



**BBC** Scotland

BRITISH BROADCASTING CORPORATION  
BBC Scotland  
40 Pacific Quay  
Glasgow G51 1DA  
Scotland  
T +44 (0)141 422 6000  
bbc.co.uk/scotland

COMHAIRLE CRAOLAIDH BHREATAINN  
BBC Alba  
40 Cidhe a' Chuain Shèimh  
Glaschu G51 1DA  
Alba  
Fòn +44 (0)141 422 6000  
bbc.co.uk/scotland

From the Legal Department, Zone 3.03: 40 Pacific Quay, Glasgow G51 1DA

18<sup>th</sup> July 2014

Professor Hector MacQueen  
The Scottish Law Commission  
140 Causewayside  
Edinburgh  
EH9 1PR

Dear Professor MacQueen

Defamation Law Reform

I refer to our conversation yesterday about the need (as I would see it) to reform defamation law in Scotland.

As you know, with the Defamation Act 2013, our southern neighbours have instituted a single publication rule, codified the Albert Reynolds defence for responsible journalism, provided a supplementary defence for online intermediaries and generally reset defamation law for the internet age. Almost none of the benefits of the Act from a freedom of expression perspective extend to Scotland, with the principal exception of peer-reviewed scientific articles and the like.

Last night, I attended a libel reform seminar hosted by the Saltire Society and arranged by English PEN. I enclose a copy of a letter from Robert Sharp of English PEN, which was published in yesterday's Herald and will demonstrate the concern in some quarters in our neighbouring jurisdictions about the potential of Scottish defamation law as it stands to undermine freedom of expression, consumer protection, corporate scrutiny, and so forth.

Of course, Scotland has a separate legal system and the fact that this might compromise the efficacy of the 2013 Act could be a price worth paying if Scottish defamation law were in better shape than its southern counterpart, but the reality is that it has not received detailed recent scrutiny in any official quarter. In fact, it will now largely be governed by the rump of an Act designed for the UK as a whole and from which the larger jurisdictions of the United Kingdom have moved on in the light of the revolution in communications since 1996.

I appreciate that this is a niche area of the law, but in terms of Articles 8 and 10 of the European Convention on Human Rights, it is an important one, especially as, as Robert Sharp puts it, we are all publishers now. Given, in particular, Lord Pentland's expertise in this area, coupled with the steps taken in the Defamation Act 2013, this would seem to be the right time for a root-and-branch scrutiny of Scottish defamation law.

Yours sincerely

Rosalind M M McInnes  
Principal Solicitor

# How do we protect free speech in an age when we are all publishers?

## AGENDA

A column for outside contributors.  
Contact: agenda@theherald.co.uk

### ROBERT SHARP

LAST year, the Libel Reform Campaign celebrated as Westminster passed the Defamation Act 2013. The new law expanded the space for free expression, offering new defences against legal threats when people speak out on matters of public interest.

Scientific debate now enjoys special protections and a further hurdle was set for companies before they can sue.

Unfortunately, most of the new law applies only to England and Wales. None of the provisions applies in Northern Ireland, and only two in Scotland.

Incredibly, the cradle of the Enlightenment offers fewer free speech protections than England and Wales. This state of affairs cannot be allowed to continue. Critics may point to the fact that

there are very few defamation cases fought in Scotland and that there is therefore no problem with the libel law. Others may argue that the tabloids need to be kept on a tight leash. Both of these objections fail to understand the reality of the "chill" on free speech.

In the four years English PEN, Index on Censorship and Sense About Science campaigned for reform of the law in England and Wales, we heard countless stories of ordinary people being threatened with legal action.

In the age of blogging, chat forums, Facebook and Twitter, everyone is a "publisher" and anyone can become the target of wealthy individuals and corporations wishing to suppress criticism.

Cardiologist Dr Peter Wilmshurst was sued by a medical device company when he criticised a heart implant it was selling.

Campaigning NGOs such as Global Witness often spend thousands of pounds fending off legal challenges. The Mumsnet website received legal threats from an author of parenting books after parents criticised the parenting methods in forum comments. Libel lawyers have bullied football

fans who blog about takeover bids and the management of their club. The libel law affects the ability of ordinary people to discuss the subjects that matter to them.

When the Defamation Bill was still being debated in Westminster, the Scottish Government had to make a decision on which aspects of the law would be extended to Scotland too.

Justice Secretary Kenny MacAskill agreed to adopt the clause giving extra protections to scientific debate in scholarly journals.

He recognised that academic research takes place collaboratively across the border, and that "parity of protection" would be desirable.

This was sensible reasoning but it is odd that Mr MacAskill did not extend that train of thought to the other protections offered by the Bill. For example, there were also proposals to improve the way Internet Service Providers (ISPs) should handle defamation claims.

Why do Scottish ISPs not deserve the same level of protection from mischievous claimant lawyers as companies based in England or Wales?

The fact that the law of defamation remains unreformed

in Scotland and Northern Ireland presents problems for everyone in the UK: it erodes the welcome provisions in Westminster's Defamation Act and undermines the liberalising impact of the new legislation for freedom of expression.

All of us will continue to risk facing legal action in Scotland or Northern Ireland. We will be forced into caution and self-censorship when we should be writing with greater freedom on issues that concern the whole of the UK.

Today, the Libel Reform Campaign begins working with Scottish PEN to bring our campaign for change to Scotland.

We need to persuade politicians that libel threats stunt public debate and interfere with the way in which we lead our lives.

If you've felt the pressure from a threatening letter when you tried to speak up on a matter of public interest, we would be eager to hear from you.

Robert Sharp is head of campaigns at English PEN.



Add your comment online at [heraldscotland.com](http://heraldscotland.com)