

### Qualified Privilege

This briefing note is intended to offer a brief overview of the use of qualified privilege by councillors as a defence to claims for defamation. In order to assess this topic, the foundations of defamation and the general defences to it must first be established. Members should note that law surrounding defamation is often complicated and can carry very serious implications for individuals. As such, this guidance is provided as a brief overview of the topic, but members are strongly advised to seek specific legal advice in advance if a relevant matter arises.

#### **Defamation**

The law surrounding defamation is intended to protect the reputation of individuals and has been broadly defined as relating to statements which ‘tend to lower the plaintiff in the estimation of right-thinking members of society generally’. Defamation covers both libel and slander. The offence of slander can include defamatory speech and gestures, while libel requires publication of the defamation, which can include television and radio broadcasts in addition to written material.

There are four main questions which must be asked in bringing a successful claim for defamation:

- Is the statement defamatory?
- Does the statement refer to the claimant?
- Has the statement been published?
- Are there any relevant defences?

#### **Defences**

At present, i.e. prior to any enactment of the Defamation Bill, the main defences to defamation are as follows:

- Justification: that the statement can be proved to be true.
- Honest comment: that the person who made the statement had the right to make the comment, meaning that it was an honest comment made in the sphere of public interest.
- Privilege: that the statement was made on a ‘privileged’ occasion and so is not subject to defamation proceedings.

#### **Qualified Privilege**

Qualified privilege is to be distinguished from absolute privilege. Absolute privilege is a complete defence to any accusation of defamation and covers situations including trials and Parliamentary debates. Qualified privilege is a weaker variant, and applies only to statements made in accordance with a specified list of situations laid out in statute or in accordance with the common law test laid out below. Qualified privilege is also lost if it can be shown that the statement was made with malice, i.e. that malice was the ‘dominant and improper motive’. Establishing malice would normally require a demonstration either of recklessness or dishonesty on the part of the person making the statement.

Councillors as a group are not automatically protected either by absolute or qualified privilege. Instead they must usually rely on the relevant defence established at common law for qualified privilege, namely that the councillor has a legal, social, or

moral duty to impart the information and the recipient, normally the public or fellow councillors/officers, has an interest in or duty to receive the information.

A key legal case covering qualified privilege in relation to councillors was *Horrocks v Lowe* [1975] in which Lord Denning found that:

'It is of the first importance that the members of a local authority should be able to speak their minds freely on a matter of interest in the locality. So long as they honestly believe what they say to be true, they are not to be made liable for defamation. They may be prejudiced and unreasonable. They may not get their facts right. They may give much offence to others. But so long as they are honest, they go clear. No councillor should be hampered in his criticisms by fear of an action for slander. He is not to be forever looking over his shoulder to see if what he says is defamatory. He must be allowed to give his point of view, even if it is hotly disputed by others. This is essential to free discussion.'

However, it is important to note that the above will certainly not apply to all statements made by councillors. It is likely that qualified privilege would be found to apply to statements made in full council or committee meetings, and might also extend to some internal working groups. The privilege would be more difficult to extend to general interactions with the public or third parties outside meetings.

Members may also be interested to note that the Defamation Act 1996 applied qualified privilege, subject to affected parties being able to supply an explanation or correction where necessary, to the following situations:

- A fair and accurate report of proceedings at any public meeting or sitting in the United Kingdom of a local authority or local authority committee, the executive of that authority or a committee of that executive.
- A fair and accurate record of any decision made by any member of the executive where that record is required to be made and available for public inspection by virtue of section 22 of the Local Government Act 2000 or of any provision in regulations made under that section.

In the UK, unlike some other common law jurisdictions, the media has no special status for qualified privilege, and, while their special role is recognised to an extent, must rely on the same defences as councillors or members of the public in establishing qualified privilege.

**Carolyn Wheater, 21 February 2013**