

Report of the City Solicitor

Report to Standards and Conduct Committee

Date: 7th March 2014

Subject: Defamation and Qualified Privilege

Are specific electoral Wards affected? If relevant, name(s) of Ward(s):	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Are there implications for equality and diversity and cohesion and integration?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Is the decision eligible for Call-In?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Does the report contain confidential or exempt information? If relevant, Access to Information Procedure Rule number: Appendix number:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

Summary of main issues

1. This report considers the application of the law in relation to defamation to elected Members, and provides advice on how to minimise the risk of a successful claim of defamation.
2. The report also sets out details of the Council's indemnity for Members and officers which extends to the defence of an allegation of defamation made against them.

Recommendations

3. Standards and Conduct Committee are requested to note the contents of this report.

1 Purpose of this report

- 1.1 This report provides an overview of the potential use of the defence of qualified privilege in any proceedings against a Member in relation to a claim of defamation.
- 1.2 The report also considers the Council's indemnity for Members and officers in so far as it extends to the defence of an allegation of defamation.

2 Background information

- 2.1 Except in limited circumstances in which press and public can be excluded the Council conducts its meetings in public, and in the 2013/14 Municipal Year the Council has begun webcasting Full Council meetings. In addition, the Council is facing increasing requests from press and public to record meetings of Council, Executive Board and their committees.
- 2.2 With the increasing use of social media and the internet, statements made by Members in meetings of Full Council, Executive Board and their committees, are more likely to be drawn to the attention of an increasingly wide audience, with potentially limited reference to the context in which those statements have been made.

3 Main issues

- 3.1 The law of defamation, which includes both slander and libel, is intended to protect the reputation of individuals from statements (both spoken and written) or gestures which:-
 - Expose a person to hatred, ridicule or contempt; or
 - Cause him/her to be shunned or avoided; or
 - Has the effect of lowering his/her reputation in the estimation of right-thinking members of society generally; or
 - Injures him/her in their office, profession or trade.

In accordance with the Defamation Act 2013 a statement will only be defamatory if its publication has caused or is likely to cause 'serious harm' to the claimant's reputation. Where the claimant is a body trading for profit 'serious harm' means 'serious financial loss'.

- 3.2 There are a number of defences to a defamation claim, including:-
 - That the imputation is substantially true
 - Honest opinion – that the defendant made a statement of opinion, setting out the basis of that opinion, and that an honest person could hold that opinion based on established fact or fact asserted under privilege on a previous occasion.

- Publication on a matter of public interest - that the statement was, or was part of, a statement on a matter of public interest, and the defendant reasonably believed that publishing the statement was in the public interest.
- Unintentional defamation – where the defamation is made unintentionally and without negligence, a defendant may avoid damages if a reasonable correction and apology is published. If the matter is the subject of a claim before the apology is published the defendant may be liable for costs in these circumstances.
- Privilege – the comment was made on a privileged occasion and is not therefore subject to defamation proceedings.

3.3 Privilege can be absolute or qualified;

- Absolute Privilege, which is a complete defence, covers situations including trials and Parliamentary debates;
- Qualified Privilege, which is a limited defence, applies in a number of circumstances, some of which are set out in statute and some of which are established in common law, provided that it can be shown that the statement was not made with malice.

3.4 The defence of privilege is not automatic for Councillors but is usually argued under the common law. To do so it must be shown that the Member has a legal, social or moral duty to make the statement and the recipient (whether a fellow Councillor, officer or member of the public) has an interest in, or a duty to receive the information.

3.5 Qualified privilege is lost as a defence if it can be shown that the ‘dominant and improper motive’ for making the statement was malice. Malice may be inferred where the defendant was motivated by a purpose other than his interest or duty to make the statement, for example giving vent to personal spite or ill-will. Likewise the defence can be lost if the statement was made with recklessness or dishonesty on the part of the defendant as to the truth of the statement. However, so long as the person making the statement honestly believes the statement to be true it is not usually possible to infer malice.

3.6 Case law supports the proposition that Members should be able to “speak their minds freely on a matter of interest in the locality.” Lord Denning went on to say “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”.¹ In addition, under the Human Rights Act 1998 political speech receives a high level of protection, although general statements criticising the public or a section of the public may not qualify as political speech and so may not provide a defence.

3.7 Whilst it is likely that the defence will apply to comments made in full Council or at committee meetings, and possible that it may apply to internal working groups, qualified privilege would be more difficult to extend to general interactions with the

¹ Horrocks v Lowe [1975]

public or third parties outside of those meetings. In addition it should be noted that the defence will only apply where the publication of the statement falls within the duty to make and receive the statement – where the statement is published to a wider audience than is necessary the defence may be lost². However, even if the defence of qualified privilege cannot be relied on in more general interactions, the “public interest” defence referred to in 3.2 above may still be available.

- 3.8 There are a number of questions which a Member should ask themselves if concerned that a statement they intend to make could be defamatory. These are set out in the checklist attached at Appendix 1 to this report.
- 3.9 The Council offers an indemnity to Members and officers which includes the defence of a claim for defamation. The indemnity, which is supported under the Council’s insurance cover, provides up to £1 million cover, to defend claims made against Members in relation to statements made whilst acting in their capacity as a Member and carrying out the business of the Council.
- 3.10 Members should be aware that statements made other than in good faith may not be covered by the indemnity, which would leave them responsible for their own legal costs.

4 Corporate Considerations

4.1 Consultation and Engagement

- 4.1.1 There are no implications for this report.

4.2 Equality and Diversity / Cohesion and Integration

- 4.2.1 There are no implications for this report.

4.3 Council policies and City Priorities

- 4.3.1 The public nature of the Council’s meetings, the live streaming of Full Council and the increasing openness to the recording of public meetings is in line with the Council’s value of being open, honest and trusted.

4.4 Resources and value for money

- 4.4.1 There are no implications in relation to this report.

4.5 Legal Implications, Access to Information and Call In

- 4.5.1 This report contains a summary of the law of defamation so far as it relates to elected Members. However it should be noted that the defence of qualified privilege described is as established in common law and it is therefore impossible to provide any categorical assurance to Members that particular situations or statements would be subject to the defence.

4.6 Risk Management

² De Buse v McCarthy [1942]

- 4.6.1 Whilst the Council's insurance covers the defence of defamation proceedings up to £1 million, the first £500k of any claim is payable by the Council. This is an accepted risk and is in line with the council's insurance of liability risk across the board.

5 Conclusions

- 5.1 The defence of Qualified Privilege applies to statements made by elected Members whether in meetings of full Council, committees and internal working groups, and this defence and/or the "public interest" defence may be available to Members in their general interactions with the public and third parties outside of those meetings.
- 5.2 The defence of qualified privilege may extend to statements made in meetings, where there is an existing legal, social or moral duty to make the statement, and a corresponding duty on the part of its recipient, so long as the statement is made in the honest belief that it is true and that the motivation for making the statement is not improper or malicious. The "public interest" defence, and the "serious harm" requirement for defamatory statements in the 2013 Act, should also afford considerable protection for Members both in relation to statements made in formal meetings, and in relation to their informal interactions with the public and third parties.
- 5.3 The checklist attached at Appendix 1 to this report may assist Members in determining whether a statement that they intend to make could be considered defamatory. However, where there is doubt Members are encouraged to seek advice from Legal Services in the first instance.
- 5.4 The Council extends an indemnity to its Members and officers which includes the defence of an allegation of defamation.

6 Recommendations

- 6.1 Standards and Conduct Committee are requested to note the contents of this report.

7 Background documents³

- 7.1 None

³ The background documents listed in this section are available to download from the Council's website, unless they contain confidential or exempt information. The list of background documents does not include published works.

Checklist Of Questions To Ask If A Statement May Be Defamatory

Before making any statement which may be defamatory:-

- Check your facts;
- Examine your motives;
- Remain courteous – even under provocation; and
- If in doubt take legal advice.

It may help to ask yourself the following questions:-

1. Do I have an interest in or duty to make the statement?
2. Is there a corresponding interest or duty on the part of:-
 - a. other Members; or
 - b. the press and publicto receive it?
3. Do I reasonably believe in the truth of the comment that I am about to make?
4. Am I motivated to make the statement only by my interest or duty to make it?
5. Will the statement cause serious harm to someone's reputation?
6. Is the statement on a matter of public interest?
7. Do I believe that making the statement is in the public interest, and is it reasonable for me to believe this?