

SCVO briefing to Scottish Parliament

Defamation and Malicious Publication (Scotland) Bill Stage One debate

November 2020

Summary of our position

- The Scottish Council for Voluntary Organisations (SCVO) **supports the exemption** for charities under part two of the Defamation and Malicious Publication (Scotland) Bill.
- The Scottish Government should redraft the section to be more precise over which bodies are covered or exempt by the legislation, but the exemption for charities must remain.
- Removing the exemption would place disproportionate risk on charities, whose ability to absorb reputational damage and the potential immediate and direct impact of the loss of income is far less than public bodies.
- The public's trust in charities links to reputation, which is formed in part by the judgement of others and what they say – this includes statements made or published by the media.
- The prominence of media as an arena where reputations are lost and won, which can seriously affect charitable giving, means charities must have a right to protection of reputation in circumstances where they deem themselves subject to defamation.
- Charities must operate transparently and be accountable for their activity, and the media plays a vital scrutiny role in uncovering stories of public interest. This, however, does not negate a charity's right to protection from harm.
- The removal of the exemption without an appropriate awareness of the risk to charities gathered through proper consultation and analysis would not have due regard for the reputation of Scotland's voluntary sector.

Our position

The Scottish Council for Voluntary Organisations (SCVO) supports the exemption for charities under part two of the Defamation and Malicious Publication (Scotland) Bill. This exemption for charities from the '*prohibition on public authorities bringing proceedings*' (also referred to as the Derbyshire Principle), would mean that a charity providing a public function would still be able to bring defamation proceedings.

SCVO has recognised that the exemption for charities from the Derbyshire Principle, as introduced at Stage One, received attention during the Justice Committee's examination of the Bill. While we support the committee's recommendation that the Scottish Government should redraft the section to be more precise over which bodies are covered or exempt by the legislation, the exemption for charities must remain.

Trust in charities is inherently linked to reputation, in that the general public's trust of charity is not only formed on personal interactions but also relies on the judgement of others and what they say – this includes statements made or published by the media. As reputation allows or stops a charity from securing and maintaining trust, charities must have the right to protection of reputation. This includes where someone, including the media, unjustifiably damages a charity's reputation in written or spoken form.

The media plays a vital role in setting the public mood and can impact people's trust in charity. SCVO research in 2018 highlighted that negative media stories are significant, with 38% of respondents to our survey revealing media stories reduced their trust in charities. Given the prominence of media as an arena where reputations can be lost and won, and reputations damaged by the media are hard – if not impossible – to correct outside the media, charities must have a right to protection of reputation where they have been subject to defamation.

We welcome the valuable contribution the media makes in helping charities to increase awareness and engagement from supporters, better enabling them to fundraise and share stories, campaigns and achieve their charitable aims. On the flip side, charities must be accountable for their activity, and the media plays a vital scrutiny role in uncovering stories of public interest. The media should have adequate protection to perform its role in holding others to account.

However, the view that the defamation rule should follow the public pound is too simplistic as it fails to recognise the disproportionate risk this would place on charitable organisations compared to public bodies. The consequences of a malicious publication are far greater for charities, who rely on supporters – both individuals and organisations – to generate income to achieve their charitable purpose. A charity's ability to absorb reputational damage and the potential

immediate and direct impact of the loss of income is far less than public bodies. It is impossible to separate the effect of a defamatory statement made solely about a charity's delivery of a public function from a charity's other activities and overall reputation.

Bringing legal action through the courts is not a simple decision for a charity to make. The decision to bring defamation proceedings would need to be agreed by trustees, who have a duty of care when managing the affairs of a charity. Public legal proceedings bring a degree of risk and damage to any organisation taking this action, both reputationally and financially. It is an extreme case, where trustees have considered that not bringing defamation proceedings would cause greater risk and damage to the charity.

While the Bill, as it stands, makes an exemption for charities, and further clarification of this through redrafting would be welcome, SCVO would be seriously concerned by any changes to the Bill to remove the exemption for charities. Such an undertaking without an appropriate awareness of the risk to charities gathered through proper consultation and analysis would not have due regard for the reputation of Scotland's voluntary sector.

