, or after the fact to see defendants with solid cases capitulate.

Importantly, though, this harm bites both ways. Recalcitrant publishers have equally been able to outlast the average claimant in the battle of deep pockets through costly legal game-playing and prevarication. Most potential claimants lack the financial wherewithal even to contemplate legal action. As [we have suggested from the outset](#) of the libel reform debate, it would be best if attention was directed towards reforming costs, procedures and remedies. One of us would go further, and recommend [the introduction of ‘anti-SLAPP’ legislation](#).

Yet, and aside from introducing [questionable new rules for Internet publication](#), Lord McNally’s Bill adopts two enervating strategies. First, in the early clauses it offers what is essentially a restatement of the existing law on the ‘seriousness gateway’ (clause 1) and on the main defences (clauses 2, 3 and 4). This will have two main effects: to create uncertainty as lawyers take time and money to ask the courts whether the law remains as it was, and to put paid to the old trope that Parliamentary time is precious.

The second strategy pursued in the Bill is the setting out of arbitrary rules that will prevent people with perfectly valid claims from seeking redress for harms to their reputation. Hence we have the single publication rule (clause 8), the jurisdictional exclusion (clause 9), and the privilege for scientific and academic publication (clause 5). These proposals follow on from the travesty of recent changes to the litigation funding regime that in practice return libel law to being the preserve of the wealthy.

All of this would be fine if reputation, whether corporate or personal, did not matter. If the goal is to apotheosise free speech, however, then it would be simpler and more candid for the Government simply to repeal the law of libel. But of course, as every scholar of literature, every business person, and at least those MPs of the 2009 vintage must understand, reputation is a key component of each individual’s public life and psychological integrity. Moreover, without it, any business is finished. Devastating harm can be exacted before the truth gets its boots on.

The Bill proffers precisely the meagre proposals that one would bring forward after having approached the matter with only one eye open, and having assumed that nothing could be done about the real problems of high cost, over-complicated process and inappropriate remedies. In those areas, the Bill takes only the lowest of low-hanging fruit. Remedies are left virtually untouched, bar the possibility that at the very end of the day a court may order a summary of its judgment to be published (Clause 12). There is nothing radical in the Bill that will change significantly the way in which complaints proceed.

We have published our views on a better way forward elsewhere ([‘Reframing libel: taking \(all\) rights seriously and where it leads’](#) (2012) NILQ, 63(1), 5-25). We may not have the right solutions (we suggest taking much of the libel process out of the High Court, jettisoning the complicating ‘single meaning rule’, emphasising discursive remedies, and changing the rules on costs allocation), and certainly have not persuaded the Government. Nevertheless, our suggestions do address the central issue of what libel law is for, how it should operate, and how we might sensibly simplify the existing law and procedure. Other good proposals are not thin on the ground.

Perhaps most importantly, we must recognise that what most people really want when they are defamed is a right to set the record straight, or at least to put their side of the story. A proper system of discursive remedies has the potential to divert many potential claims from the courts. It would see the truth put into the public domain (corrections), and/or provide for the other side of the story to be heard (rights of reply). Freedom of speech should not be conceived of as a right to defame others without consequence. Who would choose to live in a Sinonian land of plausible liars, and to suffer the lies they tell?

In this context, the contrast between the Bill and the prescription for the future mooted last week by [Lord Justice Leveson in conversation with Tony Blair](#) is embarrassingly stark. In the judge’s view, the system must ingrain free speech, but should also include a mechanism that allows members of the public to challenge publishing decisions that impinge wrongly on privacy or reputation. It should provide for speedy and effective redress with sanctions that work, particularly for those currently unable to contemplate litigation. Well said.

Should not the Government wait on the recommendations to be presented by Leveson in the Autumn? Of course, but sadly the Bill reeks of a Government unprepared to do the hard-thinking necessary to produce a media law fit for our contemporary society.

Note: This article gives the views of the author, and not the position of the British Politics and Policy blog, nor of the London School of Economics. Please read our [comments policy](#) before posting.

About the authors

Andrew Scott is a Senior Lecturer in Law at the London School of Economics and Political Science. His research interests lie in the fields of media law and regulation, constitutional law and competition law.

Alastair Mullis is a professor and Head of the Law School at the University of East Anglia. He was educated at King’s College London (LLB) and the University of Cambridge (LLM). His main research interests lie in the law of defamation and aspects of international commercial law but he has also written extensively in the area of child sexual abuse

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