

A new style public interest defence in libel law ensures that rights and interests of claimants, defendants and the wider public are properly protected

Andrew Scott and Alastair Mullis discuss the Defamation Bill making its way through Parliament. They argue that the newly proposed amendment allows the bill to both protect the right to reputation while also promoting the right to free speech. This proposal introduces a 'discursive remedy' that would reduce the need to bring costly claims, and a novel focus on the honesty and reasonableness of the publisher's belief that publication would be in the public interest.



An interesting proposal has slipped quietly into the mix for consideration during the House of Lords Committee stage deliberations on the [Defamation Bill](#). During the [Second Reading debate](#), Lord Lester mooted a possible alternative to the clause 4 defence of responsible publication on a matter of public interest. The Joint Committee on Human Rights has [pressed the Government](#) on the desirability of the new alternative. In our view, the proposal – developed by Sir Brian Neill – offers an opportunity both to improve the operation of the existing common law defence and to 'tidy up' aspects of the existing Bill.



During the extended public and policy debates on libel reform, we have been critical of many of the iterations of proposed amendments to the law. That said, we have always considered the diagnosis of the problems for publisher-defendants offered by the [Libel Reform campaign](#) to be persuasive. Fundamentally, our view has been that libel law can be so designed as to both protect the Article 8 right to reputation and to promote, rather than necessarily to restrict, the Article 10 right to free speech. The newly proposed variation to clause 4 would appear to meet that stipulation.

Until now, clause 4 of the Bill has been essentially unremarkable in that it did little more than reiterate [Reynolds](#) in statutory form. For that reason, it has been criticised by campaigners who have proposed a good faith or malice-based standard equivalent to the US law inspired by [New York Times v Sullivan](#). A public interest defence based on good faith alone would be easily exploited by unscrupulous publishers. It is alternatively the 'Tim-Nice-But-Dim' defence, or the 'I'm Mendacious But Can Hold a Straight Face' defence. It is not suited to the constitutional framework that prevails in the UK or Europe more broadly. It would clearly not be compliant with the Convention on account of its failure to allow any opportunity to consider the proportionality of the restriction it would impose on the right to reputation.

The third option recently developed by Sir Brian Neill and aired by Lord Lester would introduce a 'discursive remedy' gateway, and then a novel focus on the honesty and reasonableness of the publisher's *belief* that publication would be in the public interest. This is different in focus to the current common law defence that asks whether the *act* of publication – or communication – was 'responsible'. This new option should be endorsed in Parliament. It provides an opportunity to improve the defence, and to clarify both its relationship with honest opinion (formerly fair comment: a defence available when an author draws a damaging inference from underpinning facts that are alluded to in the text, if that inference could have been drawn by an honest person) and the drafting of the Act.

A Difference in Emphasis

There is room to debate how far a shift in focus from the 'responsibility of journalism / communication' to the 'reasonableness of belief that publication is in the public interest' would entail any substantive change. We think there are two areas in which this approach would change, or at least clarify the law. The first arises because there have always been two views as to what the *Reynolds* defence should achieve: (a) it should provide for a publisher to evade liability only when an important publication that is believed

to be true and defensible in court when published ultimately proves to have been wrong, or (b) it should also allow publication of allegations that the publisher strongly considers to be true, but thinks are perhaps likely not to be defensible in court (for example, because a highly credible source will not testify, cannot ethically be asked to testify, or may be thought emotionally incapable of withstanding cross-examination). In this second scenario, the allegations may well be true, but not provably so in court. It would seem to us that the test proposed by Lord Lester would much more clearly encompass both of these scenarios.

The second change or clarification rests on the fact that the honesty and reasonableness defence would shift attention away from the manner in which allegations were levelled. In his seminal speech in *Reynolds*, Lord Nicholls identified “the tone of the article” as one of the factors relevant to responsibility. Whether or not the manner in which the article is written should be a relevant factor in the analysis under clause 4 has been contested. It is at the root of expressed concerns that the current clause does not reflect a purported move away from this requirement in the recent decision of the Supreme Court in [Flood v Times Newspapers](#).

Tidying the Drafting of the Bill

If one accepts that judges should resist the temptation to sit in the editor’s chair, then the Lester-Neill proposal has a further benefit. It would allow a clarification of the muddled water between the *Reynolds* defence and the defence of honest opinion that is caused by clauses 3(7)(a) and clause 4(5) in the current Bill ([and which we have highlighted previously](#)). The former subclause provides that false, but *Reynolds*-privileged facts can be the basis of honest opinion; the latter that the clause 4 defence applies irrespective of whether the impugned statement is one of fact or opinion. In our view, clause 3(7)(a) should not cite clause 4. The current provision does make sense from the perspective of the original publisher who mixes (what turns out to be *Reynolds*-privileged) fact and comment. It simply does not make sense, however, from the perspective of the second publisher who relies on (what turn out to be false) facts published by someone else. Under the current iteration of the Bill, that second publisher is in effect asked to prove *Reynolds* by proxy: an impossible feat.

Our solution predicated on the new proposal: clause 3(7)(a) should be excised, and a new clause 3(4)(c) should be introduced to read, “any fact concerning a matter of public interest that he reasonably believed to be true at the time the statement complained of was published”. That is, the clause 3 honest opinion defence should be available when the factual basis for opinion expressed was either true, privileged, or reasonably believed to be true. This change, coupled with the introduction of an honest and reasonable belief test in clause 4, would remove the uncomfortable and conceptually flawed need to apply clause 4 ‘universally’ to publications that mixed statements of fact and expression of opinion. Whether something was best analysed as a statement of fact (with clause 4 applying) or of opinion (with clause 3 applying) would become immaterial: either way the applicable tests would be the reasonableness and honesty of the belief that publication was in the public interest.

Convention-Compliance

We consider that the Lester / Neill proposal would be Convention-compliant. The assessment of whether a journalist’s belief was reasonable would involve essentially the same analysis in terms of pre-publication behaviour as that which currently is applied under the *Reynolds* defence. The question would be how the belief was reasonable, rather than how the journalism was responsible. A well-resourced journalist could not reach a reasonable belief that publication was in the public interest without first having done what an ethical journalist should do to stand up a story. The position, and hence the expectation, would clearly be different in the case of the garret-room blogger or ‘below-the-line’ commenter. The Article 8 right to reputation could influence this analysis in the same way as it does under the current *Reynolds* defence. Moreover, the requirement to provide a discursive remedy in order to rely on the defence would allow a structured opportunity to vindicate reputational rights. This would overcome claimants’ frequently felt lack of access to a suitable platform for response.

The Discursive Remedy Gateway

As a final point, we consider that some attention should be given to the precise nature of the discursive

remedy to be required under clause 4. It may be that affording a 'right of reply' would be preferable to insisting on a correction or apology. This would be especially the case in circumstances where the publisher wished to maintain the accuracy of the original story. We note that the general approach under the proposed new clause 4 is coherent in concept with our own suggestions made previously regarding [retention of the multiple publication rule and introduction of a correction or notice-based defence](#) in preference to the proposed single publication rule in clause 8 of the Bill.

We also wonder whether this change in emphasis over clause 4 should prompt a more general reconsideration by the Lords of the question of whether a general right of reply and/or correction similar to that which exists in many jurisdictions around the world should be introduced. What most people who complain of having been libeled want is a swift correction or a right of reply. They do not want to become embroiled in expensive and lengthy litigation. Similarly, most responsible defendants would (or should) be content to publish a swift correction when the truth is pointed out to them. Where the truth is contested they should offer a right of reply. In limited circumstances, English law already requires that a correction or explanation be published. The Lester / Neill proposal would extend this further. A general right to a discursive remedy could have a dramatic effect on the need to bring costly claims, and would ensure that rights and interests of claimants, defendants and the wider public were properly protected.

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