

**The Law Commission**  
**Consultation Paper No 163**

**PUBLICATION OF LOCAL AUTHORITY  
REPORTS**

**A Consultation Paper**

**London: The Stationery Office**

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 20 March 2002, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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It may be helpful for the Law Commission, either in discussion with others concerned or in any subsequent report, to be able to refer to and attribute comments submitted in response to this consultation paper. In particular, it may be useful to make responses available to the Society of Local Authority Chief Executives Review Group. Any request to treat all, or part, of a response in confidence will, of course, be respected, but if no such request is made the Law Commission will assume that the response is not intended to be confidential.

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## EXECUTIVE SUMMARY

1. In February 2000 Sir Ronald Waterhouse published the results of the inquiry he chaired into abuse of children in care in North Wales.<sup>1</sup> Concern was expressed in the Waterhouse Report that in some circumstances local authorities may be unduly inhibited from acting in the wider public interest. They might be constrained by threat of legal action or loss of insurance cover from publicising failures in service delivery and from acting on inquiry recommendations, and identifying necessary reforms in the light of the results of inquiries conducted by them, or on their behalf.
2. If the effect of the law is to impede publication of the report of the inquiry, then there are several adverse results. Whatever has gone wrong will be more likely to occur again if steps are not taken to prevent it. The authority which set up the inquiry could learn from the report – but if the report is not published, other authorities and bodies which could also benefit from the report will not be prompted to improve their own practices. The facts in relation to the individual complaint ought to be put into the public domain, but if the report is not published they may not be.
3. The Waterhouse Report recommended that the Law Commission examine the legal issues surrounding the publication of local authority reports, and consider whether there is a need to reform the law. The matter was formally referred to us on 19 February 2001.
4. The particular legal problems which we examine arise out of the concern that publication of an inquiry report might amount to an admission of liability and the waiver of legal rights by the authority, and that it might precipitate an action in defamation. We consider also what effect publication might have on the local authority's liability insurance cover, given that there is likely to be a term in the insurance policy forbidding any admission of liability or waiver of rights without the insurer's consent. We also consider whether there might be any further constraint on what actions an authority might take in relation to an inquiry report, in the light of duties it might owe to the insurer, such as the duty of utmost good faith.
5. We analyse the different kinds of inquiry which may be conducted by, or on behalf of local authorities which fall within our terms of reference. We reach this working definition of a local authority ad hoc inquiry: one which is established by a principal local authority, in circumstances which are not already governed by a statutory or other procedural code, involving serious complaints against the authority or a failure in its services.

<sup>1</sup> *Lost in care: Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974* HC 201 ("the Waterhouse Report"). This inquiry was set up under the Tribunals of Inquiry (Evidence) Act 1921 on 17 June 1996.

6. While we have considered the issues only in relation to local authority ad hoc inquiries, we believe the same underlying principles will apply to other kinds of inquiries. Therefore this paper is relevant not only to local authorities but also to other bodies which instigate non-statutory inquiries.

#### **OUR PROVISIONAL CONCLUSIONS ON THE PROBLEMS**

7. We provisionally conclude in relation to admissions of liability that
  - the local authority's co-operation with the inquiry may be impeded if there is a risk that evidence given to the inquiry panel will amount to an admission of liability in breach of the insurance contract;
  - it is not sufficiently clear what kind of admission will be treated as an admission of liability within the terms of the insurance contract;
  - it is not sufficiently clear what kind of act by the council will amount to an admission of liability, especially in relation to its response to an inquiry report;
  - the lack of clarity might either result in a breach of the insurance contract, or lead an authority to make less full disclosure than it could to an inquiry panel, or to hold back from publishing the inquiry report for fear of invalidating the insurance contract;
  - the interests of the insurer and the local authority may conflict: if the insurer withholds consent, publication could be impeded where it ought not to be.
8. In relation to waiver of rights, we provisionally conclude that
  - waiver of the *right* of confidence in a document or communication may entitle the insurer to avoid the contract because waiver without the insurer's consent would be a breach of an express term of the contract;
  - legal professional privilege depends on confidentiality;
  - an authority must not therefore waive a right which it has to confidentiality, and thus legal professional privilege, in a communication without the permission of the insurer.

We wish to know whether fear of waiving these rights, in breach of the contract of insurance, leads to evidence being withheld from an ad hoc inquiry.

9. And in relation to defamation, we provisionally conclude that
  - from the point of view of the insurers and of the authorities, there are two main concerns in relation to defamation: (1) avoiding precipitating an action for defamation, especially one which will be hard to defend, and (2) the impact on the insurance contract;

- the degree of uncertainty about the availability of the common law defence of qualified privilege is likely to promote an overly cautious approach to publication;
- without some clarification or change in the law, authorities and insurers can only avoid the risk of publishing, being sued, and finding that the defence of qualified privilege is not applicable, by a very cautious approach, which is not in the public interest; and
- legislative reform in relation to qualified privilege is therefore desirable.

#### **OUR PROVISIONAL CONCLUSIONS ON THE SOLUTIONS**

10. We provisionally conclude that there are three elements to the resolution of these difficulties: an Agreement to be drawn up by the insurers and the local authorities, a Code of Practice for the conduct of local authority ad hoc inquiries, and possible legislative reform for defamation. Only the third of these is suitable for further detailed work by us.
11. There is already material which can be built on to produce the proposed Agreement between insurers and local authorities: the Local Government Association and the Association of British Insurers produced joint guidance to local authorities on the insurance aspects of ad hoc inquiries in 1999. Further, the Association of British Insurers published a Response to the Waterhouse Report which addresses many of the issues.
12. The Code of Practice we think is needed is, in effect, already being developed by the Society of Local Authority Chief Executives, which has set up a Group to review guidance on the conduct of local authority ad hoc inquiries.
13. The legislative reform which we put to consultees for their consideration is:  
to extend statutory qualified privilege to any local authority inquiry report where
  - (1) the inquiry has been fairly conducted, *and*
  - (2) the report
    - (a) is about a serious matter of genuine public interest
    - (b) only contains judgments and apportionment of blame where they are supported by the factual findings of the inquiry panel, and
    - (c) only contains criticisms of people which have been put to them in advance of publication, with an opportunity for them to respond and, subject to the requirements of observing confidentiality, those responses are fairly represented in the report.
14. We also put before consultees the possibility of an additional legislative reform which would go wider than simply making qualified privilege available as a defence in defamation to local authorities. This consists of a new power for local

authorities to set up formal inquiries, with the powers to summon witnesses, require the production of documents and take evidence on oath.

15. We have 18 questions for consultees. We should be very grateful for responses to these questions, or any other comments, by 31 July 2002.

# **PART I**

## **INTRODUCTION, FACTUAL BACKGROUND AND SUMMARY OF CONCLUSIONS**

- 1.1 In February 2000 Sir Ronald Waterhouse published the results of the inquiry he chaired into abuse of children in care in North Wales.<sup>1</sup> Concern was expressed in the Waterhouse Report that in some circumstances local authorities may be unduly inhibited from acting in the wider public interest. They might be constrained by threat of legal action or loss of insurance cover from publicising failures in service delivery, from acting on inquiry recommendations, and from identifying necessary reforms in the light of the results of inquiries conducted by them, or on their behalf. In particular, it was said that publication might amount to an admission of liability and the waiver of legal rights by the authority, and also that the authority's insurers feared actions for defamation if reports were published.
- 1.2 A local authority inquiry is set up where it is thought that there has been some wrongdoing of some seriousness and that the implications are likely to go wider than the individual complaint. If the effect of the law is to impede publication of the report of the inquiry, then there are several adverse results. Whatever has gone wrong will be more likely to occur again if steps are not taken to prevent it. The authority which set up the inquiry could learn from the report – but if the report is not published, other authorities and bodies which could also benefit from the report will not be prompted to improve their own practices. The facts in relation to the individual complaint ought to be put into the public domain, but if the report is not published they may not be. This might prevent the claimant or other potential claimants from obtaining any damages which are lawfully due to them. It would also be regrettable from the point of view of transparency and accountability generally.
- 1.3 The problems discussed in this consultation paper arise out of a tension between the broad public duty of a local authority, to provide services to the public, in the course of which it may need to acknowledge and learn from its mistakes and thus to review and change its practices, and the narrower fiduciary duty of a local authority owed to council taxpayers to manage its finances properly. This includes a responsibility not to vitiate its insurance cover. A balance must be struck by the authority between the interests of the public as recipients of services and the interests of the public as people who pay for those services.<sup>2</sup>
- 1.4 The Waterhouse Report recommended that the Law Commission examine the legal issues surrounding the publication of local authority reports, and consider

<sup>1</sup> *Lost in care: Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974* HC 201 (“the Waterhouse Report”). This inquiry was set up under the Tribunals of Inquiry (Evidence) Act 1921.

<sup>2</sup> *Prescott v Birmingham Corpn* [1955] Ch 210.

whether there is a need to reform the law. The matter was formally referred to us on 19 February 2001.

#### **THE TERMS OF REFERENCE**

##### 1.5 The terms of reference ask the Commission

[t]o consider the concerns raised in paragraphs 32.44 – 32.62 of the Waterhouse Report that in some circumstances local authorities may be unduly constrained by threat of actions or loss of insurance cover from making public, acting upon, and identifying necessary reforms in the light of the results of inquiries conducted by them, or on their behalf.

Having regard to the matters of tort and contract raised in those paragraphs, to review:

(a) the law of defamation as it applies, and the privilege that such authorities can claim, in such circumstances;

(b) the possible loss of public interest immunity or privilege against disclosure, and the making of admissions of liability, in such circumstances;

(c) the way in which existing practices for insuring local authorities against liabilities in relation to defamation, or other torts, may contribute to these problems.

To recommend courses of legislative and/or administrative action that would better enable local authorities to take effective action in response to matters of serious public concern contained in such inquiries, and to do so in as open a way as appropriate.

##### 1.6 The terms of reference are restricted to local authorities,<sup>3</sup> but in principle the same issues will apply to any body which provides a public service, other than central Government.

#### **THE FACTUAL BACKGROUND**

##### 1.7 As the Waterhouse Report states, it had been known for several years that serious sexual and physical abuse of children had taken place in homes managed by the former Clwyd County Council in the 1970s and 1980s. In 1991, criminal investigations were begun by North Wales police that led to eight prosecutions and seven convictions of former care workers.<sup>4</sup>

##### 1.8 Prior to the Waterhouse inquiry, which was set up by Parliament, inquiries had been established by Clwyd County Council to investigate allegations of sexual abuse and related matters. It is these inquiries that form the basis of our reference.

<sup>3</sup> We define “local authority” at paras 2.3 – 2.8 below.

<sup>4</sup> The Waterhouse Report, para 2.01.

- 1.9 We set out below the chronology of the inquiries and the problems that they posed for Clwyd County Council.

### **The Cartrefle inquiry**

- 1.10 The Cartrefle inquiry focused upon allegations of abuse at the Cartrefle Community Home following the conviction and sentencing of Stephen Norris in November 1990. It was established on behalf of Clwyd County Council social services department and was chaired by John F Banham, a retired senior officer of Cheshire social services department. The Clwyd Area Child Protection Committee<sup>5</sup> was informed of the social services inquiry and decided that parallel inquiries should be set up by the education department and the health authority. The three inquiries were completed in June 1991, and the Clwyd ACPC commissioned an overview of the inquiries. The overview was conducted by a panel of five members, which reported back to Clwyd in February 1992.
- 1.11 The conclusions of the overview, and the responses of the Director of Social Services were placed before the Social Services Committee on 27 October 1992. Between February and October 1992, the County Solicitor had been discussing with the insurers (Municipal Mutual Insurance Limited)<sup>6</sup> and the Crown Prosecution Service the extent to which the report could be published. The insurers intimated that publication, even on a limited scale, could amount to a waiver of public interest immunity or privilege. The Crown Prosecution Service was of the opinion that publication might prejudice forthcoming or contemplated criminal proceedings and would constitute contempt of court.
- 1.12 The County Solicitor came to an agreement with the insurers whereby extracts of the conclusions and recommendations would be circulated to members of the Social Services Committee and the ACPC. Furthermore, discussion by the members was confined to general principles; there was to be no debate on matters that might be the subject of criminal proceedings or generate claims against the County Council.
- 1.13 In the event, dissemination to the public of the Cartrefle inquiry report was not possible because of the ongoing criminal proceedings. Publication of the overview would have prejudiced those proceedings and constituted contempt of court.

### **The Jillings report**

- 1.14 The continuing police investigations, in addition to preventing publication of the Cartrefle inquiry, prohibited the establishment of a public inquiry. Following

<sup>5</sup> An Area Child Protection Committee (ACPC) is a multi-agency body which is charged with co-ordinating child protection measures in the area of the local authority. It includes the social services and educational local authorities, health services, the police and probation services. We describe ACPCs in greater detail at para 8.60 below.

<sup>6</sup> Now operating under the name of Zurich Municipal. Waterhouse describes how Zurich Municipal became the relevant insurer at paras 32.55 and 32.56 of the report.

concern that the police investigations were becoming increasingly protracted, Clwyd decided to set up another ad hoc inquiry. The council took the view that it would then be able to review past practice quickly in order to ascertain whether anything more needed to be done to secure the proper care and protection of children.

1.15 The inquiry, to be chaired by John Jillings, a retired Director of Social Services for Derbyshire, was instructed to conduct an investigation “into the management of its Social Services child care services from 1974 to date with particular reference to those concerns which prompted the investigation by the North Wales Police.”<sup>7</sup> The proposal to set up the inquiry was discussed by the Leader of Clwyd Council and the Chairman of the Social Services Committee with the Chief Executive, the Director of Social Services and the County Solicitor and approved by the Social Services Committee on 12 January 1994. The council’s insurers were not consulted about the proposal. It was anticipated that the inquiry would be finished by August 1994; its report would be submitted to the County Solicitor and the Director of Social Services, and it would then be put before the council’s Policy, Finance and Resources Committee. The report was not in fact finished until February 1996, being provided to the County Solicitor on 22 February 1996.

1.16 It is significant that Clwyd County Council was due to be dissolved on 1 April 1996, so the authority did not have long to decide how to react to Jillings’ report. Paragraph 32.43 of the Waterhouse Report describes what happened next:

... [the report] was given very limited circulation. It was seen by the senior officials involved and by the Leader of the Council, who consulted other leading members of the Council nominated by their respective groups. According to Loveridge,<sup>8</sup> “The initial reaction of the Council was one of amazement (at) the number of inaccuracies contained therein and the style and content of the Report”. It appears that an effort was made to establish a list of the alleged factual inaccuracies with a view to concurrent publication with the Report and on 7 March 1996 instructions were sent to Leading and Junior Counsel to advise on the question of publication. Supplementary instructions were sent to them shortly afterwards in the light of representations by the North Wales Police and by the Council’s insurers and by 20 March 1996 Loveridge had received a Preliminary Joint Opinion, a Joint Opinion and a Supplementary Joint Opinion from Counsel.

1.17 Counsel were asked to advise:

- (1) whether publication of the report might avoid Clwyd’s insurance policy, bearing in mind the large number of objections raised by the insurers to any publicity attaching to the report;

<sup>7</sup> The Waterhouse Report, para 32.36.

<sup>8</sup> The County Solicitor to Clwyd County Council.

- (2) the potential liability of Clwyd for publication of any defamatory comments contained within the report; and
- (3) whether there was any risk to the proper administration of criminal justice through the impact upon any pending trials of publication of the report.

1.18 In short, counsel's answer to the first question was that publication might indeed avoid the insurance policy. In relation to the second problem, counsel's view was that the council could rely on the common law defence of qualified privilege in relation to "publication" of the report in the sense of disclosing it to members of the council, but not in relation to publication to the public at large. The report was made available to councillors, but in an extremely restricted way: it was not even circulated to them. It was to be discussed by the relevant committee in private, and there was to be no discussion of its contents with the media or the public. There would then be no adverse impact on any pending criminal trials. Counsel advised that if the report was not dealt with as they advised, then there could be some risk that publication of the report could adversely affect the administration of criminal justice.

1.19 The Waterhouse Report describes how the council then dealt with the report:

The advice of Counsel was accepted and the Policy, Finance and Resources Committee duly received the report at its meeting on 22 March 1996, after earlier discussions between the leading members referred to earlier. The committee dealt with the matter by simply noting the report and agreeing to refer it to the Secretary of State for Wales to assist him in considering whether or not a public inquiry should be instituted. The procedure adopted is not clear but the evidence is that neither members of the committee nor other members of the council read the report. It may have been available in an office for them to read if they wished to do so. The decisions of the committee were approved by the Council at its last meeting on 26 March 1996.

The Welsh Office also had sought advice about the feasibility of publishing the Jillings Report and had consulted Treasury Counsel. We have not seen any written opinion given by the latter but in a letter to Loveridge (as Director of Legal and Administration for Flintshire County Council, the designated successor authority to Clwyd in respect of insurance matters), dated 14 May 1996, the Welsh Office did state:

It is not normal practice for Treasury Counsel's advice to be made available or divulged to third parties in the way that you have suggested. However, I can advise you that while in our discussions with Counsel he has generally endorsed [the opinion of the counsel instructed by Clwyd] on this matter he has indicated that it should be possible to publish an edited version of the Report's recommendations. This could be accompanied by some newly-drafted contextual passages which would explain the basis on which the recommendations are made.

At this time the Welsh Office was encouraging the successor authorities to produce an edited version of the Jillings recommendations but was unwilling to publish such a document itself. The successor authorities did not, at first, reject the idea of publication and discussed with Jillings the possibility of preparing a “safe” version but they concluded by 6 June 1996 that they could not publish the report and the Secretary of State was so informed. The problem then receded, however, with the Prime Minister’s preliminary announcement on 13 June 1996 of the Secretary of State’s intention to institute a public inquiry.<sup>9</sup>

- 1.20 That inquiry was the Waterhouse inquiry itself, which concluded in February 2000.

### **The Waterhouse Report**

- 1.21 Waterhouse noted that the legal problems surrounding the Jillings report were “more complex but essentially similar”<sup>10</sup> to those arising out of the Cartrefle report. The criminal proceedings had been concluded by the time of the Jillings report, so there was no danger of being in contempt of court by prejudicing a prosecution. But the report itself gave rise to serious legal questions about defamation, admissions of liability and waiver of privilege. It was also feared that statements which councillors might make on publication would themselves amount to admissions of liability and waiver of legal rights. The net effect was that the inquiry conducted by Jillings, initially set up as “an internal investigation for the County Council into the management of its Social Services child care services from 1974 to date with particular reference to those concerns which prompted the investigation by the North Wales Police” failed to produce any changes in practice or to increase general understanding, inside or outside the council, of what had gone wrong.
- 1.22 The problem for Clwyd County Council was not only that it might expose itself to legal actions if it published the Jillings report, but also that it might jeopardise its insurance cover in so doing. Waterhouse concluded that the insurers were right actively to alert the council to these dangers:

Looking at the part played by the insurers’ representatives in this history as a whole, we accept that they acted throughout with the honourable intention of preventing Clwyd County Council, its officers and members from acting in such a way that the insurers would be compelled to repudiate liability for claims by victims of abuse or by persons who alleged that they had been libelled by either report. The insurers’ representatives adopted an interventionist role with this objective so that Clwyd knew where it stood in the matter; and, in our judgment, that was strongly preferable to a passive role

<sup>9</sup> The Waterhouse Report, paras 32.49 – 32.51.

<sup>10</sup> The Waterhouse Report, para 32.58.

that might well have led to repudiation, with grave consequences for the Council and many others.<sup>11</sup>

- 1.23 The insurers' representative to the Waterhouse inquiry did, however, accept that the insurers went too far: "in hindsight, they accept that, at times, the tone of the correspondence on their behalf was intemperate and went too far in the demands made of the Council. They accept also that their approach to the dilemma of striking a balance between the duty of a council to seek the truth and identify reforms on one hand and its duty to protect its financial interests on the other may be open to criticism."<sup>12</sup> Waterhouse did not make any further criticism of the insurers, but referred instead to steps being taken to produce guidelines for local authorities,<sup>13</sup> and enumerated the following legal questions:

Firstly, in relation to the law of defamation, the following questions arise:

(1) Should there not be a general statutory provision enabling local authorities to institute inquiries into matters of wide public concern and to publish the reports of such inquiries to the public at large with the protection of qualified privilege, whether or not the public has a sufficient interest in receiving the report within the terms of present legislation?

(2) If not, should not the limits of legitimate publication of such reports be defined in order to safeguard the position of elected members and officers in discharging their public duty?

(3) If the issues are not considered suitable for legislation, should there not be central government guidance to local authorities on them, including guidance as to the format of inquiries and the content of reports?

(4) Is similar legislation or guidance desirable for other public authorities that may need to institute inquiries into matters of wide concern?

We consider that the problems underlying these issues are likely to recur quite frequently and that they are suitable for consideration by the Law Commission.<sup>14</sup>

- 1.24 These questions crystallised into the terms of reference as set out at the beginning of this Part.

#### **OUR PROVISIONAL RESPONSE**

- 1.25 Our first provisional conclusion is that there are indeed legal difficulties which inhibit local authorities from taking effective action in response to matters of

<sup>11</sup> The Waterhouse Report, para 32.60.

<sup>12</sup> The Waterhouse Report, para 32.60.

<sup>13</sup> See para 1.27 below.

<sup>14</sup> The Waterhouse Report, para 32.61.

serious public concern in as open a way as appropriate, and especially in relation to the publication of reports of non-statutory local authority inquiries.

- 1.26 We provisionally conclude that there are three elements to the resolution of these difficulties: an effective Agreement to be drawn up by the insurers and the local authorities (overseen by Government if appropriate), a Code of Practice for the conduct of local authority ad hoc inquiries, and possible legislative reform for defamation. We take the view that only the third of these is suitable for further detailed work by us, and we expand on this in Part IX.
- 1.27 There is already material which can be built on to produce the proposed Agreement between insurers and local authorities: the Local Government Association (LGA) and the Association of British Insurers (ABI) produced joint guidance to local authorities on the insurance aspects of ad hoc inquiries in 1999.<sup>15</sup> Further, the ABI published a Response to the Waterhouse Report which addresses many of the issues.<sup>16</sup>
- 1.28 The Code of Practice we think is needed is, in effect, already being developed. The Society of Local Authority Chief Executives (SOLACE) has set up a Group to review guidance on the conduct of local authority ad hoc inquiries. The review includes a questionnaire to local authority chief executives to establish relevant facts about how inquiries are conducted, reports are written and how the inquiries are handled by the local authorities. We look forward with interest to the results of this Review Group.
- 1.29 We acknowledge, however, the possibility that consultees might not agree with conclusion as to the best way forward. We therefore put before consultees our full analysis of the issues involved, and our views as to how they might be addressed. We wish to give consultees the opportunity to tell us if legislative reform *is* needed, where we think it is not.

#### **THE STRUCTURE OF THIS CONSULTATION PAPER**

- 1.30 Parts II – VI provide an outline of existing law and practice. In Part II, we describe what kind of inquiry a local authority ad hoc inquiry is, and the statutory powers which allow an authority to hold such an inquiry.
- 1.31 In Part III we discuss the liability and insurance of local authorities. We describe the ways in which a local authority may become subject to legal liability, thus paving the way for the ensuing description of the conditions of local authority liability insurance contracts.
- 1.32 In Part IV we analyse admissions of liability in relation to publication of the inquiry report, but also in relation to the material that an authority might provide to an inquiry panel.

<sup>15</sup> This is reproduced as Appendix A below.

<sup>16</sup> The ABI Response to the Waterhouse Report (December 2000). This and the LGA/ABI Guidance are discussed in Part VIII below.

- 1.33 In Part V we cover the rights that a local authority might waive in publishing the report of an inquiry, examining in turn confidence, legal professional privilege and public interest immunity.
- 1.34 In Part VI we consider liability in defamation and the defences available to a local authority when faced with a claim.
- 1.35 Parts VII – IX contain our provisional conclusions and proposals for reform. In Part VII we set out our policy, consider the difficulties revealed by the analysis of the issues in Parts III to VI in the light of that policy, and outline possible solutions.
- 1.36 We discuss the two non-legislative possibilities for resolving those problems in Part VIII, and in Part IX we examine the legislative solutions.
- 1.37 We attach two appendices which contain relevant background information. The first of these is the text of Guidance issued to local authorities jointly by the LGA and the ABI. The second summarises the various statutory regimes which govern access to information held by a local authority.
- 1.38 We should be most grateful for readers' views on the proposals, or indeed on any points made in this paper. We would welcome detailed responses and examples of situations which consultees have met in practice. If consultees' responses bear on the way in which inquiries should be conducted, then we would make those responses available to the SOLACE Review Group. For convenience, the consultation questions are collected together in Part X.

#### **THE IMPACT OF OUR PROPOSALS**

- 1.39 As we have indicated, we believe there is a real need for reform. In order to assist us in evaluating our provisional proposals, we would welcome comments and evidence about their benefits and costs from consultees. We invite comments about the main practical and economic impact upon the parties involved in the inquiry process, including insurers and other interest groups, and so the final consultation question asks:
- 1.40 **What practical and economic impact, in financial and non-financial terms, do consultees think our provisional proposals would have?**

#### **ACKNOWLEDGEMENTS**

- 1.41 In preparing this paper, we have been helped by discussions with, amongst others, the LGA,<sup>17</sup> the ABI, Zurich Municipal Insurance, Kieran Coonan QC, Mavis Maclean of the Department of Social Policy and Social Work at the University of Oxford, Philip Thomson of Essex County Council and Sir Ronald Waterhouse. We will continue to work with them. Their views, combined with the responses of consultees to this consultation paper, will be of the greatest possible assistance in shaping the proposals to be published in our final report, due for publication in 2003.

<sup>17</sup> Who kindly arranged a round-table discussion for us.

## **PART II**

# **AN OVERVIEW OF LOCAL AUTHORITY AD HOC INQUIRIES**

- 2.1 In order to address the legal issues arising from our terms of reference we need to examine what are the inquiries that are conducted by, or on behalf of local authorities which fall within our terms of reference.<sup>1</sup> This Part provides the background to the analysis of the legal issues that we discuss in Parts III – VI.
- 2.2 First we explain which local authorities we are addressing. Secondly, we explore the range of inquiries that local authorities may be involved in, including those established under express statutory powers and other formal types of investigations by independent bodies. On the basis of this typology we arrive at a definition of an ad hoc inquiry for the purposes of this consultation paper.<sup>2</sup> Finally we turn our attention to the legal basis for setting up ad hoc inquiries and consider the variety of subject matters that they may address.

### **DEFINITION OF A LOCAL AUTHORITY**

- 2.3 Section 270 Local Government Act 1972 defines a local authority, for the purposes of the 1972 Act, as:
- a county council, ... a district council, a London borough council or a parish council but, in relation to Wales ... a county council, county borough council or community council;<sup>3</sup>
- 2.4 In this consultation paper we are only concerned with what are termed principal local authorities; those councils that are charged with responsibility for the vast majority of services that are provided by local government.
- 2.5 Principal local authorities are:
- (1) county councils, district councils, unitary councils and London boroughs in England; and
  - (2) county and county borough councils in Wales.
- 2.6 The functions of principal local authorities, including education, housing, planning, social services, transportation, environmental health, waste collection, leisure and sports services,<sup>4</sup> are those which are most susceptible to being the subject of an ad hoc inquiry.

<sup>1</sup> Set out at para 1.5 above.

<sup>2</sup> See para 2.47 below.

<sup>3</sup> Local Government Act 1972, s 270 as amended by Local Government Act 1985, s 102, Sched 16 para 8, Sched 17 and by the Local Government (Wales) Act 1994, s 1(5).

<sup>4</sup> A complete list of the functions of principal local authorities is reproduced in *Cross on Local Government Law* (7th ed 1996) Appendix A.

- 2.7 Hence we are not addressing directly inquiries established by either parish or community councils, as the functions that they exercise<sup>5</sup> are not conspicuously amenable to the type of inquiry we have in mind.
- 2.8 Nor are we concerned with Regional Development Agencies.<sup>6</sup> They differ from the local authorities listed in paragraph 2.3 above as their powers and functions relate, in very general terms, to economic promotion and development, of the region they serve, rather than providing specific “front line” services. Moreover as they are not composed of elected representatives they are not subject to the same pressures of democratic accountability.

#### **DEFINITION OF AN INQUIRY**

- 2.9 The report into “Ad Hoc Inquiries in Local Government” produced by the Society of Local Authority Chief Executives (SOLACE) and the Royal Institute for Public Administration (RIPA) acknowledged the problems of defining a local authority inquiry:

investigations by a local authority vary widely in content from an “inquiry” under an independent chairman and panel to consider a substantial complaint against the authority to an internal “hearing” by a chairman of committee or chief officer into a comparatively minor shortcoming.<sup>7</sup>

- 2.10 The approach we have adopted is:
- (1) to identify all types of inquiries which principal local authorities may instigate, participate in, or to which they may be subject;
  - (2) to exclude from the typology certain inquiries which do not give rise to the legal problems highlighted in the Waterhouse Report;
  - (3) to formulate a definition of an ad hoc local authority inquiry which spans all the remaining forms of inquiry.

<sup>5</sup> Parish and Community councils are only subject to one duty – the duty to consider the provision of allotments on the written demand of six parliamentary electors resident in the parish (Small Holdings and Allotments Act 1908, s 23). The powers that they possess relate to baths and washhouses, cemeteries, community centres, maintenance of the highways, provision of public conveniences, village greens etc. A complete list of the powers and duties of parish and community councils is reproduced in *Cross on Local Government Law* (7th ed 1996) Appendix B.

<sup>6</sup> Regional Development Agencies (RDAs) were established by the Regional Development Agencies Act 1998 with the purposes of promoting economic development and investment in the regions.

<sup>7</sup> SOLACE and RIPA, “Ad Hoc Inquiries in Local Government” (1978) (“the SOLACE Report”), para 1.21.

## **TPOLOGY OF INQUIRIES**

- 2.11 Local authorities may initiate, participate in, or contribute to many types of inquiries. Not all of these inquiries will face the problems highlighted in the Waterhouse Report.
- 2.12 The SOLACE Report divides local authority inquiries into seven categories.<sup>8</sup> These are: statutory inquiries ordered by a minister; formal inquiries conducted independently; inter-agency inquiries; internal investigations published to the local authority; internal investigations produced for a head of department; investigations in accordance with an established complaints procedure; and formal investigation by the Local Commissioner for Administration (the Ombudsman).
- 2.13 In their study of child abuse inquiries, Corby, Doig and Roberts classify local authority inquiries into three main categories:<sup>9</sup> inquiries ordered by a Secretary of State; inquiries using independent panels; and inquiries carried out internally.
- 2.14 We have identified nine distinct types of inquiry which can be classified as follows.

### **Type 1: Inquiries ordered by a minister**

- 2.15 These types of inquiry normally arise where a minister, acting under powers conferred upon the minister by statute, orders the local authority to conduct an inquiry. An example of this is the current inquiry into the death of Victoria Climbié, which was set up by the Secretary of State for Health,<sup>10</sup> and the Secretary of State for the Home Department<sup>11</sup> under the chairmanship of Lord Laming. Inquiries established by statute normally have power to order witness attendance and compel disclosure to the inquiry.<sup>12</sup>
- 2.16 Inquiries may still be ordered by a minister even though there is no express statutory authority for their formation. The Scott Inquiry<sup>13</sup> into the failure of the Matrix-Churchill prosecutions was set up as an ad hoc public inquiry, but it was made clear to Sir Richard Scott that if he required, the powers available under a Tribunal of Inquiry Act inquiry<sup>14</sup> would be made available to him.<sup>15</sup>

<sup>8</sup> The SOLACE Report, para 1.6.

<sup>9</sup> B Corby, A Doig and V Roberts, "Inquiries into Child Abuse" (1998) 20(4) *Journal of Social Welfare and Family Law*, 377–395, 379.

<sup>10</sup> In exercise of his powers under the Children Act 1989, s 81 and under the National Health Service Act 1977, s 84.

<sup>11</sup> In exercise of his powers under the Police Act 1996, s 49.

<sup>12</sup> See eg, Children Act 1989, s 81(4), National Health Service Act 1977, s 84(2)(a) and Police Act 1996, s 49(3) for the Victoria Climbié inquiry.

<sup>13</sup> Report of the Inquiry into Exports of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions, (1995–96) HC 115.

<sup>14</sup> See type 2 in the following paras.

## **Type 2: Tribunals of Inquiry Act inquiries**

2.17 Section 1(1) of the Tribunals of Inquiry (Evidence) Act 1921 states:

Where it has been resolved ... by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or a Secretary of State, the instrument by which the tribunal is appointed or any instrument supplemental thereto may provide that this Act shall apply, and in such case the tribunal shall have all such powers, rights, and privileges as are vested in the High Court, or in Scotland the Court of Session, or a judge of either such court, on the occasion of an action in respect of the following matters:-

(a) The enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;

(b) The compelling the production of documents;

(c) Subject to rules of court, the issuing of a commission or request to examine witnesses abroad;

and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

2.18 Thus a Tribunals of Inquiry Act inquiry will possess the power to summon witnesses in a similar manner to a type 1 inquiry. The difference between the two types is the instigator. Whereas the ministerial inquiry merely needs government approval, a Tribunals of Inquiry Act inquiry needs Parliamentary support.

2.19 Recent inquiries established under this power include the Bloody Sunday inquiry into the Events of 30 January 1972 chaired by Lord Saville of Newdigate<sup>15</sup> and the Inquiry into the Dunblane Shootings chaired by Lord Cullen.<sup>17</sup> The Waterhouse Report itself was similarly a Tribunals of Inquiry Act inquiry.<sup>18</sup> Prior to this spate of inquiries, the 1921 Act had not been engaged since the Crown Agents inquiry in 1977.<sup>19</sup>

<sup>15</sup> *Hansard* (HC) 23 November 1992, vol 214, cols 650-1.

<sup>16</sup> An Inquiry into the events on Sunday 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day, established 29 January 1998.

<sup>17</sup> The Public Inquiry into the Shooting at Dunblane Primary School on 13 March 1996 (1996-97) Cm 3386.

<sup>18</sup> The Waterhouse Report, para 1.01.

<sup>19</sup> Report of the Fay Committee of Inquiry on the Crown Agents on 1 December 1977 (1977-78) Cmnd 49.

### **Type 3: Formal investigations by the Local Commissioner for Administration (the Ombudsman)**

- 2.20 Local Commissioners for England and Wales have jurisdiction to act over complaints of injustice in consequence of maladministration in connection with action taken by or on behalf of an authority.<sup>20</sup> Investigations are conducted in private,<sup>21</sup> and the Commissioner has the power to compel attendance of witnesses and the production of documents,<sup>22</sup> but not if that evidence would be inadmissible in the High Court.<sup>23</sup> This effectively prevents the disclosure of legally privileged information.
- 2.21 This type of inquiry is distinguishable from types **1** and **2** in that the instigation of the inquiry arises from a complaint made by a member of the public, and the types of complaint to which the Commissioner will respond are normally of a more routine nature. For example, a finding of injustice in consequence of maladministration may involve inordinate delay,<sup>24</sup> misleading advice,<sup>25</sup> or failure to take action against illegal occupiers of land.<sup>26</sup> In comparison, large-scale statutory inquiries are normally established in response to a specific event, or series of events, of public importance. Investigations by the Local Commissioner are not usually of the same magnitude in terms of degree of public outrage as the ministerial or Tribunals Act inquiries described above.
- 2.22 However, Ombudsmen inquiries are similar to types **1** and **2** in that there is no discretion for the local authority to participate in the inquiry. Where it is subject to a complaint being investigated by the Commissioner, obstructing the investigation without lawful excuse can be certified by the Ombudsman as contempt of court.<sup>27</sup>

### **Type 4: Standards Boards Investigations**

- 2.23 The Local Government Act 2000 created a new ethical framework for local authorities. Local authorities have to draw up Codes of Conduct,<sup>28</sup> to which members must sign up.<sup>29</sup> Local authority Codes must incorporate certain

<sup>20</sup> Local Government Act 1974, s 26(1). See generally A Arden, *Local Government Constitutional and Administrative Law* (1999) paras 8.9.1 – 8.9.68.

<sup>21</sup> Local Government Act 1974, s 28(2).

<sup>22</sup> *Ibid*, s 29(1), (2).

<sup>23</sup> *Ibid*, s 29(7).

<sup>24</sup> Investigation into Complaint 97/C/0046 against Sefton MBC, cited in A Arden, *Local Government Constitutional and Administrative Law* (1999) para 8.9.21.

<sup>25</sup> Investigation into Complaint 96/B/4978 against Breckland DC *ibid*, para 8.9.20.

<sup>26</sup> Investigation into Complaint 95/C/1356 against Manchester CC *ibid*, para 8.9.24.

<sup>27</sup> Local Government Act 1974, s 29(8).

<sup>28</sup> Local Government Act 2000, s 51.

<sup>29</sup> *Ibid*, s 52(1)(a).

mandatory sections of Model Codes.<sup>30</sup> The Model Codes are laid down by the Secretary of State for English local authorities<sup>31</sup> and the National Assembly of Wales has drawn up a similar Model Code for Welsh local authorities.<sup>32</sup> Local authorities must also establish standards committees,<sup>33</sup> to promote and maintain high standards of conduct within the authority and to assist members of that authority to observe the authority's code of conduct.<sup>34</sup>

- 2.24 In England, a new body, the Standards Board for England,<sup>35</sup> will appoint ethical monitoring officers to investigate written allegations of a failure to comply with the relevant code.<sup>36</sup> The ethical monitoring officer investigates the complaint,<sup>37</sup> and if the officer concludes that there has been a breach of a code of conduct, he or she must refer the case to the Adjudication Panel for England for a hearing and judgment.<sup>38</sup> In Wales, the written allegation is investigated by the Local Commissioner for Wales,<sup>39</sup> and if the Commissioner concludes that there has been a breach of a code of conduct, the Commissioner may refer the case to the Adjudication Panel for Wales.<sup>40</sup> Matters can also be referred to the Adjudication Panel on an interim basis where the ethical monitoring officer or the Local Commissioner for Wales conclude that a breach of the code is likely to have occurred, and that it would be in the public interest to suspend the member.<sup>41</sup> Three members of the relevant Adjudication Panel are appointed to form the case tribunal.<sup>42</sup> The case tribunal may impose penalties ranging from public censure to disqualification as a councillor for up to five years,<sup>43</sup> subject to a right of appeal to the High Court.<sup>44</sup>
- 2.25 Ethical standards officers and the Local Commissioner for Wales have access to all information held by the local authority which they think necessary for the

<sup>30</sup> *Ibid*, s 51(4)(a).

<sup>31</sup> Local Government Act 2000, s 50(1); The Local Authorities (Model Code of Conduct) (England) Order 2001 SI 2001 No 3575.

<sup>32</sup> *Ibid*, s 50(2); The Conduct of Members (Model Code of Conduct) (Wales) Order 2001 SI 2001 No 2289 (W 177).

<sup>33</sup> *Ibid*, s 53(1).

<sup>34</sup> *Ibid*, s 54(1).

<sup>35</sup> *Ibid*, s 57(1).

<sup>36</sup> *Ibid*, s 58(2).

<sup>37</sup> *Ibid*, s 59(1)(a).

<sup>38</sup> *Ibid*, s 59(4)(d); s 64(3).

<sup>39</sup> *Ibid*, s 69(1)(a).

<sup>40</sup> *Ibid*, s 69(4)(d); s 71(3).

<sup>41</sup> *Ibid*, s 65(3),(4); s 72(3),(4).

<sup>42</sup> *Ibid*, s 76(1),(2).

<sup>43</sup> *Ibid*, s 78(1); s 79(4),(6).

<sup>44</sup> *Ibid*, s 78(10); s 79(15).

purpose of conducting the investigation.<sup>45</sup> The procedure, including disclosure of documents, compellability of witnesses and costs, of the case tribunals of the Adjudication Panels is to be governed by regulations laid down by the Secretary of State in England and the National Assembly in Wales.<sup>46</sup>

- 2.26 The Standards Board for England was established on 22 March 2001.<sup>47</sup> There is as yet little guidance as to how it, the Local Commissioner for Wales, and the Adjudication Panels will interact with other forms of inquiry.<sup>48</sup>

### **Type 5: Inquiries ordered by a local authority, but chaired independently**

- 2.27 These are inquiries which are established by the local authority of its own volition but directed by an independent chairman. The inquiry may be conducted by a single individual; equally, a team of investigators or assessors may assist him or her. The panel may sit in private or in public, although we understand that the sensitive nature of these inquiries means most are conducted in private. Both the Cartrefle and Jillings inquiries were of this type: a retired senior officer from another local authority chaired the Cartrefle inquiry, while Jillings himself was a retired Director of Social Services.<sup>49</sup>
- 2.28 The chairman of an inquiry, subject to his or her terms of reference, is ultimately the directing force behind the structure of the inquiry and its subsequent report.
- 2.29 The inquiry will still be classified as independent if members or officers of the authority are co-opted to form part of the investigative panel. For example, in the Devon Foot and Mouth Inquiry the panel included councillors serving on Devon County Council.<sup>50</sup> However, if the chair is a councillor or an officer of the Authority, the fact that there are independent persons participating in the inquiry will not, we consider, make it an independent inquiry. We examine the legal basis of these investigations below.<sup>51</sup>

### **Type 6: Inquiries ordered by the local authority, but chaired internally**

- 2.30 This type of inquiry is set up by the local authority but, in contrast to type 5 above, is chaired by a person connected to the authority. It may be chaired by the

<sup>45</sup> *Ibid*, s 62(1), s 70(1); SI 2001 No 2286 (W 174) The Local Commissioner in Wales (Standards Investigations) Order 2001, art 2, Sched 1.

<sup>46</sup> Local Government Act 2000, s 77(2)–(6); SI 2001 No 2288 (W 176) Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations 2001. As yet, no regulations have been made for England.

<sup>47</sup> See <http://www.local-regions.dtlr.gov.uk/ethical/board/index.htm>

<sup>48</sup> There are provisions enabling the bodies involved in the new ethical framework to refer matters on between themselves; see, eg, Local Government Act 2000, s 67.

<sup>49</sup> See paras 1.10 and 1.15 above.

<sup>50</sup> Devon County Council, “Devon Foot and Mouth Inquiry 2001 Into the outbreak and its effects, their handling now and in the future and the recovery and sustaining of the well-being of Devon’s countryside” p 14.

<sup>51</sup> See paras 2.49 – 2.55 below.

Chief Executive Officer, or a Head of Department. Equally it may be undertaken on behalf of an officer of the authority by officers from within the commissioning department or from another department of the authority. Again, we understand that this kind of inquiry is not likely to be open to the public, although it may be.

- 2.31 The type of inquiry that is to be established, whether internal or external, may depend on a number of factors. These may include issues of speed, costs, the availability of witnesses and documents, and public and media pressure.<sup>52</sup> The fact that the inquiry is ad hoc in nature means the authority can respond flexibly to tailor the inquiry to fit its needs best.
- 2.32 Similarly, the decision whether to hold the inquiry in public may be affected by pending criminal trials, the subject-matter of the inquiry, the need for transparency, the likelihood that information will be disclosed to the inquiry about confidential matters, or issues of cost and speed. The legal power to set up this type of inquiry is examined below.<sup>53</sup>

#### **Type 7: Inter-agency inquiries**

- 2.33 These can be undertaken by one or more statutory bodies. They may involve local authorities, health authorities, police or other interested parties. They may be ad hoc in nature, or subject to standing procedures.

#### **Regulated inter-agency inquiries**

- 2.34 Where child abuse deaths or child protection issues are likely to attract major public concern a procedure, colloquially known as a Part 8 review, is instigated. Specific guidelines are laid down by the Department of Health, Home Office, Department for Education and Employment.<sup>54</sup> These require each agency which was involved in the issue to review its own conduct. These reviews are then compiled by the Area Child Protection Committee (ACPC) into one report. The decision whether to publish the final report is one for the ACPC itself. We describe these reviews in greater detail in Part VIII.<sup>55</sup> A recent example of a Part 8 publication is the inquiry into the death of John Smith in the care of his foster parents in Brighton and Hove.<sup>56</sup> This was published only his foster carers had been convicted on charges of inflicting cruelty.

<sup>52</sup> Beyond broad public and media pressure, families, relatives and local politicians can bring pressure to bear on the local authority: see B Corby, A Doig and V Roberts, "Inquiries into Child Abuse" (1998) 20(4) *Journal of Social Welfare and Family Law* 377–395.

<sup>53</sup> See paras 2.49 – 2.55 below.

<sup>54</sup> Department of Health, Home Office and the Department for Education and Employment, "Working Together to Safeguard Children" (1999) ("Working Together").

<sup>55</sup> See paras 8.59– 8.61 below.

<sup>56</sup> Brighton and Hove ACPC, "Report of the Part 8 Review for Brighton and Hove ACPC of the care and protection of JAS (aged 4) who died on 24 December 1999" (2001). We are grateful to Brighton and Hove City Council for supplying a copy of the report to us and allowing us to print extracts from it.

### ***Ad hoc inter-agency inquiries***

- 2.35 These may be established in response to a particular situation, or where increased co-operation or collaboration is anticipated between various bodies. Again, the directorship of the inquiry will be key in determining whether the inquiry is external or internal to the local authority. Depending on the chairmanship of the inquiry, these multi-party agencies may be included in types **5** or **6** above.

### **Type 8: Routine inquiries**

- 2.36 These are undertaken in relation to matters which arise at regular intervals for determination by the local authority. The authority may be under a duty to hold a form of inquiry prior to taking a decision on matters such as school admission appeals and exclusion appeals under the School Standards and Framework Act 1998. However, we also include those inquiries ordered by central government in order to endorse a local authority's actions, such as the adoption of a new local plan for development and planning control. These are distinct from inquiries established by central government described in type **1**. This is because these inquiries are used for examining what decision should be made with reference to future action, rather than a retrospective inquiry to see why something went wrong.
- 2.37 A general power to instigate a local authority inquiry is found in section 250(1) of the Local Government Act 1972. This can be used by any minister who is authorised to "determine any difference, to make or confirm any order, to frame any scheme, or to give any consent, confirmation, sanction or approval to any matter, or otherwise to act under the Act, or under any other Act affecting local authority functions."<sup>57</sup> This power is mainly used in the context of planning, licensing, and educational inquiries, but can be used where the minister considers that an authority is failing to comply with its duties under the Best Value scheme.<sup>58</sup>
- 2.38 Again, these inquiries are regulated by very specific procedures which prescribe the admissibility of evidence, whether the inquiry sits in public, and the reimbursement of costs to parties.<sup>59</sup>

### **Type 9: Investigations dealt with in accordance with the authority's complaints procedure**

- 2.39 Internal grievance procedures are the more routine types of inquiry, not strictly ad hoc in nature because they are conducted in accordance with standing guidelines which regulate the procedure. The guidelines regulate the vast majority of complaints received by the authority. These will vary from authority to authority, but their common features, we believe, will include standing orders

<sup>57</sup> See generally A Arden, *Local Government Constitutional and Administrative Law* (1999) paras 8.4.1 – 8.4.16.

<sup>58</sup> Local Government Act 1999, s 5(4).

<sup>59</sup> See, eg, in the context of planning inquiries, V Moore, *Planning Law* (7th ed 2000) ch 17.

or locally agreed arrangements on who is to deal with the complaint, the time scale for responses and comments on the decision. Complaints procedures are similar to type **8** (routine inquiries) described above.

### **Excluded inquiries**

- 2.40 The approach we have adopted in reaching our definition of an ad hoc inquiry is to consider, in light of the above typology, what we are excluding from our definition in order to distil what we are including within this project.<sup>60</sup>

### **“Public” inquiries**

- 2.41 We are not considering inquiries set up either in pursuance of a express statutory power, or under the prerogative of central government, which are held in public. This is because the statutory powers considered above already regulate to a considerable degree the problems of disclosure, confidentiality, defamation and the like. Even where there is no express regulation of these matters, such as in the Scott Inquiry, these inquiries do not give rise to the same problems as addressed in the Waterhouse Report. The authority is merely a participant in the inquiry, not the instigator of it. Thus there is no option for the authority not to co-operate; indeed, a failure to do so might amount to contempt of court. Hence we are not directly addressing the reports of ministerial inquiries (type **1**) or inquiries set up under the Tribunals of Inquiry Act 1921 (type **2**).

### **Ethical and maladministration inquiries**

- 2.42 Investigations by the Local Commissioner and the new ethical monitoring bodies are similarly excluded from the scope of this consultation exercise. The procedures by which the Local Commissioner, (type **3**) and the Standards Board for England (type **4**) exercise their functions are already covered by statute and guidance. Where there are procedures that the local authority is under a duty either to follow or have regard to, these should govern the inquiry. Again, there is an element of compulsion; the local authority cannot choose not to be subjected to these investigations because they are compulsory.

### **Inquiries subject to standing procedures**

- 2.43 Where the authority has standing procedures in place to deal with the investigation of complaints, these procedures should regulate the investigation. Thus an ad hoc inquiry (of type **5** or **6** above) will only be established where these procedures are in some way unsuited to the handling of the complaint; for example, the severity of the complaint or allegation, the breadth of the subject matter or the complexity of the issues raised.
- 2.44 We have excluded from our considerations routine inquiries (type **8**) and mechanisms that deal with everyday complaints (type **9**). Equally we consider that we are not charged with examining inter-agency inquiries like Part 8 reviews

<sup>60</sup> The definition we reach is at para 2.47 below.

for child care as the considerations raised by such reviews are already subject to detailed guidance (type 7 – regulated) though many of the procedural issues which we consider in this report may well apply to them.

#### **OUR DEFINITION OF AN AD HOC LOCAL AUTHORITY INQUIRY**

- 2.45 The SOLACE report defined ad hoc inquiries as “inquiries into exceptional circumstances, either involving substantial complaints against the authority or a substantial failure in its services.”<sup>61</sup> The dictionary definition of “ad hoc” is “for a particular, usually exclusive purpose.”<sup>62</sup>
- 2.46 For our purposes we believe that our terms of reference require us to adopt a broader definition of an ad hoc inquiry than the SOLACE report. An ad hoc inquiry may, we consider, be established even though there has been no substantial failure in the services provided by the local authority. Similarly the circumstances need not be exceptional in order for an ad hoc inquiry to be established.
- 2.47 Hence **our working definition of a local authority ad hoc inquiry is one which is established by a principal local authority, in circumstances which are not already governed by a statutory or other procedural code, involving serious complaints against the authority or a failure in its services.**
- 2.48 Therefore this consultation paper is aimed primarily at types 5 and 6 – where a local authority, in response to a particular incident, has established an ad hoc inquiry. This will also include those types of multi-agency inquiries which are not already regulated by statute or government guidance (un-regulated type 7 inquiries).

#### **THE LEGAL BASIS FOR SETTING UP LOCAL AUTHORITY AD HOC INQUIRIES**

- 2.49 It is a general principle of local government law that a council cannot act unless Parliament has conferred power upon it to act.<sup>63</sup> Therefore if a local authority wishes to establish an ad hoc inquiry, it must demonstrate that it has the necessary statutory power.

#### **The situation prior to the Local Government Act 2000**

- 2.50 Prior to the Local Government Act 2000 the statutory powers to establish and fund an inquiry were found in sections 111(1) and 137 of the Local Government Act 1972.

<sup>61</sup> The SOLACE Report, para 1.23.

<sup>62</sup> Concise Oxford Dictionary, 1990.

<sup>63</sup> *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473, 478; *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354. See generally I Leigh, *Law Politics and Local Democracy* (2000) pp 41–46, A Arden, *Local Government Constitutional and Administrative Law* (1999) paras 2.2.1 – 2.2.22.

2.51 Section 111 states:

(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.

2.52 Thus where the establishment of the inquiry was calculated to facilitate, or was incidental to, the discharge of their function, section 111 provided the necessary power. The inquiry needed to be incidental to the statutory functions of the authority. Where the inquiry related to a function, such as housing, social services, or education the section provided adequate authority. However, if an inquiry was not incidental to a function, the council might have lacked the necessary vires. For example, if the authority conducted an inquiry into health provision in its area, but was not a health authority, the council might have acted beyond its powers.

2.53 Section 137 granted local authorities the power to incur expenditure for the direct benefit of all or some of its inhabitants, if the expenditure was commensurate to the benefit. The power was only to be exercised where there was no other statutory prohibition preventing expenditure.<sup>64</sup>

### **The situation after the Local Government Act 2000**

2.54 Section 137 was repealed for principal local authorities by the Local Government Act 2000.<sup>65</sup> In its place a new power has been introduced, which enables principal local authorities to do anything<sup>66</sup> which they consider likely to promote or improve the economic, social and environmental well-being of their areas.<sup>67</sup> This came into force on 18 October 2000<sup>68</sup> for English local authorities, and 9 April 2001 for Welsh local authorities.<sup>69</sup>

2.55 Thus where the establishment of an ad hoc inquiry will improve or promote these objectives the power will provide the necessary legal framework. The wide drafting of the power means that the authority can choose simply to use the

<sup>64</sup> Local Government Act 1972, s 137(1A).

<sup>65</sup> Local Government Act 2000, s 8.

<sup>66</sup> Subject to certain restrictions, contained in Local Government Act 2000, s 3.

<sup>67</sup> Local Government Act 2000, s 2(1).

<sup>68</sup> The Local Government Act 2000 (Commencement No 3) Order 2000 SI 2000 No 2836.

<sup>69</sup> The Local Government Act 2000 (Commencement) (No 2) (Wales) Order 2001 SI 2001 No 1471 (W 97).

section 2(1) power both to establish and fund the inquiry,<sup>70</sup> in furtherance of the well-being of the community. Similarly, the authority could continue to invoke section 111 Local Government Act 1972 to establish the inquiry in conjunction with the new power to authorise the necessary expenditure. However, where the inquiry is not incidental to a function of the authority (for instance, the health example set out above) the new power will have to be relied upon to create and finance it. This is particularly important where authorities collaborate with other local stakeholders.

#### **SUBJECT MATTER OF INQUIRIES**

- 2.56 Although our reference stems from an inquiry into deeply disturbing incidents of child abuse, the flexibility of local authority ad hoc inquiries means they are a vehicle for investigating many kinds of complaint or failure. The fact that inquiries are often held into matters of heightened public concern should not mask the range of subjects that can be examined by an ad hoc inquiry. We are aware of inquiries being held into diverse subjects such as fires in rented accommodation in multiple occupation, allegations of misconduct against councillors and members, child abuse in local authority-run care homes, and aspects of the Foot and Mouth Disease outbreak.<sup>71</sup> It is however impossible to provide a full list of such inquiries, as there is no published central register.
- 2.57 It is clear that local authority ad hoc inquiries may cover not only a wide range of subjects, but also that they will vary in seriousness. It seems also, therefore, that the procedures and the degree of formality which will be appropriate for an inquiry panel will vary considerably.<sup>72</sup> In the SOLACE Report we have referred to,<sup>73</sup> there is a proposal for a new power for local authorities to establish a formal inquiry. We consider this proposal at the end of this paper.<sup>74</sup> For now we simply emphasise that our working definition encompasses ad hoc inquiries within types **5, 6** and **7** as we have described, and of any degree of formality.
- 2.58 We now turn to examine the legal issues raised by local authority ad hoc inquiries.

<sup>70</sup> The authority has the power to incur expenditure (s 2(4)(a)) and to provide staff, goods, services or accommodation to any person (s 2(4)(f)) in the exercise of its powers under Local Government Act 2000, s 2(1).

<sup>71</sup> Devon County Council, "Devon Foot and Mouth Inquiry 2001 Into the outbreak and its effects, their handling now and in the future and the recovery and sustaining of the well-being of Devon's countryside."

<sup>72</sup> For example, the decision whether to hold an inquiry in public or in private will depend on a range of considerations: see *Persey v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin).

<sup>73</sup> See para 2.9 above.

<sup>74</sup> See paras 9.92 – 9.101 below.

## **PART III**

# **LOCAL AUTHORITY LIABILITY AND INSURANCE COVER**

- 3.1 Our terms of reference highlight the possibility, mentioned in the Waterhouse Report, that “local authorities may be unduly constrained by threat of actions or loss of insurance cover” from publishing and acting on inquiry reports. In this Part we therefore start by describing briefly the bases on which an authority may be made liable.
- 3.2 Many authorities take out liability insurance to protect themselves against the financial consequences of losing a legal action. They must therefore be mindful of the conditions of their insurance. In the present context, such considerations arise when they are considering what to do about an ad hoc inquiry and report. We therefore examine what the implications of an insurance contract are for a local authority at paragraphs 3.19 to 3.50 below.

### **BASES OF LIABILITY**

- 3.3 An authority may be liable where it acts contrary to the common law, for example in breach of contract, or in tort, where it may be liable for the negligent exercise of statutory powers<sup>1</sup> or statutory duties,<sup>2</sup> vicariously liable for negligence of employees<sup>3</sup> or for intentional wrongdoing of its employees,<sup>4</sup> or for misfeasance in public office.<sup>5</sup>
- 3.4 In addition to liability in private law, a local authority’s actions and decisions can also be challenged by judicial review. This can arise where it acts beyond the scope of its statutorily defined powers (illegality); or where it exercises its discretion unreasonably (irrationality); or breaches the requirements of natural justice (procedural impropriety).<sup>6</sup> However, it must be noted that it does not necessarily follow that where a local authority has acted unlawfully in the “public

<sup>1</sup> *Stovin v Wise* [1996] AC 923.

<sup>2</sup> *X v Bedfordshire CC* [1995] 2 AC 633; *Barrett v Enfield LBC* [2001] 2 AC 550; *W v Essex CC* [2001] 2 AC 592; *Phelps v Hillingdon BC* [2001] 2 AC 619.

<sup>3</sup> *Phelps v Hillingdon BC* [2001] 2 AC 619.

<sup>4</sup> As per Lord Steyn: “the law of vicarious liability sometimes may embrace intentional wrongdoing by an employee” in *Lister v Hesley Hall Ltd* [2001] UKHL 22 para [16]; [2001] 2 WLR 1311, 1317, where the torts of the employee “were so closely connected with his employment that it w[as] fair and just to hold the employers vicariously liable”: [2001] UKHL 22 para [28]; [2001] 2 WLR 1311, 1323. See further paras 3.10 – 3.16 below.

<sup>5</sup> *Racz v Home Office* [1994] 2 AC 45; *Three Rivers DC v Bank of England (No 3)* [2000] 2 WLR 1220.

<sup>6</sup> This classification is taken from Lord Diplock’s speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

law” sense, it is liable in private law, as the relevant private law cause of action must be made out.<sup>7</sup>

- 3.5 The Human Rights Act 1998 makes it unlawful for public bodies to act inconsistently with the ECHR, and empowers the court to give appropriate remedies, including damages, for contravention of Convention rights. Convention rights may be relied on in actions against a local authority (as well as in a judicial review of a local authority decision).<sup>8</sup> Therefore the acts of a local authority may be scrutinised in the light of private law principles, administrative law principles, and Convention rights.

### **TWO DISTINCT TYPES OF LIABILITY**

- 3.6 It is against actions brought on the above bases that some local authorities seek insurance. The authority’s liability can be:
- (1) *direct*, where the authority itself commits the act or omission giving rise to the liability; and/or
  - (2) *vicarious*, where an employee of the authority, during the course of his or her employment, incurs personal liability but the authority – without fault on its part – can nevertheless be liable as well.
- 3.7 The issue is somewhat confused when an action is launched against an authority on different bases of liability and as a mixture of direct and vicarious liability. The current state of flux in the law on local authority liability (especially for torts)<sup>9</sup> means that the law reports are littered with cases where victims of wrongdoing by local authorities plead several alternative causes of action.<sup>10</sup>

### **Direct liability**

- 3.8 Local authorities may incur direct liability for a breach of contract, breach of a statutory duty, negligence, nuisance, trespass, defamation, misfeasance in public office,<sup>11</sup> or a combination of these. For instance, an authority may fail to discharge duties imposed by statute, or discharge them in a negligent manner. In this case, a direct action against the authority for breach of statutory duty may – subject to certain preconditions – be successful.<sup>12</sup>

<sup>7</sup> *X v Bedfordshire CC* [1995] 2 AC 633.

<sup>8</sup> See, eg, K Markus and M Westgate, “Recent Developments in Public Law” *Legal Action* [2001] Nov 25, 26–27.

<sup>9</sup> See *Clerk and Lindell on Torts* (18th ed 2000) para 12–06.

<sup>10</sup> See, eg, *Phelps v Hillingdon LBC* [2001] 2 AC 619. For a succinct description of the current position, see C Booth QC, “Liability in Negligence” [2002] (1) *JLGL* 3.

<sup>11</sup> Misfeasance in public office is a hybrid type of liability that can be committed directly both by the authority and/or by individual officers: see *Jones v Swansea CC* [1990] 1 *WLR* 1453.

<sup>12</sup> See *X v Bedfordshire CC* [1995] 2 AC 633.

- 3.9 An ad hoc inquiry commissioned by a local authority may, directly or indirectly, involve investigation of circumstances which give rise to legal liability. The report's findings may support any pre-existing causes of action; in addition, a new cause of action in defamation might arise from the publication of the report. This is why insurers are concerned about the establishment of inquiries and the publication of reports.

### **Vicarious liability**

- 3.10 Vicarious liability is worth some further explanation at this point. Where a claimant can bring a claim against an authority on the basis that it is vicariously liable for the fault of its member or officer or employee,<sup>13</sup> he or she is likely to do so because the chances of obtaining financial compensation and payment of legal costs will be so much higher than if an action is brought merely against the individual. Moreover, it is much easier to establish a cause of action based on, say, a duty of care, against an easily identifiable individual than against the council as a whole.

### **Definition**

- 3.11 The definition of vicarious liability is that "a master is jointly and severally liable for any tort committed by his servant while acting in the course of his employment."<sup>14</sup> To establish vicarious liability the claimant must satisfy three limbs. First, he or she must show that the worker has committed a tort. Secondly, it must be shown that the worker was a "servant" (now normally referred to as an "employee") rather than an independent contractor. Third, the claimant must establish that the tort was committed during the course of employment.
- 3.12 Many reported cases in which the vicarious liability of the local authority has been pleaded have concerned the "course of employment" criterion, especially when the tort committed by the servant is a physical or sexual assault. The tensions underlying vicarious liability – "on the one end, the social interest in furnishing an innocent tort victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise"<sup>15</sup> – are brought to the fore. Local authorities, especially in relation to child welfare and education issues, have a broad responsibility to the community at large but are subject to finite financial and staffing resources. However, when a servant of that authority abuses children entrusted to his or her care then justice might require that the victim be adequately compensated. The courts have to balance these two competing policy objectives.

<sup>13</sup> Collectively, the members (who are the elected political representative) constitute the council. Officers are those staff appointed by the authority for the necessary discharge of their functions: Local Government Act 1972, s 112(1). Whether this covers all employees of the authority has been doubted (see *R v Hertfordshire CC ex p NUPE* [1985] IRLR 258, 260 *per* Sir John Donaldson MR) but otherwise employees are employed under the incidental power in Local Government Act 1972, s 111. See further, A Arden, *Local Government Constitutional and Administrative Law* (1999) para 5.2.2.

<sup>14</sup> *Salmond and Heuston on the Law of Torts* (21st ed 1996) p 430.

<sup>15</sup> J G Fleming, *The Law of Torts* (9th ed 1998) p 410.

### ***Course of employment***

- 3.13 The “course of employment” inquiry uses as its starting point the classic definition given by Salmond:

It is deemed to be done so if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master.<sup>16</sup>

However, this statement can be misleading. The first part of this test is not concerned with vicarious liability at all. If a master actually authorises a servant to perform a tortious act, then the master’s liability will be primary and direct. The relationship between the master and servant would be transformed to a principal-agent relationship and governed by the law of agency.

- 3.14 The second part of the test asks the court to examine whether the act of the tortfeasor was merely an unauthorised mode of performing his task or if the act was so unconnected with his duties so as to be a completely independent act. Again, peculiar difficulties arise in relation to assault by local authority employees. This is because many cases are brought against councils alleging abuse by persons employed who are in close proximity to the victim of the tort – for example, wardens or foster carers. The difficulty lies in drawing the line between acts that could arguably be classified as a wrongful mode of performing their duties and those that are completely separate.

- 3.15 The issue was comprehensively revisited in the House of Lords in *Lister v Hesley Hall Ltd*.<sup>17</sup> A warden at a school boarding house had committed several acts of sexual abuse on boys in his care. The House of Lords, with the benefit of recent Canadian judgments,<sup>18</sup> analysed the Salmond test. All their Lordships agreed that insufficient weight had been placed upon the phrase after the two-limbed test, which states

But a master, as opposed to the employer of an independent contractor, is liable even for the acts which he has not authorised, provided they are *so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them*.<sup>19</sup>

- 3.16 Thus undue reliance on the unauthorised mode/independent act dichotomy had led to decisions that failed to take into account the connection between the act and the employment. Lord Steyn cited,<sup>20</sup> with approval, Diplock LJ in *Ilkiw v Samuels* when he stated that

<sup>16</sup> *Salmond and Heuston on the Law of Torts* (1st ed 1907) p 83; (21st ed 1996) p 443.

<sup>17</sup> [2001] UKHL 22; [2001] 2 WLR 1311.

<sup>18</sup> See *Bazley v Curry* (1999) 174 DLR (4th) 45, *per* McLachlin J, and *Jacobi v Griffiths* (1999) 174 DLR (4th) 71.

<sup>19</sup> *Salmond and Heuston on the Law of Torts* (1st ed 1907) p 84; (21st ed 1996) p 443 (emphasis added).

<sup>20</sup> *Lister v Hesley Hall Ltd* [2001] UKHL 22, para [42]; [2001] 2 WLR 1311, 1327.

the matter must be looked at broadly, not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: What was the job on which he was engaged for his employer? and answering that question as a jury would.<sup>21</sup>

Thus Lord Steyn concluded that there was a very close connection between the abuse committed by the warden and his employment, and their Lordships held that the school was vicariously liable.

### **Individual liability of members and officers**

- 3.17 A corporate body, such as a local authority, is legally distinct from its constituent parts.<sup>22</sup> Therefore any wrongful acts that the authority commits are separate from the legal liability of the individual members and officers. However in certain circumstances officers and members may be liable for their personal part in the authorities' wrongful acts.
- 3.18 Although members and officers are largely immune from suit when discharging their duties, they may be personally liable where a certain degree of culpability is engaged. If, for instance, if they do not act in good faith or act beyond the powers of the authority, then they may be individually liable for their actions and omissions.<sup>23</sup> Officers, where they act negligently (but still in good faith) will have no statutory protection. It will be no defence that the authority authorised their negligent acts.<sup>24</sup>

### **THE INSURANCE CONTRACT**

- 3.19 While some large local authorities may self-insure against their legal liabilities, many others have liability insurance. Even self-insurers may purchase partial cover for the unexpected liability. An independent investigator appointed by the authority to conduct an inquiry will probably have his or her own professional indemnity insurance, but that insurance company might seek an indemnity from the authority's insurers. We now examine the implications of a contract of insurance for a local authority.

<sup>21</sup> [1963] 1 WLR 991, 1004.

<sup>22</sup> See generally *Encyclopaedia of Local Government Law* paras 1-115 – 1-177; *Cross on Local Government Law* paras 10-52 – 10-53; A Arden, *Local Government Constitutional and Administrative Law* (1999) paras 8.3.2 – 8.3.35.

<sup>23</sup> Common law personal liability is inapplicable for members and officers where the Public Health Act 1875, s 265 is engaged. The section now is applicable to all local authorities, by virtue of the Local Government (Miscellaneous Provisions) Act 1976, s 39 where powers pursuant to any public general or local Act are exercised. It provides a considerable degree of immunity for both the member and the officer. Where the officer or member can demonstrate that their actions were undertaken in good faith, they will benefit from an indemnity to an action. However, for officers this indemnity does not extend to negligent acts, or allegations of irregularities in insolvency proceedings: *Southampton and Itchin Bridge Co v Local Board of Southampton* (1858) 8 El & Bl 801; 120 ER 298; *Bullard v Croydon Hospital Group Management Committee* [1953] 1 QB 511; *Bourgoine v Waltham Forest LBC* (1997) 95 LGR 520.

<sup>24</sup> *R v Watson* (1788) 2 TR 199; 100 ER 108.

- 3.20 A local authority must act prudently because it is a public body, and accountable for its use of public funds. It should operate in “a fairly business-like manner”.<sup>25</sup> It could also be said to be in the position akin to that of a trustee.<sup>26</sup> It should not, therefore, vitiate its insurance cover, deliberately or recklessly. Moreover, its accounts will be audited, and the Audit Commission will look to see whether the authority has conducted itself with “economy, efficiency and effectiveness.”<sup>27</sup> When an authority has set up an ad hoc inquiry, or is contemplating doing so, it will therefore wish to know how its obligations under its contract of insurance affect the authority’s relationship to the inquiry: what the authority ought to do, may do or should not do. In particular, it will wish to know how it may or should respond to the inquiry report, and whether it may publish it, in full or in some anonymised form.
- 3.21 Local authorities, in terms of organisational structure, have an internal dynamism that is quite different from that of private companies. For example, elected councillors may be subject to political or media pressures whereas officers are not. In addition, there is the added tension of external accountability to the electorate at large, as well as service users, complainants and victims of malpractice. This serves as an important backdrop to the relationship between a local authority and its insurer.

### **The express term**

- 3.22 An express term in a contract of liability insurance which reads “No admission of liability, waiver of rights or promise of payment shall be made without the company’s written consent” may be expected as a standard term.<sup>28</sup>
- 3.23 This condition is an innominate term of the insurance contract.<sup>29</sup> The authority must not make any admission of liability, promise of payment, or waive rights. A minor breach of this term will entitle the insurer to claim damages. A breach

<sup>25</sup> As explained by Lord Atkinson in *Roberts v Hopwood* [1925] AC 578, 595–596:

A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body.

<sup>26</sup> See *Prescott v Birmingham Corpn* [1955] Ch 210 in which Jenkins LJ said at p 235 that local authorities owed “an analogous fiduciary duty” to their ratepayers.

<sup>27</sup> Audit Commission Act 1998, s 5(1)(e).

<sup>28</sup> The Waterhouse Report referred to the contract between Clwyd County Council and Zurich Municipal which included such a term. Waterhouse describes how Zurich Municipal became the relevant insurer at paras 32.55 and 32.56 of the report.

<sup>29</sup> An innominate term is a term in a contract that does not automatically give rise to a repudiation of the contract (like, for instance, a breach of a condition) or merely a remedy in damages (such as breach of a contractual warranty) but may give rise to either: see *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. Procedural terms which regulate the insurance claims procedure were described as innominate in *Alfred McAlpine v BAI (Run-Off) Ltd* [2000] 1 Lloyd’s Rep 437.

which has very serious consequences for the insurer will entitle the insurer not to pay out under the contract.<sup>30</sup> However, the contract will continue to govern other claims made by the authority under the insurance policy.<sup>31</sup>

### ***An implied limitation on the express term***

- 3.24 The express term which forbids an admission of liability, waiver of rights of promise of payment without the insurer's consent does not necessarily give the insurer an unfettered discretion to give or withhold consent. While a term will only be implied into a contract where it "represents the obvious though unexpressed intention of the parties or is necessary for the business efficacy of the contract"<sup>32</sup> and the context and purpose of the approval must be identified in each case, it is likely that a limitation to this express term can be implied. It is highly arguable that an insurer should not "withhold approval arbitrarily, or ... [should] not do so in circumstances so extreme that no reasonable company in its position could possibly withhold approval."<sup>33</sup>
- 3.25 We consider what might amount to an admission of liability in Part IV, and what rights might be waived by the act of publishing an inquiry report in Part V.

### **Other constraints**

- 3.26 It is clear that it is likely that admission of liability and waiver of rights will be expressly prohibited, but the question remains whether there might be any further constraints on the actions open to the authority arising out of any rule of law, or out of an implied term in the insurance contract which is even more far-reaching.

### **Principles of law**

- 3.27 We start by considering the effect of two principles of insurance law: first, that a claim on an insurance policy may not succeed where the party making the claim brought about the loss through its own intentional act, and second, that no one should benefit from his or her own wrongdoing.

<sup>30</sup> See *Alfred McAlpine v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437 cf *Virk v Gan Life Holdings* [2000] Lloyds Rep IR 159.

<sup>31</sup> *Alfred McAlpine v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437, 444.

<sup>32</sup> *Gan Ins Co Ltd v Tai Pin Ins Co Ltd* [2001] EWCA Civ 1047, para [46] per Mance LJ, citing *The Moorcock* (1889) 14 PD 64; *Liverpool CC v Irwin* [1977] AC 239; and cf *Chitty on Contracts* (28th ed 1999) Vol 1 General Principles, paras 13-004 – 13-009.

<sup>33</sup> *Gan Ins Co Ltd v Tai Pin Ins Co Ltd* [2001] EWCA Civ 1047 per Mance LJ at para [73]. He continued, "This will not ordinarily add materially to the requirement that the reinsurer should form a genuine view as to the appropriateness of settlement or compromise without taking into account considerations extraneous to the subject-matter of the reinsurance."

See also *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No 2)* [1993] 1 Lloyd's Rep 397 and *Nash v Paragon* [2001] EWCA Civ 1466; [2002] 1 WLR 683.

- 3.28 If a wilful act of the insured is the cause of the loss, then the insured may not claim on the policy, whether or not the loss was intended.<sup>34</sup> Publication of an inquiry report would be a deliberate and “wilful” act and on the face of it, the authority could, on this doctrine, be unable to claim for liability which resulted from the act of publishing.
- 3.29 Moreover, if the wilful act is criminal or tortious, there again the insured may not claim on the policy, as a matter of public policy.<sup>35</sup>
- 3.30 Neither of these principles will be relevant where the authority’s liability is vicarious. In the case of the first principle, if liability is vicarious, it is on the basis of the act of an employee, and there is no deliberate act of the authority in view. In the case of the second principle, it has been held that while a person may not insure against liability arising out of the commission of a crime (save where such insurance is required by law), “there is nothing either in the authorities or in logic to justify extending this principle of public policy so as to deny insurance cover to those whose sole liability is one which arises vicariously, whether as employers or, as here, under an equivalent statutory provision.”<sup>36</sup> Indeed, it is because there is a risk that the authority will be vicariously liable that it should make provision. Thus, if an officer of the authority, without the permission of the authority, deliberately puts the findings of an inquiry into the public domain and an action for defamation results, the authority will be vicariously liable, and the doctrine that the insured may not claim where the act was wilful may not bite.
- 3.31 Where the act of putting the information into the public domain is done by a member, employee or officer *with* the appropriate authorisation, any consequential liability of the authority will be primary and direct, not vicarious.

#### THE INTERPRETATION OF THESE PRINCIPLES FOR LOCAL AUTHORITY LIABILITY INSURANCE

- 3.32 Even where these two principles are applicable on the face of it, they should be applied with reservations to local authority liability insurance contracts. The underlying principle is that the insured should not be able to recover on a policy when the insured party has itself brought about the loss deliberately. So, to take an extreme example, if an authority received legal advice that an inquiry report it had commissioned was prompted by malice and its conclusions were defamatory without justification, the principle would prevent the authority claiming on its insurance policy if it deliberately published the report. It would not have been the intention of the parties to the contract to permit this.<sup>37</sup>

<sup>34</sup> *Britton v Royal Ins Co* (1866) 4 F & F 905, 908; 176 ER 843, 844 *per* Willes J. See also *British and Foreign Marine Ins Co v Gaunt* [1921] 2 AC 41, 52 *per* Viscount Finlay.

<sup>35</sup> A person should not profit from his or her own wrongdoing (*ex turpi causa, non oritur actio*).

<sup>36</sup> *Lancashire CC v Municipal Mutual Ins Ltd* [1997] QB 897, 908 *per* Simon Brown LJ.

<sup>37</sup> *MacGillivray on Insurance Law* (9th ed 1997) para 14–31 citing *Beresford v Royal Ins Co* [1938] AC 586, 595.

3.33 It will, however, have been the intention of the parties to provide cover for liability which is not deliberately caused by the insured. Similarly, the principle that a person shall not profit from his or her own wrongdoing is tempered where the wrongdoing itself is not deliberate (though the act may be):

So a man may insure against liability for other wrongful acts committed by him which are committed innocently or through carelessness and without any deliberate intention to do wrong, such as infringement of copyright or publication of a libel.<sup>38</sup>

3.34 We would argue also that the fact that the insured is a local authority itself means that these principles should be interpreted in this limited way. First, there is the general principle that a public authority may not by contract fetter itself so as to disable itself from exercising its discretion by law.<sup>39</sup> A contract concluded between a private contractor and a local authority will not be allowed to subsist if it is reasonably foreseeable that the contract will be incompatible with the due exercise of their powers or the discharge of their functions.<sup>40</sup>

3.35 For example, it could be said that in order to discharge its statutory responsibilities to vulnerable people for whom it provides homes, an authority ought to investigate complaints of ill-treatment, and disseminate the lessons that can be learnt. Further, local authorities clearly have statutory duties to fulfil, and part of those duties may entail making certain information public. An argument could also be founded on authorities' new statutory power to do anything which they consider likely to promote or improve the economic, social and environmental well-being of their areas.<sup>41</sup>

3.36 The local authority may have a duty to publish a report.<sup>42</sup> It might, for example, be implied from the primary duty imposed upon the authority. For instance, in

<sup>38</sup> See *MacGillivray on Insurance Law* (9th ed 1997) para 14–46.

<sup>39</sup> H W R Wade and C F Forsyth, *Administrative Law* (8th ed 2000) p 333.

<sup>40</sup> *British Transport Commission v Westmoreland CC* [1958] AC 126, 144 *per* Viscount Simmonds. See generally, H W R Wade and C F Forsyth, *Administrative Law* (8th ed 2000) pp 333–338; P P Craig, *Administrative Law* (4th ed 1999) pp 526–534.

<sup>41</sup> Local Government Act 2000, s 2(1). See para 2.54 above. The DTLR's guidance to local authorities on the exercise of the power, to which the authorities are bound to have regard (Local Government Act 2000, s 3(5)) does not define any of the three well-beings. It states:

The Government does not intend to define what actions would constitute the promotion of economic, social or environmental well-being, although it should be made clear that it considers these terms to be sufficiently broad to encompass both cultural well-being and the promotion or improvement of the health of a council's residents or visitors to the area. It is for the local authority itself to decide whether any particular action would promote or improve well-being, taking account of their local circumstances and the wishes and needs of their communities. A local authority would, of course, need to interpret these terms in accordance with the general principle of “*Wednesbury*” reasonableness.

DTLR, “Power to Promote or Improve Economic, Social or Environmental Well-Being (Final Guidance)” May 2001, para 27.

<sup>42</sup> See paras 6.20 – 6.26 below.

relation to child care, Part I Schedule 2 to the Children Act 1989 imposes a duty on the local authority to publish information about the services provided by them under various sections of the Act.<sup>43</sup> Not all inquiries may be linked in such a direct manner to a primary duty imposed upon the authority.

- 3.37 There are, however, limits on the deliberate act of an insured where it has liability insurance cover. Diplock LJ described the limits on an insured's conduct in relation to liability insurance in this way:

What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy refrain from taking precautions which he knows ought to be taken.<sup>44</sup>

- 3.38 An authority which adopted a cavalier attitude to an inquiry report, and did not trouble to take the steps that a reasonable prudent<sup>45</sup> authority would take to avert the risks of an action in defamation, could be said to be courting the danger. An authority which takes reasonable steps to avert that risk, such as reviewing the quality of the report and the basis for any defamatory statements in it, before releasing it, will not be courting the danger; if it does not take reasonable steps, it might be acting imprudently. We are fortified in this view by the statements of the ABI in its Response to the Waterhouse Report. It wrote, "... insurance policies generally include a duty to behave as if uninsured. The purpose of this duty is to prevent the insured (here, the local authority) behaving imprudently simply because its risks are being assumed by someone else."<sup>46</sup>

***Implied terms: duties of utmost good faith, of co-operation, and to minimise loss***

- 3.39 Despite the strength of the arguments we have just rehearsed, if a fundamental term can be implied in the insurance contract not to say or do anything likely to prejudice the insurer's position, the authority may be constrained. We therefore

<sup>43</sup> See para 1(2). The obligation to publish information arises in relation to Children Act 1989, ss 17, 18, 20, 23B – 23D, 24A and 24B.

<sup>44</sup> *Fraser v B N Furman (Productions) Ltd* [1967] 1 WLR 898, 906. The "condition" referred to was that "the insured shall take reasonable precautions to prevent accidents and disease". The contract containing the condition was an employer's liability insurance policy. See also *Sofi v Prudential* [1993] 2 Lloyd's Rep 559; *Devco Holder v Legal and General Assurance Soc* [1993] 2 Lloyd's Rep 567.

<sup>45</sup> Hardy Ivamy submits that the words "reasonable" and "prudent" are interchangeable: E R Hardy Ivamy, *General Principles of Insurance Law* (6th ed 1993) p 144.

<sup>46</sup> The ABI Response, section 2, para 2.4.

now consider the possibility that such a term can be implied in the insurance contract.<sup>47</sup>

3.40 A term will be implied if either it is necessary for the performance of the contract, or it can be shown that the parties would have agreed to such a term if they had thought about it.<sup>48</sup> A term will not be implied if it is not reasonable.<sup>49</sup> Further, as an express term will be construed in the context in which it appears,<sup>50</sup> so it is appropriate to bear the context in mind when considering what terms might be implied into a contract.<sup>51</sup>

3.41 The argument for implying a term to the effect that the local authority must not act in a way prejudicial to the insurers' interests proceeds from the implied condition in all insurance contracts that the parties observe utmost good faith towards each other at all material times and in all material particulars.<sup>52</sup> This duty of utmost good faith continues throughout the contractual relationship at a level appropriate to the moment.<sup>53</sup>

<sup>47</sup> As recounted in the Waterhouse Report (para 32.45), Clwyd's insurers referred in correspondence to such a fundamental term. Counsel's advice was that such a term could indeed be implied in the contract. The distinction between the supposed fundamental term and the express condition was significant in counsel's advice. While the express condition prevented the council from adopting or accepting the report, it might have been possible to have published an edited and abridged version. The conclusion that the insurer was right to assert the fundamental implied term, however, meant that not even this limited form of publication was possible, because it might "be deemed so potentially prejudicial to the interests of the insurers" as to breach the fundamental term. If an insured breaches the fundamental term of utmost good faith, the insurer can avoid the contract entirely.

<sup>48</sup> *MacGillivray on Insurance Law* (9th ed 1997) para 11–11. See, eg, *Yorkshire Water Services Ltd v Sun Alliance & London Ins plc* [1997] 2 Lloyd's Rep 21, 31.

<sup>49</sup> *Liverpool CC v Irwin* [1977] AC 239, 262.

<sup>50</sup> *Fraser v B N Furman Ltd* [1967] 1 WLR 898, 905 *per* Diplock LJ.

<sup>51</sup> "The court may construe the contract in the light of the objects which the contract was intended to achieve." M A Clarke, *The Law of Insurance Contracts* (3rd ed 1997) para 15–3B2, citing authorities too numerous to repeat here.

<sup>52</sup> Mathew LJ described it as a "well-established rule of law":

it is an essential condition of a policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risk, but in the steps taken to carry out the contract.

*Boulton v Houlder Brothers* [1904] 1 KB 784, 791–2.

<sup>53</sup> M A Clarke, *The Law of Insurance Contracts* (3rd ed 1997) para 27–1A, cited with approval in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [1997] 1 Lloyd's Rep 360 by Leggatt LJ. The duty of good faith is not an absolute. As Lord Clyde held in the House of Lords' decision:

The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made.

- 3.42 Authorities on the duty of utmost good faith often concern the duty to disclose material facts to the insurer.<sup>54</sup> That aspect of the duty is no doubt very important, in consequence of the fact that the insured will or should have the information pertinent to risks and liabilities, and the insurer needs to have that information. But the problem for a local authority in the present context is not one of non-disclosure of information to the insurer; it is whether its words and actions, as regards others, should be circumscribed beyond what is stated in the express term because of the duty of good faith owed to the insurer.
- 3.43 So what effect exactly does the duty of utmost good faith which the authority undoubtedly owes to the insurer have? We are not aware of any case law which expressly addresses the duty of utmost good faith as interpreted in the context of a policy of insurance for a public body. The principles applicable to a private person or body may not be those which apply to a public body.
- 3.44 However, where terms are sought to be implied into a private law transaction between the local authority and a private party, they will not be implied if the term would interfere with the discharge of statutory duties or functions.<sup>55</sup> In *William Cory and Son v London Corpn*<sup>56</sup> the claimants sought to imply a term to a contract that would have effectively prevented the corporation from discharging its statutory duty, expressed in imperative language. The court held that this term was ultra vires the corporation's authority; the contract was incompatible with the effective discharge of the authority's functions.
- 3.45 This case, and the general principle to which it relates, suggests a narrow interpretation of any implied duty, term, or condition in an insurance contract such that the authority is not prevented from carrying out its statutory functions. For example, it could be argued that the fact that the insured is a statutory authority responsible for the care and protection of children has a modifying impact on the duty of utmost good faith.<sup>57</sup>

*Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 1, para [7]; [2001] 2 WLR 170, 175. See also *Konstantinos Agapitos v Agnew* [2002] EWCA Civ 247 in which it was held, following their Lordships' decision in *The Star Sea* that the duty of utmost good faith owed under the Marine Insurance Act 1906, s 17 is superseded or exhausted by the rules of litigation, that the same is true of the common law duty of good faith.

<sup>54</sup> For example, *Leon v Casey* [1932] 2 KB, 576, in which Scrutton LJ held at p 579, "insurance has always been regarded as a transaction requiring the utmost good faith between the parties, in which the assured is bound to communicate to the insurer every material fact within his knowledge not only at the inception of the risk, but at every subsequent stage while it continues...". See also *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 1; [2001] 2 WLR 170, cited at n 53 above.

<sup>55</sup> [1951] 2 KB 476, 484; *Commissioners of Crown Land v Page* [1960] 2 QB 274, 287 and 289 per Evershed MR and Omerod LJ.

<sup>56</sup> [1951] 2 KB 476.

<sup>57</sup> In the Clwyd case, counsel referred to having considered the impact of this fact, but concluded on balance that a cautious approach was nevertheless best, because there was no express modification in the insurance contract.

- 3.46 Bearing this important feature in mind, we now consider the interpretation of the duty of utmost good faith in the light of any duty of co-operation, or a duty to minimise loss, that may be implied. As we say above, we have in mind the argument that these duties mean that a local authority may not act in a way which is prejudicial to its insurers' interests.

#### A DUTY OF CO-OPERATION

- 3.47 It could be argued that the duty of utmost good faith has been developed to embrace a "duty of co-operation". Liability insurance contracts commonly contain a co-operation clause, in which the insured promises not to admit liability or to settle a claim without the consent of the insurer, and to secure information or evidence required by the insurer to defend a claim against the insured and to render the insurer all reasonable assistance.<sup>58</sup> If there is no express term, a duty of co-operation may be implied, according to Lord Blackburn, when

... it appears that both parties have agreed that something shall be done, which cannot be effectually done unless both parties concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.<sup>59</sup>

- 3.48 A co-operation clause may be implied to the extent that it is necessary, namely where without co-operation, it would be impossible for the contract to be performed.<sup>60</sup> Thus it extends to matters such as obtaining or providing information, and rendering the insurer all reasonable assistance, but the implied duty of co-operation should not be interpreted as requiring that the insured not do anything prejudicial to the interests of the insurer. The context of the contract points rather in the opposite direction, as we explain at paragraph 3.34 above. We would therefore question whether a duty of co-operation extends so far as taking all steps to prevent or minimise loss, when to do so conflicts with a proper function or duty of the insured.

#### A DUTY TO MINIMISE LOSS

- 3.49 Judicial and academic opinion is divided as to whether or not a duty to mitigate loss is to be implied into insurance contracts.<sup>61</sup> Some judges have stated that, in the absence of an express duty, no duty to minimise the extent of loss will be implied. Others, mainly writers, have asserted that, if the insured has no express duty to take reasonable steps to minimise loss, a duty of that kind will be

<sup>58</sup> M A Clarke, *The Law of Insurance Contracts* (3rd ed 1997) para 27-4A.

<sup>59</sup> *Mackay v Dick* (1881) 6 App Cas 251, 263 per Lord Blackburn.

<sup>60</sup> See Devlin J in *Mona Oil Equipment and Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014 at 1018.

<sup>61</sup> See *MacGillivray on Insurance Law* (9th ed 1997) paras 26-18 – 26-19; *British and Foreign Marine Ins Co v Gaunt* [1921] 2 AC 41; *Yorkshire Water Services Limited v Sun Alliance and London Ins plc* [1997] 2 Lloyd's Rep 21.

implied.<sup>62</sup> Although the writers have little support from the judges, many cite Scrutton LJ in *City Tailors Ltd v Evans*:

it is immaterial that the fire was caused by the negligence of the assured's servants ... But, once the fire has happened, the assured must do his best to extinguish it.<sup>63</sup>

- 3.50 Clarke explains that a duty on the insured to minimise loss may arise because the insured's act or failure to act may break the chain of causation, or

as part of the wider duty to render assistance to the insurer which, in turn, is "linked" to the general duty of good faith.<sup>64</sup>

but he points out that "the insured is obliged to take care to prevent or avoid *any* insured loss at all only if the contract says so in very clear terms". Again, it would be a considerable leap to infer from a duty to minimise loss once loss has occurred or started to occur, a duty not to do *anything* prejudicial to the interests of the insurer, even if to do so would mean that the insured cannot carry out its proper duties, and we doubt whether a duty of co-operation extends so far as taking all steps to prevent or minimise loss, when to do so conflicts with a proper function or duty of the insured.

## CONCLUSIONS

- 3.51 An express term in the insurance contract may well prohibit any act which constitutes an admission of liability or waiver of rights, without the insurer's consent.<sup>65</sup> In considering whether to withhold consent, the insurer must not exercise its discretion dishonestly, for an improper purpose, capriciously or arbitrarily.
- 3.52 Turning to the effect of terms which may be implied into the insurance contract: the authority may take steps which might expose it to liability – it can hardly avoid doing so – and in that sense it may insure against its own deliberate act, but it may not court liability, and must act as a prudent, reasonable, authority would act. It owes a duty of utmost good faith to the insurer, and duties of co-operation and to minimise loss may also be implied, but these duties do not extend so far as to inhibit it from doing or saying anything prejudicial to the interests of its insurers, when its own functions as a public body so require.

<sup>62</sup> See M A Clarke, *The Law of Insurance Contracts* (3rd ed 1997) para 28–8G1.

<sup>63</sup> (1922) 126 LT 439, 443.

<sup>64</sup> M A Clarke, *The Law of Insurance Contracts* (3rd ed 1997) para 28–8G1.

<sup>65</sup> For discussion of what might constitute an admission of liability or waiver of rights, see Parts IV and V below respectively.

## **PART IV**

### **ADMISSIONS OF LIABILITY**

- 4.1 It is obvious that the interests of the elected members of a local authority and their insurers might conflict. Whereas the members may wish to fulfil their political obligations by absorbing criticism and promising to compensate victims, when they think something has gone wrong with the delivery of their services, the insurers will be concerned about the disclosure of statements and documents that might prejudice their chances of a favourable settlement. Hence insurers often include a condition to prevent the authority from admitting liability without the insurer's consent, as described in the previous Part.<sup>1</sup> In this Part we examine what might amount to an admission of liability in this context.

#### **THE DIFFERENT KINDS OF LIABILITY**

- 4.2 It should be borne in mind that the authority, and the insurer, will be concerned about admissions both where the authority's liability is primary and direct, and where it is vicarious.<sup>2</sup> It is likely that only an employee of some seniority would be capable of making an admission of primary liability that would bind the authority, but any employee or member might make an admission of fact on which a claim of vicarious liability for the tort of its employees, or direct liability for breach of its own duties could be founded. In many cases, if the facts are as admitted, direct liability of the local authority will follow inevitably from the failures in supervision or procedural failures.

#### **DEFINITION OF AN ADMISSION OF LIABILITY**

- 4.3 The insurance contract refers only to admissions of liability, but the question arises whether the prohibition on admissions of liability extends to admissions of fact, because of the inferences that could be drawn from them. Our provisional view is that a distinction can be drawn in law between admissions of fact and admissions of liability. In *Terry v Trafalgar Insurance Company Ltd* oral and written admissions of liability were made by the plaintiff after a road accident. He pleaded that the condition in his insurance policy preventing an admission of liability was contrary to public policy because it would cause the insured person to lie about what had happened, or at least conceal the truth. His Honour Judge Graham Rogers, sitting in the Mayor's and City of London Court, in dismissing this argument, stated that

There is a world of difference between giving a factual account of what happened, without giving any expression of opinion as to blame, and an admission of liability.<sup>3</sup>

<sup>1</sup> See para 3.22 above. Even where an authority self-insures, it will wish to guard against admissions of liability being made without proper consideration by members.

<sup>2</sup> See paras 3.6 – 3.16 above for a brief description of these different types of liability.

<sup>3</sup> [1970] 1 Lloyd's Rep 524, 526.

- 4.4 While some statements can be easily classified as a purely factual account or, at the other extreme, as an admission of liability, we appreciate that sometimes there may be a very fine line between what is a statement of a fact and what is an informal admission of liability, especially where an inquiry report directly cites evidence provided by the council's employees to the inquiry panel. At paragraphs 4.16 – 4.17 below we give an example to illustrate the difficulties of distinguishing between statements of fact and admissions of liability.
- 4.5 The significance of an admission lies in the procedural rules governing civil proceedings: an admission made during the course of an inquiry or in response to an inquiry report can be admissible as evidence in subsequent proceedings against the local authority.
- 4.6 A formal admission is one made by a party which admits the whole or part of the truth of another party's case in the proceedings, in writing by letter or in statement of case.<sup>4</sup> Admissions may be implied as well as express, but they must be clear.<sup>5</sup> If the defendant (for present purposes, we are assuming this to be the authority) makes such an admission, the claimant can apply for summary judgment on the admission.<sup>6</sup>
- 4.7 A formal admission would not be made without proper consideration by the legal officers, and appropriate consultation with insurers where necessary, but informal admissions are a different matter. An informal admission is a statement made by a party (or by some person by whose admission a party is bound as a matter of law)<sup>7</sup> from which the court would be entitled to, but is not bound to, find facts or draw inferences adverse to the case of that party.<sup>8</sup> These informal admissions are admitted as evidence by Civil Evidence Act 1995, section 7(1). They are not determinative of the issue but the court can give whatever weight it considers appropriate to the admission.<sup>9</sup> The weight to be attached to the admission increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion on which it was made.<sup>10</sup>
- 4.8 Additionally, any out-of court statement made by a party to the claim or by anyone else can be admitted as evidence against the authority under Civil

<sup>4</sup> Civil Procedure Rules (CPR) Pt 14, r 1(1), (2).

<sup>5</sup> *Ellis v Allen* [1914] 1 Ch 904; *Ash v Hutchinson and Co (Publishers) Ltd* [1936] Ch 489; *Technistudy v Kelland* [1976] 1 WLR 1042; *Murphy v Culhane* [1977] QB 94.

<sup>6</sup> CPR Pt 24 provides for a fast track mechanism for the summary disposal of cases where there is no real prospect of the claim either being defended or made out, and there is no other compelling reason why the case or issue should be disposed of at a trial.

<sup>7</sup> See *Tustin v W Arnold and Sons (British Dominions General Ins Co Ltd, third party)* (1915) 31 TLR 368 and *Burr v Ware RDC* [1939] 2 All ER 688.

<sup>8</sup> P Murphy, *Murphy on Evidence* (7th ed 2000) p 244.

<sup>9</sup> A list of non-exhaustive factors to be taken into account is given in Civil Evidence Act 1995, s 4(2).

<sup>10</sup> *Phipson on Evidence* (15th ed 2000) para 28–09.

Evidence Act 1995, section 1. Statements by third parties, however, will not be “admissions of liability” as described in the insurance contract and therefore will not affect the authority’s insurance cover.

- 4.9 Previous statements of witnesses are admissible in evidence with the leave of the court.<sup>11</sup> The statement can thus be adduced to support or undermine any oral evidence given by that party.

#### **WHAT ACTIONS WILL CONSTITUTE ADMISSIONS?**

- 4.10 The issue of what actions constitute admissions subdivides into four: first, whether admissions may be made by officers or council staff *to* the inquiry. Secondly, whether the *reception* of the report by the council can constitute an admission of liability. Thirdly, whether *adoption* or endorsement, including publication, of the report can amount to an admission. Fourth, what *public statements* might amount to an admission of liability, and if so when. The answers to these sub-issues may vary according to whether the inquiry is independent (type **5**) or internal (type **6**).<sup>12</sup>

#### **Admissions made by members, officers or staff during the course of the inquiry**

- 4.11 An authority will want to be aware to what extent, and how, the oral and documentary evidence its members, officers or staff give to an inquiry might amount to an admission of a relevant fact or an admission of liability which could be relied upon in later proceedings by a claimant. The claimant could have access to that information, even if the inquiry is held in private, because in some circumstances, the evidence given to the inquiry will have to be made available for public inspection as a background paper to the report when it is being considered by the council.<sup>13</sup>
- 4.12 Oral evidence presented will never amount to a formal admission because a formal admission must be in writing, but oral statements made to the inquiry may amount to an informal admission.
- 4.13 It will only be where a person, whether employee or councillor, has authority to speak for the council that an admission could be construed as an admission of primary liability. If a person giving evidence sought to admit liability as a whole for the council, this would be beyond their authority so no statement would bind the authority as a matter of law.<sup>14</sup>
- 4.14 Even without expressly admitting liability for the authority as a whole, an officer or member giving evidence to an inquiry might make relevant admissions of

<sup>11</sup> Civil Evidence Act 1995, s 6.

<sup>12</sup> See paras 2.27 – 2.32 above for the typology we are using.

<sup>13</sup> See paras B.13 – B.19 and B.26 – B.29 below.

<sup>14</sup> *Burr v Ware RDC* [1939] 2 All ER 688.

facts from which an inference of primary or vicarious liability could be drawn. We anticipate that most oral or written admissions made to an inquiry would result in vicarious liability for the authority, rather than primary liability of the authority. Primary liability might follow where the person giving evidence is sufficiently senior for an oral or written admission of fact to amount to evidence of executive acts carried out by the authority. Hence any statement of this nature would not constitute a binding admission of liability, but it could be admissible in evidence. This is because section 1 of the Civil Evidence Act 1995 renders admissible an out-of court statement whether made by a party to the claim or by anyone else. The relevance of whether or not there is a relationship of agency or privity goes to the weight that the court will attach to the statement.<sup>15</sup>

- 4.15 To this end, we have used the following example to help clarify at what point statements made to the inquiry can amount to an admission of liability.
- 4.16 Our typical situation involves the report of an inquiry into allegations of abuse and neglect in homes for the elderly where a former resident is now bringing an action for negligence directly against the authority and also based on the vicarious liability of the authority for the acts and omissions of its employees.
- 4.17 If the nurse stated “I failed to follow the standard procedures in respect of monitoring medication given to patients,” the issue is far from clear cut. Although this is a factual statement, the court might well be able to find facts or draw inferences adverse to the authority, because a failure to follow set, mandatory procedures could entitle the court to draw the conclusion that the nurse was in breach of the duty of care owed to patients in his or her care and/or that the authority’s supervisory systems were inadequate (resulting in possible direct liability for the authority).
- 4.18 Hence we consider that authorities and their insurers may be right in certain instances to be concerned with even strictly factual accounts given to the inquiry team, where adverse conclusions can be drawn from those factual accounts. But once the decision is taken to set up the inquiry there would be little point in officers, members and employees of the authority presenting evidence to the inquiry if the insurers considered that mere statement of bare facts would amount to informal admissions of liability.

#### **Admissions made by the authority on receiving the report**

- 4.19 In order to assess whether admissions can be made where the authority reacts to the report, the procedure used for the reception and adoption of reports must be examined.<sup>16</sup>

<sup>15</sup> M Keane, *The Modern Law of Evidence* (5th ed 2000) p 314, commenting on Civil Evidence Act 1995, s 4.

<sup>16</sup> The risk of admitting liability in the Clwyd case affected what action was open to the council to take, formally, in relation to the Jillings report. The original plan (as related in counsel’s opinion) was to consider the report at a special meeting of a council committee,

### ***The procedure for reacting to a report***

- 4.20 We envisage that the report of the inquiry will be presented, in the first instance, to the body commissioning the investigation. Hence if the Policy and Resources Committee commissioned the inquiry, our understanding is that the report would be placed before that committee.
- 4.21 It may be that the report is of such concern to the elected members that it is more appropriate to discuss its findings in a meeting of the full council, in which case the report might be presented to the full council.<sup>17</sup> Such a procedure is most likely to be invoked where there is a good deal of public interest in the matter under investigation or the issue involves constituents of a councillor's ward not represented on the Policy and Resources Committee.
- 4.22 If the report is likely to contain sensitive material excluded from the Access to Information Act 1985 regime then the report can be dealt with under part 2 of the agenda of the meeting, whereby the press and public can be excluded.<sup>18</sup> If the report is to be discussed at a meeting open to the public, we do not consider that making the report available in advance of the meeting would constitute any approval of its contents or any admission of liability.
- 4.23 We anticipate that a covering paper from the relevant officer will normally be attached to the report, explaining the relevant background, and what action is proposed. The report of the officer might also include policy advice on whether or not the recommendations (if any) should be adopted. This policy advice may include legal advice on whether or not a wholesale adoption of all or any of the findings or recommendations could amount to an admission. We assume that, in such a case, the officer would have ensured that the obligation to seek the consent of the insurer was complied with.
- 4.24 The council's response to the report may be simply that its contents were *noted*. This is unlikely to constitute a binding admission of liability, as it does not imply approval of the report's findings. (In the Clwyd case, counsel thought the findings could simply be noted.) This will apply a fortiori if the report's authors are independent of the authority. The report will be listed in the minutes of the meeting. We consider that the mere listing of a report in the minutes of a committee or council meeting is insufficiently emphatic an approval of its

to be held a little over a week before the council ceased to exist. Counsel's advice was sought on, amongst other things, how the council should handle the report at that meeting: the Waterhouse Report, paras 32.35 – 32.49.

<sup>17</sup> The leader of the council can call an extraordinary meeting of the full council at any time: Local Government Act 1972, Sched 12, para 3(1). If five members of the council call for a full meeting and the leader refuses, the meeting can nonetheless be called: Local Government Act 1972, Sched 12, para 3(2).

<sup>18</sup> See paras B.19 – B.25 below.

findings to amount to an admission. The minutes of the meeting will however be admissible in evidence to prove resolutions contained therein.<sup>19</sup>

### **Admissions made by the council on adopting the report**

- 4.25 Alternatively, the council may also choose to *adopt* the report. If a resolution is passed in committee or full council that expressly admits, or the effect of which is to admit liability in respect of incidents clearly identified in the report, then that resolution may constitute an informal admission. Whether it does will depend upon the level of detail contained in the report, and the specific nature of the findings and/or recommendations. If for instance, one of the report's conclusions read "between 1980 and 1990 there were failures in respect of the supervision and training of staff in care homes" it is unlikely to be sufficiently specific enough to amount to an admission of negligence in respect of individual children within specific care homes. On the other hand, a finding that "teacher C physically assaulted pupil D on 12 May 1997", if adopted, could constitute an admission for the purposes of a civil case of assault.
- 4.26 Hence, any covering note, the language of the report itself, coupled with the wording of any resolution passed by the authority, may amount to an informal admission. For instance, a resolution may be passed that "the committee (or council) endorses the findings and recommendations of the report."<sup>20</sup>
- 4.27 As we note in paragraph 4.23, at the point where the council is considering formally how to respond to an inquiry report, the officer presenting the report to the authority will have checked what obligations the authority might have under its contract of insurance and, as described at paragraph 3.22 above, it is likely that there will be an express term in the insurance contract forbidding an admission of liability without the insurer's consent. Therefore, if an authority made an admission such as the one in the paragraph above without the consent of the insurer, the insurer would be entitled to refuse to indemnify the authority for any claims arising out of the statement, because the authority would clearly be in breach of the express term. In this regard, the authority is in the position of a private body, and it is bound by its contractual obligations. The authority should not consider making an admission at this stage without having consulted with the insurer.
- 4.28 In some cases, the inquiry panel will not have been charged with determining the legal liability of the authority, and even if it has reached conclusions adverse to the authority, liability to individual claimants will not follow automatically. In other cases the authority's liability (vicarious or primary) will be clear. It is possible in theory for the insurer to withhold consent to the admission even

<sup>19</sup> Local Government (Miscellaneous Provisions) Act 1976, s 41(1), (2A).

<sup>20</sup> In the case of the Jillings report, counsel accepted the insurer's contention that there was a "considerable risk" that "any formal adoption or approval" of the report by the council would amount to an admission of liability in respect of any individual cases of abuse considered in the report, should such cases result in legal action being taken against the council: the Waterhouse Report, para 32.45.

where liability is clear;<sup>21</sup> each claimant's case will have to be considered individually. We discuss this potential problem further in Part VII, and ask consultees how far this is a problem in practice.

### ***Acting on the report***

- 4.29 The purpose of an inquiry will usually be to identify necessary improvements to the authority's practices, and to prevent a recurrence of whatever has been found to have gone wrong. Therefore, it is highly likely that the authority will wish to consider and pass resolutions on certain actions, in the light of the report. The question then arises whether, even if the council does not formally approve the report, if it resolves on changes in policy or practice as a result of the report, those resolutions could be construed as evidence of relevant admissions. Much may depend on the degree of specificity of any proposed changes of policy or practice. For example, the accompanying officer's report might state that, in the department's view the findings of fact are not borne out, but the department approves of the recommendations. The council could then adopt the report's recommendations, while merely noting its findings of fact, but this seems in danger of being artificial unless there were sound reasons for rejecting the factual findings while accepting the need for changes.

### ***Publication***

- 4.30 The recommendations of the officer presenting the inquiry report to the council or committee will no doubt have a significant impact on the authority's decision whether to publish the inquiry report, and in what form. At the minimum, though, it seems to us that some form of publication is possible even if the authority has not endorsed the findings of the inquiry. The authority could publish an inquiry report, or an abbreviated and anonymised version of it, whether internal or independent, with an accompanying statement to the effect that it is being published in the interests of putting the information into the public domain, as a matter of public interest, without any endorsement of the contents. There may be other legal reasons for deciding not to publish a full version (such as respecting duties of confidentiality, or fear of a defamation action, which are discussed below) but, in the absence of these specific considerations, it seems to us possible, as the law stands, for an inquiry report to be published without it amounting to, or containing, admissions of liability or any endorsement of its findings.

### ***Statements to the public***

- 4.31 It is very likely that where there is sufficient public concern for a matter to become the subject of an ad hoc inquiry, a public statement on behalf of the local authority will be appropriate. This could be the case when the inquiry is established and on the occasion of publication of the report.

<sup>21</sup> Although the insurer may not withhold consent arbitrarily: see para 3.24 above.

- 4.32 The same considerations apply to a public statement as to statements made to an inquiry. Admissions of liability can only properly be made by a person who has the authority to make them, but liability of the authority, both primary and vicarious, can be inferred even from admissions of fact. While a local authority should tell the public what action has been or is being taken in response to public concern, it will want to control the statements made to the public so that no adverse effect on the insurance contract results.
- 4.33 Conversely, if a councillor makes a public statement without the necessary authority of the council,<sup>22</sup> then any admission he or she makes will not be binding on the council.

#### **SUMMARY**

- 4.34 An informal admission of liability can be relied upon in subsequent proceedings brought against a local authority. It can be implied or express.
- 4.35 An individual councillor may only make an admission on behalf of the authority if the power to do so has been properly delegated to that councillor.
- 4.36 While an officer with sufficient seniority may be authorised to admit liability on behalf of an authority, admissions of *fact* by members, officers and employees may allow liability to be inferred, whether primary or vicarious.
- 4.37 The risk of making an admission arises not only at the time of publication of the inquiry report, but also when the council is responding to the report, whenever a public statement is made, and during the inquiry itself: evidence given to the inquiry by council members, officers or staff might amount to a relevant admission.
- 4.38 It is not clear when an admission of fact might count as an admission of liability.
- 4.39 An authority may simply receive and note an inquiry report. We do not consider that noting a report in itself can constitute an admission of liability.
- 4.40 We also do not consider that mere publication of a report need constitute an admission of liability, but this may depend on the way in which the matter is handled, including for example, the wording of the resolution approving publication.
- 4.41 Approval, endorsement or adoption of a report may well constitute acceptance of any findings or conclusions in the report.

<sup>22</sup> The members of the council are distinct in law from the council: A Arden, *Local Government Constitutional and Administrative Law* (1999) para 8.3.2.

## **PART V**

### **WAIVER OF RIGHTS**

- 5.1 The standard express condition in a local authority's liability insurance contract prohibits any "waiver of rights" without the permission of the insurer. The rights considered by counsel in the Clwyd case were to confidence, legal professional privilege and public interest immunity.<sup>1</sup> In the following paragraphs we discuss confidentiality in general terms, because it has significant implications for legal professional privilege and for public interest immunity. However, we conclude that an action against a local authority for breach of confidence does not have the same importance in terms of the effect on its insurance contract as does a waiver of a right to confidentiality.

#### **CONFIDENTIALITY**

- 5.2 Confidentiality can be described as the corollary of the public's right of access to information held by the local authority. Thus against the framework of the public's rights of inspection of and access to material held by the authority,<sup>2</sup> there is a corresponding framework which imposes duties on the council as to how it treats material in its possession. The matrix of public rights has undergone significant change since the Jillings report; the enactment of the Data Protection Act 1998 and the Freedom of Information Act 2000 are of particular importance.
- 5.3 A distinction can be drawn between two situations where confidentiality might arise, which we now describe briefly. Only the second of these is pertinent to the term of the insurance contract under consideration.

#### **The duty of confidentiality**

- 5.4 First, an authority may owe a duty of confidentiality to another party. This might arise, for example, where it holds personal information about recipients of its services,<sup>3</sup> or the local authority may be in a special relationship with the communicator of the material.<sup>4</sup> Similarly, the information may have been

<sup>1</sup> Counsel advised in the Clwyd case that any publication of the report so as to bring into the public domain matters which would otherwise be confidential, privileged or protected by public interest immunity, could amount to a waiver of the authority's right to assert the same: the Waterhouse Report, para 32.45.

<sup>2</sup> In Appendix B we describe what rights of access a person may have, under, eg, the Data Protection Act 1998 and the Freedom of Information Act 2000.

<sup>3</sup> The duty of confidence may arise out of a transaction or relationship between the communicator and the recipient of the information, but it may also arise independently of any transaction or relationship: *Venables v News Group Newspapers Ltd* [2001] Fam 430, 462 para [81] *per* Butler-Sloss P.

<sup>4</sup> Special relationships may cover, eg, co-operation with police authorities under the Crime and Disorder Act 1998, s 115; communications between teachers and educational psychologists in respect of personal information relating to pupils (see *Phelps v Hillingdon BC* [2001] 2 AC 619); and inter-agency communications under the Working Together

imparted to the authority on the understanding that it was being provided subject to confidentiality.<sup>5</sup> In this instance no question of a waiver of a right will arise: in the case law, where confidentiality has been lost in a document this is referred to as a “breach”, not a “waiver”.<sup>6</sup>

- 5.5 It is clear that unauthorised use of this material can be classed as a breach of a duty, in the same way as, for instance, a breach of the duty of care in negligence. Breach of confidence is defined as unjustified disclosure or use, or the unjustified putting at risk thereof, of confidential information.<sup>7</sup> Disclosure may also occur if there is partial unauthorised use of the material, subject to such use being significant and substantial.<sup>8</sup> Breach can also occur where subsidiary or ancillary material is disclosed to the public.<sup>9</sup>
- 5.6 An authority will wish to avoid exposing itself to an action for breach of confidence, just as it will wish to avoid committing any tort or breach of statutory duty.
- 5.7 One way of doing this may be for the authority to release material to an inquiry, but on the express understanding that it is not to be further disclosed. Material that has been shared with other professionals or agencies<sup>10</sup> but is still restricted from public access will still benefit from the quality of confidence, as material can be confidential between some persons and not others.<sup>11</sup>

### **A right to confidentiality**

- 5.8 Secondly, confidentiality might attach to documents created specifically for the authority. For example, communications between the director of social services and the legal department will be confidential. This confidentiality is not owed to a third person, but owed internally within the authority. A right to confidentiality means that the local authority has a right to decide whether this information should be made public. Therefore placing material of this nature in the public

guidelines, paras 7.27 – 7.46. The provenance of these guidelines is described at para 8.57 below.

<sup>5</sup> This may include complaints made to the authority by “whistleblowers”: see *D v NSPCC* [1978] AC 171.

<sup>6</sup> See, eg, *A-G v Blake (Jonathan Cape Ltd third party)* [2001] 1 AC 268.

<sup>7</sup> *Terrapin Ltd v Builders’ Supply Co (Hayes) Ltd* [1960] RPC 128, *CA Churchill Gear Machines Ltd v National Broach and Machine Co* [1967] 1 WLR 384; *Seager v Copydex Ltd* [1967] 1 WLR 923. Note that disclosure of material in respect of which a duty of confidence is owed may be justified: see paras 5.31 – 5.33 below.

<sup>8</sup> *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239.

<sup>9</sup> *Prince Albert v Strange* (1829) 2 De G & Sm 652; 64 ER 293.

<sup>10</sup> Such as the police, under the Working Together guidelines: see Working Together, paras 7.27 – 7.46.

<sup>11</sup> *Gotha City v Sotheby’s* [1998] 1 WLR 114. In this case, the claimant sought sight of documents disclosed by one defendant in the action to the other. The court did not accept the claimant’s contention that confidentiality in the documents was lost by virtue of having disclosed them to someone.

domain may amount to a waiver of a right within the term of the insurance contract. But the right in this case will not be a right to confidentiality. It will be a legal right of some other nature, such as legal professional privilege, of which confidentiality is a necessary element.

- 5.9 This distinction between a waiver of a right based on the principle of confidentiality and a breach of confidence owed may not be clear-cut in all cases. The distinction might pose problems where, for instance, the authority discloses personal information relating to officers or staff of the authority. Although the information is internal to the authority, disclosure of this information by the employer may breach duties of confidentiality imposed upon the authority by, for example, employment or data protection law.
- 5.10 Confidentiality underpins the legal issues we discuss next because claims of legal professional privilege and public interest immunity are precluded if the information in question is not confidential.

#### **LEGAL PROFESSIONAL PRIVILEGE**

- 5.11 Privilege entitles a litigant or his or her successor in title<sup>12</sup> to withhold documents from production during the course of legal proceedings. Privilege is fundamentally a rule of evidence,<sup>13</sup> but may also be claimed in certain investigative non-adversarial proceedings.<sup>14</sup> Once privilege is established, the right to withhold the document is absolute.<sup>15</sup> This means that if a document from the local authority is privileged then it is protected from being produced. But the fact that a document may be privileged does not mean it is not admissible, because privilege may be waived.<sup>16</sup>
- 5.12 The type of privilege that will arise most often in local authority reports is a claim of legal professional privilege. This can arise where communications are made between the legal adviser and the client, the client being the authority, or between the authority's solicitor and the insurer. Legal professional privilege covers communications between the client and the adviser whether or not proceedings are in existence or contemplated (legal advice privilege) and communications between the adviser and the client, or between either and a third party, where

<sup>12</sup> Including the insurer.

<sup>13</sup> *Phipson on Evidence* (15th ed 2000) para 20–01. Privilege was described by the Law Reform Committee in its 16th report as “the right of a person to insist on there being withheld from a judicial tribunal information which might assist it to ascertain facts relevant to an issue upon which it is adjudicating”: *Privilege in Civil Proceedings* (1967) Cmnd 3472, para 1.

<sup>14</sup> Such as regulatory investigations: *Price Waterhouse v BCCI Holdings* [1992] BCLC 583.

<sup>15</sup> In this respect, privilege differs from public interest immunity. The court will ultimately decide whether public interest immunity is applicable in an individual case. The distinction was pointed out by Scott VC in *Secretary of State for Trade and Industry v Baker (Re Barings)* [1998] Ch 356. In *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, the House of Lords firmly rejected the notion that privilege involved any form of balancing act in the particular case.

<sup>16</sup> *Phipson on Evidence*, (15th ed 2000), para 20–03.

litigation is pending or in prospect, if the dominant purpose of the communication is getting evidence or advice for the litigation (litigation privilege).<sup>17</sup> Litigation privilege is, in our opinion, not central to the question upon which we are asked to report. The concern raised in the Waterhouse Report is the issue of waiving privilege by publication, thus potentially prejudicing the authority (and its insurer) in *subsequent* trials and negotiations for favourable settlement. We are not presently concerned with the communications made by the council and its legal advisers once litigation is anticipated or pending *after* the publication because these communications will not be directly affected by the publication of the report.

- 5.13 Communications between the legal advisers to the authority and the council will benefit from legal advice privilege if that communication is reasonably necessary to the giving or receiving of legal advice.<sup>18</sup> This privilege will extend to communications passing between the authority's departments and local authority lawyers, statements from the officers involved and other witnesses in the pre-inquiry stage.
- 5.14 As we mentioned above, a communication can only be privileged if it is also confidential. If an otherwise privileged document has lost its confidentiality, there can be no claim for privilege. In *Goldstone v Williams*<sup>19</sup> depositions had been read into a compromise settlement in a previous trial. The defendant sought disclosure of the depositions. Disclosure was granted because the depositions were freely available to be inspected by anyone who had proper grounds for doing so. Thus privilege could no longer attach to the documents as they were no longer confidential.<sup>20</sup>
- 5.15 Therefore if a privileged document, or statement, is communicated during the course of the inquiry, the local authority cannot claim privilege in any legal proceedings following from the report's publication if publication is to the world at large. Confidentiality might be preserved if the report is circulated in a limited fashion but if the distribution is not tightly controlled confidentiality will be lost.<sup>21</sup> Confidentiality might also be preserved if the documents are supplied to an inquiry conducted in private on the understanding that they will be kept confidential. This limits the use the inquiry can make of them.
- 5.16 Communications will be protected from disclosure to the inquiry if the inquiry acts in a quasi-judicial manner or is set up under the Tribunals of Inquiry (Evidence) Act 1921.<sup>22</sup> However, this is unlikely to be the case in most local

<sup>17</sup> *Re L (A Minor) (Police Investigation Privilege)* [1997] AC 16, 33 *per* Lord Nicholls.

<sup>18</sup> *Wheeler v Le Marchant* (1881) 17 Ch 675.

<sup>19</sup> (1899) 1 Ch 47.

<sup>20</sup> See also *Nederlandse Reassurantie Groep Holding NV v Bacon and Woodrow* [1995] 1 All ER 976; *Bourns Inc v Raychem Corp* [1999] 3 All ER 154.

<sup>21</sup> In the case of the Jillings report, distribution was successfully restricted. See para 1.18 above.

<sup>22</sup> Section 1(3).

authority inquiries. If the inquiry does not act in a quasi-judicial capacity or under the 1921 Act, the authority may simply refuse to disclose the document on the ground that it is confidential:

Whereas legal professional privilege is normally an answer to compulsory disclosure to a court of law or, in most cases, to a body having statutory powers to require disclosure, confidentiality alone affords protection only against voluntary disclosure without the consent of the person to whom the duty of confidentiality is owed.<sup>23</sup>

- 5.17 The report of the inquiry itself will not be privileged unless it was produced for the dominant purpose of aiding the legal adviser to advise the council on legal issues.
- 5.18 Partial disclosure of a privileged document to the inquiry will expressly waive privilege in the rest of the document, and disclosure of one privileged document to the inquiry may compel the authority to disclose related relevant communications dealing with the same subject matter.
- 5.19 Thus, the local authority, by participating in the inquiry and publishing the report, will waive privileges attaching to communications released to the inquiry and associated material, either in the same document or associated documents, unless they are disclosed on the express understanding that confidentiality is preserved beyond the inquiry panel.
- 5.20 Obviously the risk of waiving privilege may hamper the effectiveness of the inquiry. If the legal department of the authority is unwilling to divulge documents to the panel for fear that those documents may be used by claimants in trials,<sup>24</sup> then the findings of the report might be incomplete. The material protected by privilege may be crucial to explaining the authority's action or inaction in a particular case.

#### **PUBLIC INTEREST IMMUNITY**

- 5.21 There are a number of assertions reported in the Waterhouse Report that evidence presented to panels and panel reports fell within the scope of public interest immunity. For example, Waterhouse states, in relation to the Cartrefle report,<sup>25</sup> at paragraph 32.57: "A major concern of the insurers at that stage was that the Council should not be seen to waive public interest immunity that would otherwise attach to the report, or to important parts of it, and to many background documents." Counsel's opinion on the Jillings report refers to waiver of public interest immunity, but it is not given any separate treatment.

<sup>23</sup> *Price Waterhouse v BCCI* [1992] BCLC 583, 596 *per* Millett J.

<sup>24</sup> The reason the insurer does not want the right waived without the insurer's consent is because waiver, which means disclosure, could afford a basis for a claim or evidence to support a claim in an action against the local authority. An action may be brought for negligence, breach of statutory duty, vicarious liability for the actions of the authority's employees or a violation of the Human Rights Act, as described at paras 3.3 – 3.5 above.

<sup>25</sup> See paras 1.10 – 1.13 above for a brief description of the circumstances of the Cartrefle Report.

- 5.22 Information held by public bodies, including central and local government is, in general, information which may, if necessary, be disclosed to others. There have been many moves in recent years to extend the principle of openness. There are specific statutory regimes covering, for example, local government and the national health service.<sup>26</sup> Practice in central government has moved in the same direction,<sup>27</sup> and will move further with the enactment of the Freedom of Information Act, which will grant, subject to specific exemptions, a general right of access to information held by public authorities.<sup>28</sup>
- 5.23 Nevertheless there are circumstances in which information should remain confidential to the government department or other public agency<sup>29</sup> that holds the information. Public interest immunity is the doctrine that permits certain information to be withheld from public disclosure. It is a general rule of law founded on public policy and recognised by Parliament<sup>30</sup> that any document may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.<sup>31</sup>
- 5.24 Public interest immunity is normally claimed by the body in possession of the confidential information. Here, we are concerned with whether, by the act of publication, the local authority is placing into the public domain documents which might be subject to a claim of public interest immunity.
- 5.25 There have been a number of situations where the courts have held that public agencies may assert the doctrine of public interest immunity to protect the confidentiality of sources of information held by them. For example, in *Re G (A Minor) (Social Worker: Disclosure)* Butler-Sloss P confirmed that “information obtained by social workers in the course of their duties is ... confidential and covered by the umbrella of public interest immunity.”<sup>32</sup>
- 5.26 Similarly, in *D v NSPCC*<sup>33</sup> the House of Lords held that the NSPCC – which received and investigated complaints from members of the public about cases of ill-treatment or neglect of children under an express pledge of confidentiality – were entitled to public interest immunity, so that they were not bound to disclose in civil proceedings the identity of informants who had given information about

<sup>26</sup> See, for instance, Access to Health Records Act 1990. We discuss rights of access under the Local Government (Access to Information) Act 1985 in Appx B, paras B.13 – B.29.

<sup>27</sup> In April 1994 the Government produced a Code of Practice, “Code of Practice on Access to Government Information” to regulate, in a non-statutory manner, the disclosure of information. It was last updated in 1997.

<sup>28</sup> See Appendix B, paras B.52 – B.60.

<sup>29</sup> The limitation of the former doctrine of Crown Privilege to Central Government departments is long gone: *Conway v Rimmer* [1968] AC 910.

<sup>30</sup> See the Crown Proceedings Act 1947, s 28(1).

<sup>31</sup> *Conway v Rimmer* [1968] AC 910.

<sup>32</sup> [1996] 1 WLR 1407, 1411.

<sup>33</sup> [1978] AC 171.

the neglect or ill-treatment of children to them. Indeed the House of Lords stated that the same principle would apply to those providing information to local authorities. There was a public interest in preserving the identity of informants, analogous to the public interest in preserving the identity of informants in criminal cases. However the House of Lords stressed that it was not confidentiality itself that lay at the heart of the doctrine; it was a judgment about the public interest.<sup>34</sup>

### **The public interest**

- 5.27 When deciding whether or not disclosure should be ordered, the court has to balance the interests of the litigant against the public interest.<sup>35</sup> As stated by Lord Hailsham of Marylebone in *D v NSPCC*, “The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop.”<sup>36</sup>
- 5.28 More recent authority has confirmed the trend for the judge to reach a balance between the competing interests as they arise in the individual case. In *McNally v Chief Constable of Greater Manchester Police* Lord Justice Auld, giving the judgment of the court, held that the trial judge had been “entitled to balance the conflicting public interests in protection of an informer and in doing justice in the instant case rather than consider herself tied to an exhaustive list of possible exceptions.”<sup>37</sup> This trend was described as “part of a wider jurisprudential move away from near absolute protection of various categories of public interest in non-disclosure.”<sup>38</sup> In that case, the Court of Appeal upheld an order to disclose whether “X” was a police informant in a civil action for wrongful imprisonment. The judge had taken into account the following factors: in favour of withholding the identity of the informer as argued by the police, Article 2, the right to life,<sup>39</sup> and Article 8, the right to respect for private and family life;<sup>40</sup> and on the claimant’s side, Article 5(5), which provides an enforceable right to compensation to everyone who has been a victim of unlawful arrest or detention,<sup>41</sup> and Article 6(1), the right to a fair trial.<sup>42</sup>

<sup>34</sup> See also *Science Research Council v Nassé* [1980] AC 1028.

<sup>35</sup> *Rogers v Home Secretary*, on appeal from *R v Lewes Justices ex p Home Secretary* [1973] AC 388, 400 *per* Lord Reid.

<sup>36</sup> [1978] AC 171, 230.

<sup>37</sup> [2002] EWCA Civ 14, para [23]; *The Times* 6 March 2002.

<sup>38</sup> *Ibid*, para [21]. The court referred to, at para [16], *Powell v Chief Constable of North Wales Constabulary* (CA) *The Times*, 11 Feb 2000 and *Whitmarsh v The Chief Constable of Avon and Somerset Constabulary* (CA) 31 March 2000, unreported.

<sup>39</sup> Article 2, so far as material, states:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

<sup>40</sup> The text of Art 8 is reproduced in Part IX below at para 9.8 below.

<sup>41</sup> Article 5(5) states:

- 5.29 Thus a court will assess where the public interest lies, and uphold public interest immunity or not, on a case by case basis. It is clear that information held by a local authority may be protected from disclosure to proceedings where it is in a greater public interest that that material is suppressed.<sup>43</sup> For example in *Gaskin v Liverpool CC*<sup>44</sup> the Court of Appeal refused to order disclosure of confidential records relating to a child who had been in their care. There was a greater interest in upholding the proper functioning of the child care system. Similarly the anonymity of informers has been recognised by the courts as a valid ground for claiming public interest immunity.<sup>45</sup>
- 5.30 Public interest immunity may be claimed by any party or witness in proceedings.<sup>46</sup> The court may even raise the immunity of its own motion.<sup>47</sup>

### **Relationship to confidentiality**

- 5.31 Information will not be protected by the courts from disclosure merely because it is confidential.<sup>48</sup> Hence the fact that records of a local education authority are confidential is insufficient ground for protection from disclosure.<sup>49</sup> Similarly, just because material is “exempt information” within Schedule 12A to the Local Government Act 1972,<sup>50</sup> which prevents public and media access to the material

Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

<sup>42</sup> Article 6(1) states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

We examine the impact of Art 6(1) in greater detail in Part IX below.

<sup>43</sup> *D v NSPCC* [1978] AC 171; *Re M (A Minor) The Times* December 29 1989, CA; *Gaskin v Liverpool CC* [1980] 1 WLR 1549.

<sup>44</sup> [1980] 1 WLR 1549.

<sup>45</sup> *D v NSPCC* [1978] AC 171; *R v Cheltenham Justices ex p Secretary of State for Trade* [1977] 1 WLR 95; *Buckley v The Law Society (No 2)* [1984] 1 WLR 1101.

<sup>46</sup> H W R Wade and C F Forsyth, *Administrative Law* (8th ed 2000) p 831.

<sup>47</sup> *Rogers v Home Secretary*, on appeal from *R v Lewes Justices, ex p Home Secretary* [1973] AC 388, 400 *per* Lord Reid.

<sup>48</sup> *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405. The court may, while ordering disclosure to one body, attach conditions preventing the material from being disclosed more widely. See, eg, *H v N (A Health Authority) The Times* 19 March 2002.

<sup>49</sup> *Thompson v Inner London Education Authority* (1977) 74 LSG 66.

<sup>50</sup> See paras B.22 – B.25 below.

or its discussion in council, it is not necessarily immune from being produced in court.<sup>51</sup>

- 5.32 Therefore confidentiality in the sensitive material is crucial in a similar manner to confidentiality as a precursor for claiming legal professional privilege. It is unlikely that a claim for public interest immunity will succeed where the material has been widely circulated, for instance to an internal or independent panel which receives evidence in public. This is because once in the public domain, the necessary quality of confidentiality will have been lost.
- 5.33 Where the inquiry receives evidence in private, it will be easier to argue a case for public interest immunity in those documents. This is because material may be confidential between some persons but not others.<sup>52</sup> Thus where the material has been narrowly circulated, public interest immunity issues may be relevant in deciding whether or not to publish the report.

### **Is there a duty to assert public interest immunity?**

- 5.34 If there is a duty to assert public interest immunity then the insurers should not, we believe, be able to influence the exercise of the immunity by reference to the insurance contract. However, if public interest immunity is more akin to a privilege which may be waived then this may impact adversely upon the validity of the insurance cover.
- 5.35 Because of the nature of the public interest objection, it has been doubted whether public interest immunity can ever be waived. In *Rogers v Home Secretary*<sup>53</sup> Lord Simon said:

It is not a privilege which may be waived by the Crown ... or by anyone else.<sup>54</sup>

- 5.36 However, in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)*<sup>55</sup> Lord Cross stated:

His [the Chairman of the Gaming Board] objections to disclosure were taken in the interests of the third parties concerned as much as

<sup>51</sup> *West Midlands Police Authority v Walsall MBC* *The Independent* 26 February 1992. In this case, the police authority passed a resolution at a meeting to exclude the public and press because information which fell within Local Government Act 1972, s 100A(4) would be disclosed. The court held that the fact that the information was “exempt” within the meaning of s 100A(4) had not rendered it confidential so as not to be disclosed in court proceedings, but it did find that it fell within the common law concept of confidentiality. We discuss in greater detail the rights of access to council-controlled documents in Appendix B on Access to Information.

<sup>52</sup> *Gotha City v Sotheby's* [1998] 1 WLR 114.

<sup>53</sup> *Rogers v Home Secretary*, on appeal from *R v Lewes Justices, ex p Home Secretary* [1973] AC 388.

<sup>54</sup> [1973] AC 388, 407.

<sup>55</sup> [1974] AC 405.

in the interests of the commissioners and if any of them is in fact willing to give evidence, privilege in respect of any documents or information obtained from him will be waived.<sup>56</sup>

- 5.37 Faced with this apparent conflict of authority, Brightman LJ in *Hehir v Commissioner of Police of the Metropolis*<sup>57</sup> left open for future decision the question whether public interest immunity might not be waived in certain circumstances. He stated:

It seems to me at least arguable that the public interest would not in all circumstances continue to attach to a statement given for the purposes of section 49 of the Police Act 1964<sup>58</sup> if the maker of the statement wished disclosure to be made. Perhaps this is not strictly a question of waiver, but of public interest immunity ceasing to attach to a statement if particular circumstances exist. In this sense only I respectfully question the view that there cannot be waiver of public interest immunity.

- 5.38 In *Multi Guarantee Co v Cavalier Insurance Co Ltd*<sup>59</sup> it was accepted that although public interest immunity could not be waived, it could evaporate. In this case, the claimants were seeking relief against the defendant, who was in liquidation. The defendant had participated in meetings with officials from the Department of Trade and Industry. The notes of these meetings had been passed to the liquidator of the defendant by the DTI, with certain passages blacked out. The claimants were seeking disclosure of those documents from the liquidator. It was common ground that the defendant consented to the disclosure of the documents.

- 5.39 Knox J held that the basis of public interest immunity was not the proprietary right of the person giving or receiving the information but the protection of the public administration. The fact that immunity had been severely eroded by partial disclosure would be a relevant consideration when deciding where the balance of public interest lay. Those who would be giving and receiving the confidential information were persons who would realise that in exceptional circumstances a court might order disclosure.

- 5.40 In the later case of *Makanjuola v Commissioner of Police of the Metropolis*<sup>60</sup> Bingham LJ stated:

Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary

<sup>56</sup> [1974] AC 405, 434.

<sup>57</sup> [1982] 1 WLR 714, 722.

<sup>58</sup> Section 49 Police Act 1964 (now repealed) placed a statutory duty upon Chief Officers of Police to investigate complaints against a member of a police force. See now Part IV ch 1 Police Act 1996.

<sup>59</sup> *The Times* 24 June 1986.

<sup>60</sup> [1992] 3 All ER 617.

rule, imposed on parties in certain circumstances, even where it is to their disadvantage in the litigation. This does not mean that in any case where a party holds a document in a class prima facie immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest, in withholding the document against the public interest in disclosure for the purpose of furthering the administration of justice, there is a clear balance in favour of the latter. But it does, I think, mean: (1) that public interest immunity cannot in any ordinary sense be waived, since, although one can waive rights, one cannot waive duties; (2) that where a litigant holds documents in a class prima facie immune, he should (save perhaps in a very exceptional case) assert that the documents are immune and decline to disclose them, since the ultimate judge of where the balance of public interest lies is not him but the court ...<sup>61</sup>

- 5.41 The cases above do not give a clear answer as to the circumstances in which public interest immunity is waived, ceases to attach to a particular statement or is otherwise “eroded”. Public interest immunity differs from other types of privilege in that it is a public, not a private law right.<sup>62</sup> What all the authorities agree on is that public interest immunity is not in the same category as a claim of legal professional privilege. It is not designed to protect the litigant’s private interests but a greater public interest.

### **Conclusion**

- 5.42 A local authority, as a public body, is under a duty to assert public interest immunity when it considers it necessary to do so. Public interest immunity, once asserted, cannot be waived. It is not a privilege from disclosure available to be used by a local authority as a private litigant, akin to legal professional privilege, but a public law duty. We do not consider that it can, therefore, be described as a right to be waived, and an express term forbidding waiver of any right will not bite on it. We also do not consider that it would be proper for an insurance company to seek to influence an authority’s conduct in relation to the assertion or otherwise of public interest immunity. Our preliminary consultations with local authorities and their insurers suggest that, in fact, it is not the practice of insurance companies to seek to do so. Accordingly, our provisional view is that public interest immunity does not contribute to the potential problems for local authorities identified in the Waterhouse Report and our terms of reference.

### **SUMMARY**

#### **Confidentiality**

- 5.43 A local authority will have in its possession much information that is confidential. Concomitant with its duties to grant public access to information,<sup>63</sup> it is subject to obligations which regulate how sensitive information may be used. This is a

<sup>61</sup> [1992] 3 All ER 617, 623.

<sup>62</sup> *Science Research Council v Nassé* [1980] AC 1028, 1087 per Lord Scarman.

<sup>63</sup> On which, see Appx B below.

matter of a duty of confidentiality owed to others. It is not a matter of a right to confidentiality which may be claimed by the local authority.

- 5.44 Waiver of the *right* of confidence in a document or communication may entitle the insurer to refuse a particular claim because waiver without the insurer's consent would be a breach of an express term of the contract. Therefore, an authority must not waive a right which *it* has to confidentiality in a communication without the permission of the insurer. This will most frequently arise in the context of legal professional privilege. The possibility of claiming legal professional privilege will itself be lost if confidentiality is waived.

### **Legal professional privilege**

- 5.45 If privileged material is referred to in a public document, privilege in that document will have been waived. Privilege might also have been waived in collateral documents and other parts of the same document if disclosure was partial but misleading. A local authority must be alert to the danger of waiving privilege inadvertently.
- 5.46 The inquiry report itself will not be the subject of legal professional privilege, as its dominant purpose will not be the giving of legal advice.
- 5.47 The protection afforded to communications by legal professional privilege is significantly different from the protection afforded by public interest immunity in one regard: it will almost certainly not be overridden in the public interest by a court.<sup>64</sup>
- 5.48 Waiver of legal professional privilege in a document or communication may entitle the insurer to refuse a particular claim because waiver without the insurer's consent would be a breach of an express term of the contract.

### **Public interest immunity**

- 5.49 Public interest immunity is not a privilege from disclosure to be used by a local authority as a private litigant, but a public law duty. It is not a right to be waived.
- 5.50 We think the duty to claim public interest immunity is not a matter on which insurers can instruct local authorities. We think that the only circumstances in which it can contribute to the potential problems for local authorities identified in the Waterhouse Report and our terms of reference would be in the very unlikely situation that information for which public interest immunity ought to be claimed is made public contrary to the legal advice given to the authority.

<sup>64</sup> We say "almost certainly" because there are dicta which offer some tentative support for the view that in cases where the welfare of a child is paramount, even legal professional privilege might have to give way, but there is no decided authority on the point. See the comments of Lord Jauncey of Tullichettle at p 28 of *Re L (A Minor) (Police Investigation Privilege)* [1997] AC 16 on the view of Thorpe J in *Essex CC v R* [1994] Fam 167, 168–169.

## PART VI

# DEFAMATION

- 6.1 Liability in defamation needs extra discussion because publication of the report of an inquiry can expose the authority to a new cause of action, namely in defamation, whereas the other liabilities described at the beginning of Part III will have arisen, or not, as a result of how the authority and others have conducted themselves in the matters giving rise to the inquiry.
- 6.2 To succeed in an action for defamation, the claimant must demonstrate that the matter complained of:
- is defamatory (defamation)
  - refers to the claimant (identification) and
  - has been published to a third person (publication)<sup>1</sup>
- 6.3 As Gatley states, “the difficulty of producing a comprehensive definition of the meaning of ‘defamatory’ has often been remarked.”<sup>2</sup> Definitions in the case law have referred to exposing the claimant to hatred, contempt or ridicule,<sup>3</sup> causing a person to be shunned or avoided,<sup>4</sup> or lowered in the estimation of others.<sup>5</sup>
- 6.4 Once the statement is deemed capable of a defamatory meaning, by the judge, the test to be applied by the jury<sup>6</sup> is whether the imputation tends to “lower the plaintiff in the estimation of right-thinking members of society generally”.<sup>7</sup> It is clear that some local authority reports will contain defamatory material. Although in the joint guidelines issued by the LGA and ABI it is recommended that inquiries limit themselves to findings of fact,<sup>8</sup> defamatory material may be present in reports, especially if the report casts doubts on the professional capacity of officers of the authority.<sup>9</sup>

<sup>1</sup> *Carter-Ruck on Libel and Slander* (5th ed 1997) p 35.

<sup>2</sup> *Gatley on Libel and Slander* (9th ed 1998) p 22.

<sup>3</sup> *Parmiter v Coupland* (1840) 6 M & W 105,108; 151 ER 340, 342.

<sup>4</sup> *Youssouf v Metro-Goldwyn-Mayer* (1934) 50 TLR 581, 587, CA.

<sup>5</sup> *Sim v Stretch* [1936] All ER 1237.

<sup>6</sup> The relative functions of judge and jury are described in *Gatley on Libel and Slander* (9th ed 1998) at p 24.

<sup>7</sup> *Sim v Stretch* [1936] All ER 1237, 1240 *per* Lord Atkin, confirmed in *Skuse v Granada TV* [1996] EMLR 278, 286 *per* Sir Thomas Bingham MR.

<sup>8</sup> The LGA/ABI Guidance, para 4. This Guidance is reproduced as Appx A below. See also paras 8.6 – 8.8 below.

<sup>9</sup> Where a defence is available to the local authority, a person who claims to have been libelled will not succeed even though the report is “defamatory”. The defences are described at para 6.7 below.

- 6.5 Publication occurs whenever the statement is communicated to a person other than the claimant.<sup>10</sup> Thus the possibility of defamation arises when the inquiry report is communicated to the members of the council, as well as when the authority makes it more publicly available.<sup>11</sup>
- 6.6 Publication may also arise where the report to be discussed must be made available for public inspection three clear days before the council is due to debate it.<sup>12</sup> In the future, publication of the report may also arise where the information has been communicated to an individual in accordance with the Freedom of Information Act 2000.<sup>13</sup>

## **DEFENCES**

- 6.7 Although the scope of liability is very wide, there are broad defences available to the defendant. These are:
- (1) Absolute privilege
  - (2) Qualified privilege
  - (3) Truth or “justification”. It is a defence for the publisher of the report to establish that the defamatory statement is in fact true.<sup>14</sup> The danger of relying on a plea of justification is that the authority will have to discharge the burden of proving that the statement was in fact true.<sup>15</sup> This may be particularly onerous given that the report may rely on hearsay. The authority will have to establish these facts for itself in its defence before justification is made out. Moreover, such a plea will involve a full court hearing, potentially before a jury. This will undoubtedly add uncertainty and delay.
  - (4) Fair comment. It is a defence to a defamation action that the statement is a fair comment on a matter of public interest.<sup>16</sup> This defence is not particularly relevant for local authority reports as it attaches primarily to opinion, rather than facts. Ad hoc inquiries, although drawing conclusions, are primarily a vehicle for discovering facts. Despite the fact

<sup>10</sup> *Pullman v Walter Hill & Co* [1891] 1 QB 524.

<sup>11</sup> But the defence of qualified privilege will attach to the publication in this instance: see para 6.22 below.

<sup>12</sup> See para B.13 below.

<sup>13</sup> See paras B.52 – B.60 below. Note that statutory qualified privilege may be available where information is supplied under the Freedom of Information Act 2000: see paras B.58 and B.59 below.

<sup>14</sup> There is one exception to this rule: by virtue of s 8 of the Rehabilitation of Offenders Act 1974, if a person’s conviction for an offence is “spent” by the lapse of the appropriate period, a malicious reference to it is actionable despite its truth.

<sup>15</sup> *Belt v Lawes* (1882) 51 LJQB 359, 361.

<sup>16</sup> *Lyon v Daily Telegraph* [1943] KB 746; *Slim v Daily Telegraph* [1968] 2 QB 157.

that some parts of reports may benefit from this defence, it does not provide sufficient cover for the whole of the report.

- (5) Offer of amends. This defence obliges the defendant to pay compensation and/or damages to the aggrieved party, and publish an apology to the person defamed.<sup>17</sup> It is aimed at the innocent disseminator of a defamatory statement rather than a local authority which wishes to inform its community about those persons who may have been incompetent or acted improperly. Therefore this defence is not relevant to deliberate publication of defamatory matter by a local authority in an ad hoc report.

6.8 Defences (1) and (3) are absolute, in that they are not defeated by malice.<sup>18</sup> The claimant who can show malice will defeat the qualified privilege and fair comment defences.

### **Privilege**

6.9 Privilege arises in situations in which it is in the public interest that the defamatory statement should be published. This defence overrides the normal protection afforded to a person's reputation. Absolute privilege is the highest form of protection and attaches to matters of extreme public interest and the institutions of democratic power. Qualified privilege is reserved for situations in which although there is a good reason why the information may be published, malicious motivation or intent will remove that benefit.

### ***Absolute privilege***

6.10 Absolute privilege attaches to statements made in the course of Parliamentary proceedings.<sup>19</sup> In addition, various statutory provisions confer absolute privilege upon reports, statements and determinations of a number of persons and bodies performing investigative or regulatory functions which would not (or might not) be regarded as of a judicial nature.<sup>20</sup> The details and scope of the privilege vary considerably from one case to another.

6.11 There is no specific statutory provision applicable to local authority inquiries, but recourse may be had to the doctrine that no action will lie for defamatory statements made in the course of judicial proceedings before a court of justice.

<sup>17</sup> Defamation Act 1996, s 2.

<sup>18</sup> That is, knowing it to be untrue, recklessly (without considering or caring whether or not it was true), or with some indirect or improper motive: *Horrocks v Lowe* [1975] AC 135.

<sup>19</sup> See Article 9 of the Bill of Rights (1688) and Defamation Act 1996, ss 13(4) and 13(5). See further para 9.73 below.

<sup>20</sup> For example, Local Government Act 1974, s 32(1) confers absolute privilege on matters published by a Local Government Ombudsman. Among others, statute has granted absolute privilege to certain documents connected with the Parliamentary Commissioner for Administration, the Commissioner for Local Administration in Scotland, the Health Service Commissioner, the Monopolies and Mergers Commission, the Children's Commissioner for Wales and the Pensions Ombudsman. For a detailed list of these provisions, see *Gatley on Libel and Slander* (9th ed 1998) para 13.46.

This doctrine also applies to statements made in the course of any proceedings before a tribunal (which includes a commission or inquiry) recognised by law which, though not a court in the ordinary sense, acts judicially – that is, in a manner similar to that in which a court of justice acts in respect of an inquiry before it.<sup>21</sup>

- 6.12 The findings of a tribunal are an intrinsic part of the hearing so that if the hearing itself is protected by absolute privilege, the same applies to its findings.<sup>22</sup> Therefore, the report of any body which can be said to be recognised by law and which carries out its investigations in a manner similar to that in which a court may, would attract absolute privilege. It is arguable that reports of some inquiries could be covered by absolute privilege as the context in which the inquiry was carried out may be so formal and adversarial in approach that it could be judicial in nature. In *Trapp v Mackie*<sup>23</sup> Lord Diplock said that it was necessary to

consider first under what authority the tribunal acts; secondly the nature of the question into which it is its duty to inquire; thirdly the procedure adopted by it in carrying out the inquiry; and fourthly the legal consequences of the conclusion reached by the tribunal as a result of the inquiry.<sup>24</sup>

- 6.13 Proceedings which are judicial in nature have been held to include proceedings before the General Medical Council,<sup>25</sup> the Benchers of one of the Inns of Court,<sup>26</sup> the Disciplinary Committee of the Law Society,<sup>27</sup> courts martial<sup>28</sup> and coroner's courts.<sup>29</sup> But administrative proceedings, such as applications for renewals of licences,<sup>30</sup> statements made to a medical referee,<sup>31</sup> and applications to a Social Security adjudicating officer,<sup>32</sup> will not benefit from this type of absolute privilege.

<sup>21</sup> *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 442, per Lord Esher MR, which is said to state the law on this subject accurately: *O'Connor v Waldron* [1935] AC 76, 81.

<sup>22</sup> *Addis v Crocker* [1961] 1 QB 11, 24, per Hodson LJ.

<sup>23</sup> [1979] 1 WLR 377.

<sup>24</sup> [1979] 1 WLR 377, 379.

<sup>25</sup> *General Medical Council v Spackman* [1943] AC 627.

<sup>26</sup> *Lincoln v Daniels* [1962] 1 QB 237.

<sup>27</sup> *Addis v Crocker* [1961] 1 QB 11.

<sup>28</sup> *Dawkins v Lord Rokeby* (1873) LR 8 QB 255; 176 ER 800.

<sup>29</sup> *McCarey v Associated Newspapers Ltd* [1964] 1 WLR 855.

<sup>30</sup> *Attwood v Chapman* [1914] 3 KB 275; *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431.

<sup>31</sup> *Smith v National Meter Co* [1945] KB 543.

<sup>32</sup> *Purdew v Seress-Smith* [1993] IRLR 77.

6.14 Some local authority inquiry reports may thus benefit from absolute privilege; however, we consider that it is unlikely that ad hoc local authority inquiries would be sufficiently judicial in nature to benefit from the defence. The authority does not carry out ad hoc inquiries under an express statutory power, still less a statutory duty; an inquisitorial, rather than adversarial procedure may be adopted; the terms of reference will involve a retrospective and prospective element, rather than simply reaching a verdict on (for instance) legal liability. In accordance with the guidance in *Trapp v Mackie*,<sup>33</sup> these factors point towards ad hoc inquiries being administrative, rather than judicial in nature. While some inquiries in which the local authority participates may be judicial, such as the new Standards Boards inquiries,<sup>34</sup> ad hoc inquiries of the type that we are discussing are more likely to be factual investigations with the aim of assessing structures and procedures rather than making binding legal decisions.

### **Qualified privilege**

6.15 Qualified privilege grants a defence against liability in defamation for a broader range of situations than absolute privilege. The publisher of a report to which qualified privilege attaches will be protected unless it is shown that any defamatory statement contained in it was made with malice, that is, knowing it to be untrue, recklessly (without considering or caring whether or not it was true), or with some indirect or improper motive.<sup>35</sup> The rationale behind this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end.<sup>36</sup>

### STATUTORY QUALIFIED PRIVILEGE

6.16 The Defamation Acts of 1952 and 1996 extended the situations to which qualified privilege could attach<sup>37</sup> (but not to circumstances which would have covered the Jillings report).<sup>38</sup> "Reports" in the context of the Act does not refer

<sup>33</sup> [1979] 1 WLR 377. See para 6.12 above.

<sup>34</sup> See paras 2.23 – 2.36 above.

<sup>35</sup> *Horrocks v Lowe* [1975] AC 135. But note that the issue of malice has become less important where common law privilege applies: para 6.30 below. For brief comments on how malice may be proved, see paras 9.27 – 9.28 below.

<sup>36</sup> See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 195, *per* Lord Nicholls.

<sup>37</sup> Section 15 of the Defamation Act 1996 provides for qualified privilege for the publication of "any report or other statement" listed in Sched 1 to the Act. The list in Part I of Sched 1 extends qualified privilege to a fair and accurate report of proceedings at various kinds of public meeting or sitting in the UK, and includes "a fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world". This does not apply to local authority reports as they are not commissioned by a legislature or government but by a local council. A publication within a category listed in Sched 1 will not, however, attract qualified privilege unless the matter is of public concern and for the public benefit: see Defamation Act 1996, s 15(3).

<sup>38</sup> Clwyd County Council, which commissioned the Jillings report, was dissolved on 1 April 1996. The 1996 Act received Royal Assent on 4 July 1996. Different provisions came into

to the actual publication of the original defamatory material, but rather to the repetition by the media of that material.<sup>39</sup> As to publication of the inquiry report itself, there is no category in the Schedule to the 1996 Act which would cover a local authority ad hoc inquiry report. Paragraph 15 of the Schedule permits the Lord Chancellor to designate by Statutory Instrument bodies whose reports will also benefit from the defence of qualified privilege, but none has been designated.<sup>40</sup>

- 6.17 Where the report must be open to inspection, in accordance with the public's right of access to local authority papers,<sup>41</sup> the supply of that information will attract qualified privilege.<sup>42</sup> Local Government Act 1972, section 100H(5) grants a defence of qualified privilege to any transmission of an "accessible document." This is defined to include any copy of the whole or part of a report,<sup>43</sup> or background paper<sup>44</sup> for the meeting. The regulations for the access to information and meetings of local authorities under the new executive structures provide that where information is to be open for public inspection, the documents will similarly attract qualified privilege.<sup>45</sup> Information supplied to the authority by a third person and disclosed to another person by the authority in accordance with the Freedom of Information Act 2000 will, when section 1 of that Act is in force, benefit from qualified privilege.<sup>46</sup>
- 6.18 There is no statutory qualified privilege where the material need not be open to inspection, due to a mandatory confidentiality exemption or a Schedule 12A exemption applying.<sup>47</sup> These exemptions – including those concerning the personal details of staff, information about recipients of any service provided by the council, legal advice and the identity of whistleblowers – prevents public access to the meeting and prior communication of the documents to be discussed at the meeting. They are most likely to be engaged where the subject

force on different dates, but the main body of the Act came into force on 4 September 1996: see Defamation Act 1996, s 19(2).

<sup>39</sup> *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 295 per Lord Steyn. See also *Gatley on Libel and Slander* (9th ed 1998) para 15.3.

<sup>40</sup> The Schedule to the Act came into force on 1 April 1999: The Defamation Act 1996 (Commencement No 1) Order 1999 SI 1999 No 817. The Lord Chancellor's Department has issued a consultation paper in which it included a list of possible bodies for this designation, but the Department has no current plans to issue any SI under para 15.

<sup>41</sup> See paras B.13 – B.25 below.

<sup>42</sup> Defamation Act 1996, Sched 1, Part I, para 5.

<sup>43</sup> Local Government Act 1972, s 100H(6)(d).

<sup>44</sup> Local Government Act 1972, s 100H(6)(e).

<sup>45</sup> The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000 No 3272 reg 22 para (4)(a); Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 SI 2001 No 2290 (W 178) reg 13 para (4)(a).

<sup>46</sup> Freedom of Information Act 2000, s 79.

<sup>47</sup> See paras B.20 – B.25 below.

matter is particularly sensitive – for instance, inquiries into maltreatment of the elderly or allegations of assault by school teachers.<sup>48</sup> But it is exactly these types of reports that are more likely to contain defamatory statements. Thus where the report alleges that a person is guilty of a criminal offence, for example, of assault, that statement is defamatory.<sup>49</sup> In a similar manner, imputations on the character of an employee of the council, or a statement that that person lacks some essential quality to carry on the office, trade or profession successfully, are defamatory.<sup>50</sup> The reports which would benefit most from a statutory defence of qualified privilege, are thus not covered by the defence.

- 6.19 Therefore for the reports about which we are most concerned, there is no statutory defence of qualified privilege available. However, the common law qualified privilege, which was not repealed by the 1996 Act, may still be of relevance in some situations.

#### QUALIFIED PRIVILEGE AT COMMON LAW

- 6.20 In *Adam v Ward* Lord Atkinson said that:

a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.<sup>51</sup>

- 6.21 While it is clear that this will encompass legal duties to communicate or receive statements, it is less certain how far this extends in the context of moral and social duties. Moral duty was defined by Lindley LJ in *Stuart v Bell*:

... to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal ...<sup>52</sup>

- 6.22 When applying this test, it is important to consider to whom publication has been made. The making of a statement to the inquiry panel itself will clearly attract qualified privilege. The step of making the inquiry report available to the commissioning authority should also attract qualified privilege, as there would be a duty on the panel to report its findings, and a corresponding duty on at least that part of the authority which set up the inquiry to be informed of the findings. If an officer of an authority, or an insurer, were troubled by the prospect of the report being made available only to the elected members, this would be for the practical reason of fearing that members would disseminate the information

<sup>48</sup> See para B.24 below.

<sup>49</sup> *Berry v British Transport Commission* [1961] 1 QB 149.

<sup>50</sup> *Skuse v Granada TV* [1996] EMLR 278.

<sup>51</sup> [1917] AC 309, 334.

<sup>52</sup> [1891] 2 QB 341, 350.

more widely, rather than on the legal ground that to do so would be indefensible in law.

- 6.23 The position is not the same where the report may be made available to a section of the community, or the general public. The question of whether publication in this wider sense would attract qualified privilege under the common law is more difficult. While in theory there could well be a reciprocal duty-interest in a report if it were merely distributed to those in the area of the local authority, in practice it is highly unlikely that an authority could restrict publication to people within a certain area. The Jillings report, if it had been published, would have been distributed far beyond the area of the former Clwyd County Council. Too wide a publication, to persons who lack the requisite interest in receiving the information, is not privileged.<sup>53</sup> For example, circulating copies of the report to care staff in another authority may be justifiable in the interests of spreading best practice, but posting the report on the Internet may not be.
- 6.24 Nevertheless, there are occasions when the publisher can be said to have a duty to publish, and the public to have a genuine interest in being informed, and publication to the world at large should then be privileged. Whether a publication is in the public interest depends upon the circumstances of the case, including the nature of the matter published and its source or status.<sup>54</sup> The question is whether the local authority owes a legal, moral or social duty to disclose the information and whether the public has a reciprocal interest in receiving it. The difficulty for the authority, under the present law, lies in knowing where the boundary lies between permissible and impermissible publication.
- 6.25 In *De Buse v McCarthy*,<sup>55</sup> there had been a loss of petrol, and two employees had been convicted of criminal offences in relation to the loss. One of the convicted people made allegations against other employees of the council, and so the council had the matter investigated by a committee. The committee reported to the council. As part of the normal practice of giving advance notice of matters to be discussed at council meetings, the report of the committee was distributed around public libraries, as the matter was on the agenda.
- 6.26 The council pleaded that it was protected by common law qualified privilege. In deciding this issue, Lord Greene MR set out the test: “adopting the language of Lord Atkinson, we have to consider, first, what interest or duty the council had to communicate to the ratepayers the report of a committee which the council was

<sup>53</sup> *Adam v Ward* [1917] AC 309, 321, *per* Earl Loreburn. See also *Watt v Longsdon* [1930] 1 KB 130, in which the claimant succeeded in his action for defamation against his employer for revealing damaging information about him to the claimant’s wife, but failed as regards the communication of the same information to the chairman of the company. It was held that while Watt’s wife might well have had an interest in the information, there was no reciprocity of interest between her and the defendant.

<sup>54</sup> *Blackshaw v Lord* [1984] QB 1, 26.

<sup>55</sup> [1942] 1 KB 156.

proposing to consider ...”<sup>56</sup> Lord Greene held that, given the preliminary nature of the report, on which the council had not decided its stance, while there was obviously a duty and an interest in the committee reporting to the council, there was no duty nor interest on the part of the council to communicate it to the ratepayers. He held, though, obiter, “There may well have been a duty, or, if not a duty at any rate an interest, of the council to inform the ratepayers of the result of its own deliberations.”<sup>57</sup>

#### GENERAL PUBLIC INTEREST

- 6.27 There is a different strand of authority which may also be of assistance to local authorities considering the risks of an action in defamation. It stems from the decision of the House of Lords in *Reynolds v Times Newspapers Ltd*.<sup>58</sup> While their Lordships explained the decision in terms of the “duty-interest” test, being a moral duty on the part of the media to publish, and a “legitimate interest” on the part of the general public to be informed of, the matters in question, it seems that the underlying principles give the authority a wider reach, as described:

The reality, however, is that this is, conceptually, a different species of qualified privilege from both the more general duty and interest based defence and the defined categories of privileged reports ... The underlying basis of the *Reynolds*’ defence is that where the subject matter of the defamatory material is of sufficient importance to the public and the defendant has behaved reasonably and responsibly, the publication will be protected.<sup>59</sup>

- 6.28 In *Reynolds v Times Newspapers Ltd*, the House of Lords considered whether qualified privilege attached to a newspaper article which had implied that the Prime Minister of Eire had lied to the Dáil (House of Representatives).<sup>60</sup> Lord Nicholls’ comments in that case, which have been relied upon in subsequent cases on the point, provide useful guidance:

Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject matter is a matter of public concern.

<sup>56</sup> *Ibid*, 164.

<sup>57</sup> *Ibid*, 165.

<sup>58</sup> [2001] 2 AC 127.

<sup>59</sup> D Price, *Defamation: Law, Practice and Procedure* (2nd ed 2001) 13–01.

<sup>60</sup> [2001] 2 AC 127.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

4. The steps taken to verify the information.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

6. The urgency of the matter. News is often a perishable commodity.

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

8. Whether the article contained the gist of the plaintiff's side of the story.

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing.<sup>61</sup>

6.29 The principles set out in *Reynolds* fell to be considered in *Loutchansky v Times Newspapers Ltd.*<sup>62</sup> The Court of Appeal confirmed that *Reynolds*

is designed to enable a proper balance between on the one hand the cardinal importance of freedom of expression by the media on all matters of public concern, and on the other the right of an individual to his good reputation.<sup>63</sup>

6.30 The court also explained that *Reynolds* had developed the common law, first in that privilege deriving from *Reynolds* attaches to the publication itself rather than to the occasion of publication, and second that if *Reynolds* privilege attaches, then there is little scope for any finding of malice.<sup>64</sup> It affirmed that *Reynolds* is indeed a significant departure from the previous law: it is “a different jurisprudential creature from the traditional form of privilege from which it sprang”.<sup>65</sup>

<sup>61</sup> [2001] 2 AC 127, 205.

<sup>62</sup> [2001] EWCA Civ 1805; [2002] 1 All ER 652. The judgment of the Court of Appeal handed down on 5 December 2001, to which we refer here, addressed various substantive issues, including the interpretation of *Reynolds*. We refer at para 9.86 below to an interlocutory point decided in a separate judgment but as part of the same litigation, on whether publisher can pray in aid of a defence of qualified privilege facts of which the publisher was unaware at the time. This was also a decision of the Court of Appeal, delivered by Brooke LJ on 3 April 2001: [2001] EWCA Civ 536; [2001] 3 WLR 404.

<sup>63</sup> [2001] EWCA Civ 1805, para [22], approving this description by Simon Brown LJ in *Al-Fagih v H H Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634, para [26]; [2001] All ER (D) 48 (Nov).

<sup>64</sup> [2001] EWCA Civ 1805, para [33]; [2002] 1 All ER 652, 665.

<sup>65</sup> [2001] EWCA Civ 1805, para [35]; [2002] 1 All ER 652, 665.

- 6.31 *Loutchansky* is significant also, for confirming that application of the principles in *Reynolds* may not be easy. Indeed, on the substantive appeal, the Court of Appeal held that the trial judge had applied the wrong test to the question whether there was a duty to publish, through mis-interpretation of *Reynolds*.<sup>66</sup>
- 6.32 The House of Lords in *Reynolds* emphasised that cases should be decided on their individual facts, but applying the principles they enumerated. While *Reynolds* concerns the freedom of expression of the press, in particular in relation to investigative journalism as opposed to reporting,<sup>67</sup> and may not translate simply to the context of local authority inquiry reports (in applying the principles to local authority inquiry reports some of the principles would have to be adapted) there nevertheless seems to be considerable scope for arguing that application of these principles, and a proper balancing of the factors in the individual case, could well result in a defence of qualified privilege applying to the general publication of a report. Whether it is put as an aspect of the duty-interest test, or as a conceptually different approach probably does not matter. *Loutchansky* demonstrates, however, that it might not be a straightforward matter, and it is not, moreover, clear how widely a report might be published with the benefit of common law privilege.

### **Conclusion**

- 6.33 Reports of local authority ad hoc inquiries which do not have Parliamentary privilege or which are not published by the appropriate statutory officers or bodies are in an unsatisfactory position. Reports which may be withheld from public inspection when tabled for discussion at a council meeting fall into this category, and many ad hoc inquiry reports will be of this type because of their subject matter. The reports will not automatically benefit from a defence but will have to rely on the “duty-interest” test of common law qualified privilege. The application of this test is a matter of judgment, and it may ultimately not cover the report. The report may, however, attract qualified privilege, applying the principles enumerated in *Reynolds*, if the court finds that the public was indeed “entitled to know the particular information”.<sup>68</sup>

<sup>66</sup> The claimant sued on the basis of articles published in *The Times* and on *The Times* website which made allegations of involvement in various criminal activities by the claimant. The trial judge held that the newspaper was not under a duty to publish the articles complained of, applying *Reynolds*. He had asked whether the duty owed is “such that a publisher would be open to legitimate criticism if he failed to publish the information in question” but should have asked whether the journalist met the standard of responsible journalism: [2001] EWCA Civ 1805, para [50]; [2002] 1 All ER 652, 670.

<sup>67</sup> *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 291 *per* Lord Bingham of Cornhill.

<sup>68</sup> [2001] 2 AC 127, 206, *per* Lord Nicholls.

## **PART VII**

# **THE POLICY, THE PROBLEMS AND THE SOLUTIONS**

- 7.1 In this Part we first explain what policy considerations govern our analysis of the legal problems and the solutions. We then set out what we see as the legal difficulties, drawing on the preceding Parts, and consider how they might best be addressed. We conclude that some can be resolved or mitigated by agreed practice between local authorities and the insurance industry, and also that a Code of Practice for the conduct of local authority ad hoc inquiries would itself, by helping to promote good quality inquiries, make it less likely that such problems would arise in individual cases. We examine these two non-legislative solutions in more detail in Part VIII.
- 7.2 We also conclude in this Part that the issue of qualified privilege as a defence in defamation may require a legislative solution. We discuss possible legislative solutions in Part IX.

### **THE POLICY**

- 7.3 We start by setting out the underlying policies which have informed our analysis.

### **Publication**

- 7.4 Publication, in some form, of the inquiry report is desirable to inform the complainants, their families, the local authority constituents and the public at large about what happened, to promote transparency, and to bring about changes in practice. There may be a need to hide the identities of individuals from (wide) public knowledge. There may be a duty to respect confidentiality. These two considerations will legitimately restrict what may be published in the inquiry report.
- 7.5 Publication
- (1) enhances the accountability of local authorities for the manner in which they discharge their statutory functions;
  - (2) enables an authority to change its own practices and procedures to prevent a wrong being repeated;
  - (3) encourages the possibility that lessons learned by one local authority can be publicised so that improvements in practice will spread; and
  - (4) encourages the publicisation of findings of fact in matters where there is a genuine public interest.

7.6 When the Society of Local Authority Chief Executives (SOLACE) issued its report on ad hoc inquiries in local government in 1978, it stated that there should be a presumption in favour of publication.<sup>1</sup> It said,

Following any formal inquiry, public or private, the local authority shall accept an obligation to publish a report.

If the inquiry has been public the report shall be published in full. Very exceptionally there may be additional conclusions reached in a public inquiry which are nevertheless reported privately, in which case this report would be withheld from publication.

If the inquiry is private a report, though not necessarily the full report, shall be published. We endorse the relevant Davies proposal:

When an inquiry is held in private it should submit two reports:

(i) a full confidential report to the appointing authority;

(ii) an abridged report which safeguards parties to whatever extent the Chairman and members think necessary, where professional capacity and reputation or disclosure of intimate personal circumstances are concerned.<sup>2</sup>

Copies of the report to be published shall be sent to interested parties before publication.

...

The obligation on local authorities to publish a report shall apply whether or not they accept it or propose to take action on it.<sup>3</sup>

7.7 We agree that this should be the presumption. With one caveat relating to the quality of the inquiry and of the report, we cannot see that there is any good reason that some version of the inquiry panel's findings should not be made available to the public.

7.8 The decision whether to publish, and what to publish, should be the authority's. It is in our view undesirable for the insurer to be able to prevent publication (and thereby avoid liability) *purely* on the grounds that the report is adverse to the insurer's interests in the sense of disclosing valid grounds for claims against the local authority.

7.9 It is also our provisional view that if the local authority was right to instigate the inquiry, and it has been fairly conducted, then merely publishing the findings of the inquiry should not, as a matter of policy, leave the local authority, or an insurer, vulnerable to a new cause of action for defamation.

<sup>1</sup> The SOLACE Report, para 4.60. See paras 8.62 – 8.65 below.

<sup>2</sup> Report of the Committee on Hospital Complaints Procedure (1973) ("The Davies Report"). See further paras 8.55 – 8.56 below.

<sup>3</sup> The SOLACE Report, paras 4.60 – 4.65.

### **The conduct of inquiries**

- 7.10 An inquiry report should be fair to all interested parties, which includes complainants, their families, and others who might have been similarly affected, alleged perpetrators of wrong-doing, and those with supervisory or managerial responsibility for the alleged perpetrators.
- 7.11 A fairly conducted inquiry should start with an open mind, allow witnesses to tell their full story, hear from all those people with relevant information to give and uncover all relevant documents, allow people a fair chance to respond to allegations made against them, accord evidence appropriate weight, be factually accurate, stay within its terms of reference which have been carefully and clearly defined, and reach conclusions on the evidence heard.
- 7.12 Very occasionally it might be apparent that an inquiry was not well conducted, was unfair, or that the report itself is poor, meaning that it goes beyond its terms of reference, or reaches unsustainable conclusions, or is evidently unfair in some other way. The commissioning authority might become aware of the defects of the report when it is presented to the council for its consideration, prior to any decision being taken on how to react to it. For example, when parts of the report are shown to those criticised in advance of publication, their responses might alert the authority to unfairness or unsustainability.
- 7.13 A statement in a report which is defamatory<sup>4</sup> should not be published unless it is believed to be true, with good grounds for the belief. Therefore, in these unusual circumstances, it might be right not to publish a report or even an abbreviated version of it, because of the potential for serious harm if unfounded criticisms of a person are put into the public domain.
- 7.14 Our provisional view is that, if an inquiry report is fair, it or an edited version of it should usually be published.

### **THE PROBLEMS**

- 7.15 We now draw together the legal difficulties which have emerged from the analysis in the preceding Parts.

### **Admissions of liability<sup>5</sup>**

- 7.16 Our provisional view is that the risks of making an admission of liability, in contravention of the insurance contract, could pose a real problem for authorities because the insurer may be entitled to avoid an insurance contract where an admission of liability is made without the insurer's consent.
- 7.17 This may occur where a member or official of a council makes a public statement admitting liability, with the authorisation of the council but without the insurer's consent. It may also occur where a council responds to an inquiry report by

<sup>4</sup> The legal meaning of this term is explained at para 6.3 above. A defence may be available, eg that the defamatory statement is true, or that qualified privilege applies.

<sup>5</sup> See Part IV above.

publishing it. It is not sufficiently clear what kind of act by the council will amount to an admission of liability, especially in relation to its response to an inquiry report.

- 7.18 We provisionally consider that the problem could also arise at an earlier stage in the process for local authorities, namely when deciding what evidence may be given to the inquiry. While the inquiry is taking evidence there is the possibility that a member or an official or other employee, with knowledge of the facts will make an admission of fact to the inquiry, from which liability may follow. If the authority anticipates that the inquiry, even though held in private, will produce a report which is likely to be published, it may be inclined not to make full disclosure to the inquiry panel on the grounds that it fears making an admission of liability, and thereby being in breach of its insurance contract. Part of the difficulty arises because the admission of some facts might amount to an admission of liability.
- 7.19 We would expect the local authority to remain covered by its insurers where the claim is brought on the basis of vicarious liability for its employees, even where relevant admissions were made to the inquiry by the employees, because that is what the insurance is for. However, whether this is in fact the case will depend in part on the construction of the insurance contract and in part on the approach of the insurers.
- 7.20 Admissions of liability by those with authority to make them are a different matter: it seems to us reasonable for the insurer to stipulate in the contract that such admissions should not be made without their consent. It will therefore be especially important to the authority that those officers who might be thought, by virtue of their position, to have sufficient standing to speak for the authority, do not make admissions without the insurer's consent.
- 7.21 As regards admissions in a published report, our provisional view is that, where the authority has considered the inquiry report and has no grounds to doubt its findings, and it is in the public interest that the report be made public, the authority ought to be able to release it without fear of loss of cover. Insurers have told us it is not their general practice to seek to prevent the publication of reports *purely* on the grounds that they contain statements or conclusions which might give rise to legal liabilities, and in that sense be contrary to the insurers' interests. To do otherwise would negate the whole purpose of the insurance which is to provide cover against the risk of unforeseen liability.
- 7.22 However, insurers often conduct their own investigations into the validity of complaints against authorities, and if they conclude that there are no grounds for admitting liability, they may be inclined to see a report which reaches or implies a contrary conclusion as adverse to their interests. They might then seek to rely on the express term in the insurance contract which prevents the authority admitting liability without the insurer's consent.
- 7.23 We noted at paragraph 3.24 above that an insurer does not have a wholly unfettered discretion as to the circumstances in which it may refuse consent to an admission of liability being made. Its decision must be reasonable in the

“*Wednesbury*” sense, in that the insurer should “form a genuine view as to the appropriateness of settlement or compromise without taking into account considerations extraneous to the subject-matter of the reinsurance”.<sup>6</sup> It may be a problem for the claimant or potential claimant if the insurer’s consent is unreasonably withheld, because it may be harder to pursue a justified claim. It may be a problem for the authority if the insurer’s consent is unreasonably withheld because its freedom to respond to the complaint, and to address the matter openly and transparently, is curtailed. Moreover, there may be a problem for the local authority if the insurer reasonably withholds consent, on the ground that there will be an admission of liability, because again the local authority will be inhibited from addressing the matter openly.

7.24 It may well be that insurers’ normal practice is to settle claims at the earliest stage where liability is clear, rather than defending a claim at all costs, but this may not be the practice across the board. For example, while insurers do not, we understand, now adopt a hostile attitude to claims arising out of alleged abuse of children in care, this may not always have been the case when the issue of child abuse was less frequently identified than it is today. It is possible that they might adopt such an attitude to other kinds of claims, particularly newly-emerging issues.

7.25 The problems may be summarised as follows:

- The local authority’s co-operation with the inquiry may be impeded if there is a risk that evidence given to the inquiry panel will amount to an admission of liability in breach of the insurance contract.
- It is not sufficiently clear what kind of admission will be treated as an admission of liability within the terms of the insurance contract.
- It is not sufficiently clear what kind of act by the council will amount to an admission of liability, especially in relation to its response to an inquiry report.
- The lack of clarity might either result in a breach of the insurance contract, or lead an authority to make less full disclosure than it could to an inquiry panel, or to hold back from publishing the inquiry report for fear of invalidating the insurance contract.
- The interests of the insurer and the local authority may conflict: if the insurer withholds consent, publication could be impeded where it ought not to be.

The following consultation questions aim to clarify how much of a problem these legal issues pose in practice.

<sup>6</sup> *Gan Ins Co Ltd v Tai Pin Ins Co Ltd* [2001] EWCA Civ 1047, para [73] *per* Mance LJ. Mance LJ’s dictum is relied on in a subsequent decision on the reasonableness of a mortgage lender raising its rates of interest by Dyson LJ. Having cited the part of Mance LJ’s judgment to which we refer, he continues: “So here too, we find a somewhat reluctant extension of the implied term to include unreasonableness that is analogous to *Wednesbury* unreasonableness.” *Nash v Paragon* [2001] EWCA Civ 1466, para [41]; [2002] 1 WLR 683.

### ***Questions for consultees***

- 7.26 **Is it the experience of consultees that, even though liability may be inferred from an admission of fact, witnesses to local authority non-statutory inquiries are free to give all relevant facts to an inquiry (subject to requirements of confidentiality)?**
- 7.27 **Is it the experience of consultees that publication of an inquiry report, whether internal or independent, is treated in practice as amounting to acceptance of any findings of fact and conclusions reached in that report, and thus to an admission of liability?**
- 7.28 **Is it the experience of consultees that inquiry reports are ever withheld from publication for fear that statements in them will amount to admissions of liability?**
- 7.29 **Is it the experience of consultees that consent to an admission of liability is ever withheld by an insurer in circumstances where the local authority would have wanted to make that admission? If so, we should be interested to know the circumstances.**

### **Waiver of rights<sup>7</sup>**

- 7.30 Waiver of the *right* of confidence in a document or communication may entitle the insurer to avoid the contract because waiver without the insurer's consent would be a breach of an express term of the contract, and therefore an authority must not waive a right which *it* has to confidentiality in a communication without the permission of the insurer. This is important because loss of confidentiality may bring in its wake loss of legal professional privilege.
- 7.31 If privileged material is referred to in a public document, privilege in that document will have been waived. Privilege might also have been waived in collateral documents and other parts of the same document if disclosure was partial but misleading. A local authority must be alert to the danger of waiving privilege, as waiver of privilege without the insurer's consent will put the authority in breach of the insurance contract.
- 7.32 We wish to know whether there is a problem in practice for local authorities in determining what documents may be disclosed to an inquiry without breach of this term of the insurance contract, or in waiving these rights inadvertently and thus losing insurance cover.
- 7.33 We concluded in Part V that the duty to claim public interest immunity is not a right that can be waived by the authority, and therefore not a matter which can lead to a breach of the condition in the contract of insurance which prohibits waiver of rights without consent. The authority will, however, want to keep documents confidential where public interest immunity will or may apply. A question is, therefore, included in relation to public interest immunity.

<sup>7</sup> See Part V above.

### ***Questions for consultees***

- 7.34 **In consultees' experience, does the fear of waiving the right to confidentiality which may be claimed by the authority lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?**
- 7.35 **Does the fear of waiving legal professional privilege lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?**
- 7.36 **Does the fear of disclosing a document which might be subject to public immunity privilege lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?**
- 7.37 **In the experience of consultees, has insurance cover ever been lost through waiver of rights to confidentiality, legal professional privilege or through disclosure of a document subject to public interest immunity?**

### **Defamation<sup>8</sup>**

- 7.38 We concluded in Part VI that it is difficult for a local authority to know how widely it may disclose a report and claim qualified privilege: the law is currently just not clear enough on this point. This will have important consequences for the public image of local authorities and may lead to a doubly chilling effect if local authorities are loath to publish any report for fear of actions in defamation, not only to avoid legal action in itself, but also for fear of invalidating the authority's insurance cover. Our questions for consultees are aimed at finding out the extent of the problem in practice.

### ***Question for consultees***

- 7.39 **In consultees' experience, are inquiry reports ever withheld from publication because of defamatory statements in them? If this has occurred, was it because of fear of an action in defamation, or because of the risk of invalidating the insurance cover, or both?**
- 7.40 Equally importantly, if the local authority knew that any report was unlikely to receive the publicity it wished to give to its findings, it may be reluctant to undertake the inquiry in the first place. This could mean that facts which ought to be established might not be; steps which could be taken to make improvements might not be; it could also lead to allegations of cover-ups by the public and frustration on the part of the council.
- 7.41 A further problem follows from the vicarious liability of a local authority for the acts of its employees. For example, if a director of social services criticised council staff in public before an inquiry had concluded, and without

<sup>8</sup> See Part VI above.

authorisation by the council, that criticism could amount to actionable defamation, and the council could be vicariously liable.<sup>9</sup>

7.42 Thus, from the point of view of the insurers and of the authorities, there are two main concerns in relation to defamation: (1) avoiding precipitating an action for defamation, especially one which will be hard to defend, and (2) the impact on the insurance contract.

7.43 In relation to the first point, as regards the risk of an action in defamation, if an authority is confident that its reports could attract qualified privilege at common law if the point were litigated, then the courts might expect the authority to be robust, whatever the insurer might say. The court might take a similar line to that in relation to the provision of information to the Department of Health about an employee found to be unsuitable to work with children. Lord Woolf MR said,

We recognise that there may be a few timid spirits who will be deterred from doing their duty if it is not clear that they cannot be sued for defamation. However, we find it difficult to accept that a local authority under the statutory duties to which the authority are subject would be deterred from providing the appropriate information to the service by the threat of litigation. We say this despite the straightened circumstances of local authorities.<sup>10</sup>

7.44 We accept that the fact that it may have to defend itself in the courts should not, in itself, inhibit a local authority, but the degree of uncertainty about the availability of the common law defence of qualified privilege seems to us likely to promote an overly cautious approach. We identify this issue as requiring legislative reform, and we set out the possibilities in Part IX.

7.45 In relation to the second point, our provisional view is that the risk of avoiding the insurance contract can be resolved by agreement between the insurer and the local authority. An agreed statement of principles might state that insurance cover will continue if the authority carefully and conscientiously assesses the quality of a report and the public interest in knowing of it before deciding to make it available to the public. This will be so even if it subsequently loses a court action for defamation. Publication would not be unfairly impeded.

7.46 Similarly, it could be agreed between the local authority and the insurer that if the authority takes all reasonably practicable steps to advise its officers not to make statements which could lead to an action in defamation without proper consideration and authorisation by the council, then it will have been acting prudently.<sup>11</sup>

<sup>9</sup> See paras 3.10 – 3.16 above. It *might* be arguable that vicarious liability should not subsist if the director had been explicitly instructed by the authority not to make the statement. Vicarious liability will not, of course, be relevant where the director is speaking in a personal capacity.

<sup>10</sup> *S v Newham LBC* [1998] 3 FCR 277, 284.

<sup>11</sup> We concluded in our discussion of implied terms in a contract for liability insurance that an authority should not *court* liability: see para 3.38 above.

## **SOLUTIONS**

7.47 Our provisional view is that, with the exception of the one issue of qualified privilege in defamation, all the problems we have identified would best be tackled in two non-legislative ways: by an agreement between the local authorities and their insurers, and by a Code of Practice. As was stated in the Waterhouse Report: “The contractual issues that arise are less suitable for legislation because insurers cannot be compelled to underwrite liabilities and will make their own assessments of risk when they do agree to provide cover.” The Report continued, “It is highly desirable, however, that there should be an agreed code of practice to guide local authorities in their response to situations of the kind that arose in Clwyd.”<sup>12</sup>

### **An agreement between local authorities and insurers**

7.48 With regard to an agreement between authorities and insurers, we have to consider whether a set of ground rules can be established, which will in practice bind both local authorities and insurers, as to how these possible points of conflict between them will be addressed. Our provisional view is that, in the light of the problems we have identified, such an agreement should cover:

- what evidence members officers and employees of the local authority may give to the inquiry;
- what will be treated as an “admission of liability” such as will trigger a breach of the express term of the insurance contract if made without the insurer’s consent, including when an admission of fact will be treated as an admission of liability within the terms of the contract;
- in general terms, the circumstances in which the insurer will withhold consent to an admission of liability and to the waiver of legal professional privilege;
- how the authority is to respond to an inquiry report and what procedures it should adopt;<sup>13</sup>
- statements to the public made on behalf of the authority;
- statements made without the authorisation of the authority;
- the consequence for the insurance contract of inadvertent waiver of a right to confidentiality or legal professional privilege;
- the impact on the insurance contract of potential actions in defamation.

7.49 In Part VIII we examine the steps taken so far by the ABI and the LGA to address these kinds of issues, and suggest how they could be taken further.<sup>14</sup>

### **A Code of Practice**

7.50 The second strand to the solutions should, in our provisional view, be a Code of Practice for the conduct of local authority ad hoc inquiries. We see this as a

<sup>12</sup> The Waterhouse Report, para 32.62.

<sup>13</sup> See paras 4.20 – 4.29 above.

<sup>14</sup> See paras 8.2 – 8.46 below.

distinct, and important, component of the solutions to the problems identified in the Waterhouse Report and in this consultation paper. A Code of Practice would guide those involved in the setting up of and the running of a local authority non-statutory inquiry, and promote best practice. The agreement we have outlined in paragraph 7.52 above would, by contrast, be a matter of regulating practice between local authorities and their insurers. The two would be connected in that if an inquiry were conducted in accordance with any guidance in a Code of Practice, the kinds of problems we have outlined would be less likely to arise in the first place.<sup>15</sup>

- 7.51 A Code of Practice would also be relevant to the possible legislative solution to the defamation issue which we outline in Part IX.<sup>16</sup>
- 7.52 The fairness of the inquiry and report are key. The complaint which gives rise to the inquiry ought to be properly and fairly investigated for the benefit not only of the complainant, and his or her family, but also in the wider public interest.
- 7.53 As we have said above,<sup>17</sup> we think publication of the resulting inquiry report is desirable as an important aspect of the public interest. While any solution needs to allow for the possibility that publication might not be appropriate where the inquiry or report are unfair, non-publication should be a rare occurrence. On the other hand, no solution should make it such that an authority, with or without the agreement of its insurer, could easily suppress a report on the ostensible grounds that the inquiry was unfair or the report defamatory when the reality was that the report was accurate but the authority did not wish to publicise it. This eventuality can best be avoided by securing a high quality inquiry and report in the first place.
- 7.54 We therefore consider what principles might govern a Code of Practice for local authority ad hoc inquiries, and what matters it might cover at paragraphs 8.00 below.

#### **Question for consultees**

- 7.55 **Our provisional view is that, without some clarification or change in the law, authorities and insurers can only avoid the risk of publishing, being sued, and finding that the defence of qualified privilege is not applicable, by a very cautious approach, which is not in the public interest, and legislative reform in relation to qualified privilege is therefore desirable. Do consultees agree?**
- 7.56 **Do consultees agree that the other legal difficulties are best addressed by (1) a binding agreement between local authorities and their insurers, and (2) by development of a Code of Practice for the conduct of local authority ad hoc inquiries?**

<sup>15</sup> And the insurers could require a local authority to observe a Code of Practice.

<sup>16</sup> See paras 9.32 – 9.37 below.

<sup>17</sup> See paras 7.5 – 7.7 above.

## **PART VIII**

# **NON-LEGISLATIVE SOLUTIONS: AN AGREEMENT AND A CODE OF PRACTICE**

- 8.1 In this Part we examine in more detail the two non-legislative routes to resolving the problems we identified in Part VII: first, a statement of agreed principles or practice between the insurers and the local authorities,<sup>1</sup> and second, a Code of Practice for the conduct of local authority ad hoc inquiries.<sup>2</sup>

### **A STATEMENT OF AGREED PRINCIPLES**

#### **Developments since the Waterhouse Report**

- 8.2 We now examine the extent to which the issues discussed have been taken forward since the publication of the Waterhouse Report in two documents: (1) the LGA/ABI Guidance of 1999, and (2) the ABI Response of 2000 to the Waterhouse Report.

#### **(1) The LGA/ABI Guidance 1999**

- 8.3 Following completion of the Jillings report, the LGA and the ABI issued a Guidance Circular to local authorities on how to approach inquiries concerned with reviewing statutory responsibilities which are subject to indemnity insurance cover: “Ad Hoc Inquiries in Local Government – Insurance Aspects”.<sup>3</sup> It was circulated on 30 September 1999, and is reproduced as Appendix A.
- 8.4 The Guidance “sets out principles which the LGA recommends local authorities apply when considering arrangements for an inquiry concerned with reviewing statutory responsibilities which are subject to indemnity insurance cover.”<sup>4</sup> It begins by reminding authorities to check whether an insurance liability might arise.<sup>5</sup>

#### **THE DECISION TO INSTITUTE AN INQUIRY**

- 8.5 The Guidance states plainly that “it is for the authority alone to decide whether or not to hold an inquiry. Insurers would not expect or wish to be involved in such a decision, though it is important that the authority informs the insurer of its decision.”<sup>6</sup> We agree that this is the appropriate approach.

<sup>1</sup> See paras 8.2 – 8.46 below.

<sup>2</sup> See paras 8.47 – 8.67 below.

<sup>3</sup> Referred to here as “the LGA/ABI Guidance” or “the Guidance”.

<sup>4</sup> LGA Circular 631/99, covering note to the LGA/ABI Guidance, p 1.

<sup>5</sup> The LGA/ABI Guidance, para 1.

<sup>6</sup> *Ibid*, para 3(b).

## THE TERMS OF REFERENCE

- 8.6 The Guidance points out the importance of accurate and reasonable reports, and that conclusions be well-founded. It therefore advises that the terms of reference be restricted “to findings of fact and recommendations for the avoidance of a recurrence”.<sup>7</sup> The Guidance advises “instructing the inquiry that comment, opinion or criticism should only be introduced into its report if it is justified; to avoid introducing any inference or supposition into its report; and to ensure that any unproven allegations and unsubstantiated statements are represented as such”.<sup>8</sup>
- 8.7 We doubt it is realistic or right for apportionments of blame to be excluded from the report itself. For example, the author of a report of a review instigated by Brighton and Hove Area Child Protection Committee, Alyson Leslie,<sup>9</sup> writes, “... I would maintain the inadequacy of the professional social work support did not arise principally from the organisational pressures on fieldwork staff in a period of resource redistribution. Rather, it was the result of professional practice that varied between inadequate and negligent.”<sup>10</sup> There are many findings of fact and recommendations in Alyson Leslie’s report, and there is much supporting evidence in her report for her conclusions.
- 8.8 Our provisional view is that it is right not to have the apportionment of blame as one of the *aims* of an inquiry in its terms of reference,<sup>11</sup> while allowing for the possibility of the expression of this kind of opinion, where it is properly supported by evidence and findings of fact.
- 8.9 There is no mention in the Guidance of the desirability of legal advice on the terms of reference, or, if the inquiry is to be independent, of consulting the person who will be chairing the inquiry on the terms of reference. It seems to us that this would be highly advisable.
- 8.10 Authorities are recommended to instruct the inquiry “to avoid introducing any inference or supposition into its report”.<sup>12</sup> While speculation should have no

<sup>7</sup> The Guidance, para 4(a).

<sup>8</sup> *Ibid*, para 4(b).

<sup>9</sup> Alyson Leslie is a former assistant director of social services who was appointed to conduct the Part 8 Review following the death of a child. See para 2.34 above.

<sup>10</sup> Brighton and Hove ACPC, “Report of the Part 8 Review for Brighton and Hove ACPC of the care and protection of JAS (aged 4) who died on 24 December 1999” (2001) para 12.8. See also para 1.45 of that report.

<sup>11</sup> Although it may be right on occasion to have “to make criticism of individuals or organisations where appropriate” as one of the objectives of the inquiry, as it was in the case of the Bristol Royal Infirmary Inquiry: M Maclean, “How Does an Inquiry Inquire? A Brief Note on the Working Methods of the Bristol Royal Infirmary Inquiry” (2001) 28 *Journal of Law and Society* 590, 596 commenting on Learning from Bristol, Report of the Public Inquiry into Children’s Heart Surgery at the Bristol Royal Infirmary 1984–1995 (2001) Cm 5207.

<sup>12</sup> The LGA/ABI Guidance, para 4(b).

place in an inquiry report, we doubt whether it is possible never to draw inferences from the facts which have been properly found by the inquiry.

- 8.11 The Guidance also recommends ensuring that the inquiry “avoids reference to liability or matters of compensation”,<sup>13</sup> leaving these strictly to the authority and the insurer. It seems appropriate to us that an inquiry should not generally pronounce on issues of liability, including entitlement to compensation.

#### DISCLOSURE AND STATEMENTS TO THE PUBLIC

- 8.12 The Guidance does not cover precisely what the authority is to do with the report produced by the inquiry. It advises that the authority and insurer(s) “should meet early on to seek a full understanding of each other’s position and concerns ...”.<sup>14</sup> It recommends that one of the first steps should be agreeing a “protocol” which, amongst other things, deals with how and by whom statements to the public and media should be made. It states, “Elected members should be fully informed and support the protocol; it may be beneficial for relevant members to be involved in meetings with the insurer(s). These meetings can be used to identify the true legal position, which is equally binding on local authorities and insurers.”<sup>15</sup>
- 8.13 The protocol should identify “who is authorised to speak officially, and to the press”,<sup>16</sup> and “the extent to which (if at all) liability should be admitted”.<sup>17</sup> Given that the insurance contract will almost certainly prohibit an admission without the insurer’s prior written consent, the Guidance very sensibly says that the authority should liaise fully with the insurer before making any admission of liability for events that have occurred.<sup>18</sup>
- 8.14 On the matter of expressing regret, it advises, “A simple expression of sympathy for the affected parties and their families, coupled with an announcement that a full investigation is to be held into the circumstances, can be an appropriate response and does not amount to an admission of liability.”<sup>19</sup>
- 8.15 The Guidance does not specifically address the question of publication of the report, or a version of it, at all. It therefore does not give advice on how a report might be dealt with where the authority itself is not satisfied that it was well-conducted or that its conclusions are fair. As we have made clear in Part VII, we think publication should be the norm, not the exception, and, while it may be rare

<sup>13</sup> *Ibid*, para 4(c).

<sup>14</sup> *Ibid*, para 5(a).

<sup>15</sup> *Ibid*, para 5(b).

<sup>16</sup> *Ibid*, para 6(a).

<sup>17</sup> *Ibid*, para 6(b).

<sup>18</sup> *Ibid*, para 6(b). Note that an admission made by a councillor who purports to speak for the authority, but who does not in fact have the power to make it will not bind the authority. See para 4.33 above.

<sup>19</sup> *Ibid*, para 6(c).

that the problem will arise, it may well be advisable for there to be guidance for local authorities on how to recognise a report which contains statements which are likely to be defamatory, and how the authority should handle it.

- 8.16 We think it might be advisable for there to be an agreed procedure for the handling of a report by the council, so that the authority could be confident that if it followed the procedure, there would be no question of the insurer treating a resolution of the council as amounting to an admission
- 8.17 The Guidance is understandably silent on the difficulty of knowing to what extent publication might attract the defence of qualified privilege in an action for defamation.

### **(2) The ABI Response to the Waterhouse Report 2000**

- 8.18 One of the recommendations in the Waterhouse Report was for this Guidance to be reviewed.<sup>20</sup> The ABI accepted that recommendation in its Response to the Waterhouse Report.<sup>21</sup> We now turn to the contribution made by the ABI's Response to the amelioration of the problems.

#### BACKGROUND

- 8.19 The ABI Response makes a number of points in its "Background" section. The conflict faced by a local authority between its broad public duty as a provider of services and its narrower public duty not to vitiate its insurance cover<sup>22</sup> features early on. In paragraph 2.3 the ABI writes, "Insurers rightly have no direct locus in the setting up of such an inquiry or the publication of its results. These are matters for the authority after appropriate deliberation." It continues in the next sentence, "Nevertheless, the matters under inquiry may often be the subject of indemnity under an insurance policy, particularly if injury, illness or stress are involved."
- 8.20 The ABI Response then explains the purpose of certain standard terms in local authority liability insurance contracts. On admissions, it states,

The purpose of the insurance policy is to protect the authority against the financial consequences of claims, so it usually requires the local authority not to make any admission of liability or promise of payment without the insurance company's consent. This is to protect the local authority from inadvertently jeopardising the position, for example if the authority admitted full responsibility at the start of the

<sup>20</sup> Recommendation 72, at para 55.05 of the Waterhouse Report:

Subject to the preceding recommendation, [that the Law Commission look at the legal issues] guidance to local authorities on the setting up and conduct of inquiries and the dissemination of reports thereon should be up-dated and re-issued.

<sup>21</sup> ABI, "The Waterhouse Report Supplementary Matters – recommendations 71 and 72: A Response by the Association of British Insurers" (December 2000) ("The ABI Response").

<sup>22</sup> On which, see para 1.3 above.

inquiry and found out subsequently that the matters under investigation were not legally the authority's fault.<sup>23</sup>

- 8.21 This indicates that inadvertent admissions are the focus of the insurers' concerns.
- 8.22 What is not clear is what their approach might be to considered, deliberate admissions of liability. It may well be that, in line with the spirit of the Woolf reforms, which favours early resolution of disputes and the avoidance of litigation, insurers would be inclined to permit admission of liability and to settle claims. Indeed, insurers will often wish to save costs by settling claims where liability is clear.
- 8.23 Another alternative to litigation which insurers and authorities might want to pursue in such cases is Alternative Dispute Resolution. Matters subject to arbitration or mediation may be dealt with on a confidential basis. This offers the possibility of finding a private solution in the individual case, including remedies which litigation does not offer, such as an apology, while leaving it open to the authority to make a public statement of changes in practice which will result.
- 8.24 The ABI Response also does not tackle what we perceive as the practical problem of what might constitute an admission of liability.
- 8.25 The ABI Response continues, "In addition, insurance policies generally include a duty to behave as if uninsured. The purpose of this duty is to prevent the insured (here, the local authority) behaving imprudently simply because its risks are being assumed by someone else."<sup>24</sup> Again, this is clear enough. As we noted above,<sup>25</sup> the ABI does not expect insurance contracts to be interpreted in such a way that an authority must put the interests of the insurers before all others.
- 8.26 Section 3 is the body of the Response. It is structured following the headings in the Waterhouse Report, and includes the LGA/ABI Guidance at appropriate points. It expands on that Guidance.

#### THE DECISION TO INSTITUTE AN INQUIRY

- 8.27 Liability insurance contracts will require the authority to notify the insurer if a claim is anticipated, and if an inquiry is being set up. The ABI Response says the insurers "do not want to be involved in the setting up or publication of the inquiry or its report – those decisions are solely for the authority."<sup>26</sup>

#### THE ADVERTISING OF REQUESTS FOR WITNESSES TO COME FORWARD TO GIVE EVIDENCE

- 8.28 The ABI Response comments:

<sup>23</sup> The ABI Response, para 2.4.

<sup>24</sup> *Ibid*, para 2.4.

<sup>25</sup> See para 3.38 above.

<sup>26</sup> *Ibid*, para 2.5. This refers to paras 1–3 of the LGA/ABI Guidance.

The need to consider the overall interests of the alleged victims or witness is paramount. Whilst the authority will have a duty fully to investigate allegations of abuse it should be borne in mind that individual responses to such calls for evidence may result in further trauma to those concerned. Each situation will need careful consideration in light of its own particular circumstances.<sup>27</sup>

- 8.29 It then refers to the possibility of the authority offering counselling and other support services to alleged victims or witnesses. Amongst other points,<sup>28</sup> it advises that “careful consideration should be given to the words used in the surrounding publicity, so that ... the authority’s position on liability is not compromised.”<sup>29</sup> The ABI is concerned that the fact that an authority is offering a counselling service should not be construed as an admission of legal responsibility for the events which gave rise to the need for counselling.

DISCLOSURE BY THE LOCAL AUTHORITY OF DOCUMENTS TO ASSIST THE INQUIRY; AND EVIDENCE TO THE INQUIRY BY COUNCIL STAFF, PARTICULARLY SENIOR OFFICERS

- 8.30 The ABI Response states:

Authorities should be encouraged to keep detailed records of all material disclosed and evidence given by its officials during the course of its own inquiries and should be encouraged to consider carefully the risk of defamation should there be unauthorised disclosure or publication of it.

Even before a formal inquiry is set up, it would be prudent for the authority to adopt a consistent approach to the collating and recording not only of any allegations brought to its attention but also of any preliminary investigative steps taken as a consequence. It is advisable that the content, date and format of any such discussions are also recorded. This approach will help with the collection and preservation of evidence should an inquiry be set up subsequently.<sup>30</sup>

- 8.31 In relation to “the risk of defamation”, if disclosure is unauthorised, then the person defending any ensuing defamation action will be the person who made the disclosure.<sup>31</sup> The difficulty for the local authority is that, even if disclosure

<sup>27</sup> *Ibid*, section 3 B 1.

<sup>28</sup> One of which relates to “recovered memory”: see section 3 B 2. Insurers are, presumably, concerned that local authorities should be slow to admit liability on the basis of doubtfully recovered memories.

<sup>29</sup> *Ibid*, section 3 B 2.

<sup>30</sup> The ABI Response, section 3 D paras 1–2.

<sup>31</sup> “Disclosure” in this context equates to “publication” in the context of defamation which means communication, not publication in the usual sense of the word. See para 6.5 above.

was not authorised, the authority might nevertheless be vicariously liable for the actions of its officers.<sup>32</sup>

REFERENCES IN THE COURSE OF THE INQUIRY AND IN ANY REPORT TO MATTERS, INCLUDING DOCUMENTS, WHICH MIGHT BE THE SUBJECT OF CLAIMS OF PRIVILEGE IN SUBSEQUENT LITIGATION

8.32 The ABI Response continues:

An appropriately qualified member of the inquiry team or official of the local authority should examine documents disclosed to the inquiry and the draft report of the inquiry for defamation risk. If there is a serious risk of defamation, there will be a need to consider any possible defence of qualified privilege and, perhaps, the principle of public interest immunity.<sup>33</sup>

8.33 As will be apparent from the analysis of the waiver of rights in Part V and of defamation in Part VI, there are two distinct types of privilege which can get confused. First is legal professional privilege, which might be claimed for a document to prevent it being disclosed in litigation, for example where a communication between the legal advisers to the authority and the council was reasonably necessary to the giving or receiving of legal advice. Second, there is privilege as a defence to a defamation action. If the defence of qualified privilege is available, then a claimant will not succeed unless it can be shown that any defamatory statements in the report were made with malice, that is, knowing it to be untrue, recklessly (without considering or caring whether or not it was true), or with some indirect or improper motive. Similarly, while public interest immunity is certainly a matter on which the authority would seek legal advice, it is not related especially to the issue of defamation. In our view, it would be better if these different concepts were addressed separately in any guidance.

8.34 At the point when it is considering what material to pass to the inquiry, the authority will want to be mindful of any duty to respect and preserve confidentiality which it might owe to someone else.<sup>34</sup> Our provisional view is that guidance might usefully include a section on the importance of confidentiality.

8.35 The ABI Response then reminds authorities that the insurer which bears the risk in relation to questions of liability which may emerge from the inquiry (such as abuse, negligence, assault and so on) will not necessarily be the insurer which bears the risk in relation to any action for defamation arising out of publication (which includes any communication) of an inquiry report.<sup>35</sup> It then goes on to cite paragraph 4 of the LGA guidance, which we refer to and comment on at paragraphs 8.6 – 8.11 above.

<sup>32</sup> It will not, however, be liable for a defamatory statement made by a councillor to whom authority to act on behalf of the council has not been delegated.

<sup>33</sup> *Ibid*, section 3 E 1.

<sup>34</sup> See para 5.4 above.

<sup>35</sup> The ABI Response, section 3 E 2.

THE EXTENT OF CIRCULATION OF ANY REPORT AND PERMISSIBLE COMMENT BY COUNCILLORS AND OFFICERS UPON IT

- 8.36 The ABI Response repeats the advice given in relation to references in the course of the inquiry and in the report to documents “which might be the subject of claims of privilege in subsequent litigation”:

As above, the circulation and publication of the report may raise the risk of defamation, which should be carefully considered by an appropriately qualified member of the inquiry team or official of the local authority. If there is a serious risk of defamation, there will be need to consider any possible defence of qualified privilege and, perhaps, the principle of public interest immunity.<sup>36</sup>

- 8.37 As regards comment on the report, the ABI Response then repeats the wording of the LGA/ABI Guidance, as described at paragraph 8.12 above, including the passage on recommending a protocol. As we say at paragraph 8.33 above, we think that the concepts of legal professional privilege, qualified privilege as a defence in defamation, and the issue of public interest immunity, should not be run together in a single paragraph, but should be treated separately.

GENERAL COMMENTS ON DEFAMATION ISSUES

- 8.38 This part of section 3 consists of an argument for the extension of the defence of qualified privilege.<sup>37</sup> It cites part of the Waterhouse Report, and then goes on to describe a possible court procedure which the ABI favours. We consider the possibility of a reform along similar lines in the next Part.<sup>38</sup>
- 8.39 The ABI Response then refers to co-operation with criminal proceedings.<sup>39</sup> The report of an inquiry cannot be published while criminal proceedings are continuing, for fear of prejudicing the prosecutions and being in contempt of court.
- 8.40 The ABI Response advises, amongst other things, that authorities should be encouraged to consider the risk of defamation should there be unauthorised disclosure or publication of that material. We agree that this is a point to which specific attention should be given by a local authority because of the risk that the authority would be vicariously liable for a defamatory statement even if it was made in the course of *unauthorised* disclosure if made by an employee.<sup>40</sup> The

<sup>36</sup> *Ibid*, section 3 F 1.

<sup>37</sup> *Ibid*, section 3 G.

<sup>38</sup> See paras 9.40 – 9.71 below.

<sup>39</sup> *Ibid*, section 3 H.

<sup>40</sup> See paras 3.10 – 3.16 above. However, where the defamatory material is “published” by a councillor, (for instance by leaking the report to the press) there will be no vicarious liability imposed upon the council; hence there should be no insurance implications.

authority must not court liability, which may entail taking reasonable steps to prevent disclosure.<sup>41</sup>

- 8.41 Disclosure of material to the police for the purposes of the investigation of a crime will attract absolute or qualified privilege.<sup>42</sup> If the police themselves then release the information without permission, it will be they who are the “publisher” for the purposes of any defamation action.

### **Conclusion**

- 8.42 The LGA/ABI Guidance, and the ABI Response to the Waterhouse Report, have addressed to an important degree the practical matters on which agreement between local authorities and insurers is needed to resolve the legal problems which arise in the context of local authority inquiry reports. In our provisional view they provide a good basis for developing the further statement of agreed principles we think is needed.
- 8.43 The essentials, in our view, are that agreement on the difficulties is negotiated by the local authorities and their insurers, in such a way that the resulting agreement governs the liability insurance contract between a local authority and its insurers, and that an authority knows what steps it ought to take at each stage of a local authority inquiry.
- 8.44 Whether such an agreement is cast in the form of revised joint LGA/ABI Guidance, or a Statement of Practice such as might be issued by insurers,<sup>43</sup> is not a matter for us: what is important is that any such agreement is observed in practice, is clear, and is known by all involved.
- 8.45 In addition to the points made in the LGA/ABI Guidance and the ABI Response, the agreement might usefully include the following.
- The terms of reference of an inquiry should allow for the drawing of inferences and the expression of judgments and opinions in the inquiry report where they are supported by evidence.
  - It is highly desirable to obtain legal advice on the terms of reference, or, if the inquiry is to be independent of the authority, for the person who will be chairing the inquiry panel to be consulted on the terms of reference.
  - Whether an admission of fact from which an admission of liability may be inferred will be a breach of any term of the contract of insurance if made without the insurer’s consent.

<sup>41</sup> See para 3.38 above.

<sup>42</sup> See *Taylor v Serious Fraud Office* [1998] 3 WLR 1040.

<sup>43</sup> Such as the ABI Statement of General Insurance Practice (L 249 August 1997, first issued 1977) which states that the code “shall be taken into account in arbitration and any other referral procedures which may apply in the event of disputes between policyholders and insurers”: p 2. No mention is made of its legal status beyond this. Birds comments that although not legally binding, a large majority of insurers generally observe the terms of the Statement of General Practice: *Birds’ Modern Insurance Law* (5th ed 2001) p 4.

- The need for the authority to respect duties of confidentiality owed to others.
- There should be an agreed procedure for the handling of a report by the council, and this should include steps the council should take to satisfy itself of the fairness of the inquiry and the report.
- The presumption that publication of the report or some version of it will take place.

### **Question for consultees**

- 8.46 **Given our description of how an agreement between the local authorities and their insurers could be developed, do consultees agree that this would be the right way forward? If not, what additional points would consultees say should be included, or what alternative would consultees propose?**

### **TOWARDS A CODE OF PRACTICE**

- 8.47 The ABI Response referred to the comment “that there should be an agreed code of practice to guide local authorities in their response to situations of [this] kind...”<sup>44</sup> and stated that it accepted this recommendation, and “fully supports further work towards the development of such a code”.<sup>45</sup> Indeed, some of the points made in the LGA/ABI Guidance, and in the ABI Response, are points one would expect to see in a code of practice. Our provisional view is that any agreement between insurers and local authorities about the interpretation of the insurance contract is best kept distinct from a code of practice on how ad hoc inquiries should be conducted. The agreement (or statement of practice) would almost certainly be connected to the code of practice, and both parties would expect authorities, and those who conduct inquiries at their request, to follow any established code of practice.
- 8.48 While we think it may not be either practicable or desirable to produce guidance which *prescribes* particular ways of conducting inquiries and writing reports, it is nevertheless both possible and desirable to produce guidance which alerts the authority as to the issues to be thought about, the options, and the factors to be taken into account when deciding how to progress. A Code of Practice could be issued by a body such as the LGA: a local authority could then be expected to have regard to it. On the other hand, there might be value in Government issuing it, albeit after consultation, or in conjunction with, the LGA.<sup>46</sup>

<sup>44</sup> The Waterhouse Report, para 32.62.

<sup>45</sup> The ABI Response, section 2, para 2.8.

<sup>46</sup> For example, the Education Act 1996, s 313(2), requires a local authority to have regard to a Code of Practice with regard to duties to children with Special Educational Needs. On appeal to the Special Educational Needs Tribunal, the Tribunal will similarly have regard to the provisions of the code: s 313(3).

### **The underlying principles**

- 8.49 A code of practice would be founded on the underlying values it seeks to promote. The Council on Tribunals identified effectiveness,<sup>47</sup> fairness,<sup>48</sup> speed and economy.<sup>49</sup> The SOLACE guidelines emphasised effectiveness and fairness. If the concept of fairness is developed a little, it may be seen to comprise the following elements: openness/confidentiality; procedural fairness aimed at securing substantive fairness; impartiality or independence; efficiency or timeliness; equal treatment.<sup>50</sup>
- 8.50 These values may translate into different practices for different kinds of inquiry. In view of that fact, and the fact that SOLACE is revising its own recommendations, as mentioned above, we doubt that it is helpful for us to rehearse in detail here all the various procedural recommendations made in relation to a variety of kinds of inquiry.

### **The content of a Code of Practice**

- 8.51 Various bodies have issued advice on the constitution and process of inquiries, and their objectives. It is worth referring to them here, even though they are not all aimed at exactly the kind of inquiry we have in view.

### **The Council on Tribunals**

- 8.52 Following the Report of the Scott Inquiry,<sup>51</sup> the Council on Tribunals published advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by ministers.<sup>52</sup> That advice concludes that it

<sup>47</sup> The Council wrote,

The need here is for the constitution, procedure and powers of the inquiry to be such as to enable it to fulfil the purpose for which it is being set up. In other words, the inquiry must be properly equipped to investigate the issues thoroughly, ascertain all the relevant facts and reach a conclusion.

The Council on Tribunals, "Advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers" (July 1996) ("The Council on Tribunals Advice") para 2.5.

<sup>48</sup> "The need here is for the procedures of the inquiry to be fair to witnesses and to others whose interests may be affected by the work of the inquiry and by its conclusions." *Ibid*, para 2.6.

<sup>49</sup> "The need here is for the proceedings of the inquiry to be completed without losing sight of the time and money that the proceedings will involve, whether for the taxpayer or for individuals involved in the inquiry." *Ibid*, para 2.8.

<sup>50</sup> Supplementing the values asserted by the Report of the Committee on Administrative Tribunals and Inquiries (1957) Cmnd 218 ("the Franks Report"), as amplified in M Partington, "Restructuring Administrative Justice? The Redress of Citizens' Grievances" (1999) 52 *Current Legal Problems* 173.

<sup>51</sup> See para 2.16 above.

<sup>52</sup> The Scott Report made recommendations about inquiry procedures (Part 4, Section K, Chapter 1) and the advice was issued in response to those recommendations. Scott recommended, in brief, that notice should be given of allegations to the subject of the

is wholly impracticable to attempt to devise a single set of model rules or guidance that will provide for the constitution, procedure and powers of every inquiry. Instead, the Council advise that such issues should be addressed by taking into account, for each inquiry, the objectives of effectiveness, fairness, speed and economy.<sup>53</sup>

- 8.53 This advice is, we note, in relation to *public* inquiries set up by a minister, not local authority inquiries, which may be conducted in private or in public.
- 8.54 We tend to agree that it is neither practicable nor desirable to produce guidance which *prescribes* particular ways of conducting inquiries and writing reports, but that it is both possible and desirable to produce guidance which alerts the authority as to the issues to be thought about, the options, and the factors to be taken into account when deciding how to progress.

### ***The Davies Report***

- 8.55 The Davies Report<sup>54</sup> recommended the establishment of standing independent panels for regional health authorities, to conduct external investigations where the jurisdiction of the Health Ombudsman was not engaged, nor the matter so serious to warrant a public inquiry.<sup>55</sup> The independent panel would investigate on a reference from a health authority, staff or complainant, where the complaint could form the subject of legal proceedings but the complainant has no intention, to the satisfaction of the chairman, of litigating the matter.<sup>56</sup>
- 8.56 The proposed system of independent panels was a fundamental recommendation of the report, which also incorporated a Code of Practice to govern, in a detailed and prescriptive manner, the investigation of hospital complaints from the minor to the very serious.<sup>57</sup> No mention was made of how the Code of Practice should be enforced. It is unclear whether the health authority, in seeking to comply with the requirement above, would merely need to have had regard to the Code, or ensured that it was substantively followed. However, the fact that the authority had not complied with the Code might not give rise to any legal consequences. No statutory privilege, immunity or protection was to be tied to compliance with the Code.

allegations, and an opportunity to respond to them, and an opportunity to comment on criticisms which will appear in the report before they are finalised; that legal assistance should be made available; and that adversarial procedures should not be incorporated into an inquisitorial inquiry, except as fairness requires.

<sup>53</sup> The Council on Tribunals Advice, para 2.3.

<sup>54</sup> Report of the Committee on Hospital Complaints Procedure (1973), chaired by Sir Michael Davies. It was commissioned by the Department of Health and Social Security and the Welsh Office.

<sup>55</sup> *Ibid*, paras 8.15, 8.16, 8.22 and 8.29.

<sup>56</sup> *Ibid*, paras 8.15 – 8.21.

<sup>57</sup> *Ibid*, paras 6.1, 6.15, 7.24 – 7.27.

### ***The “Working Together” guidelines***

- 8.57 The Working Together to Safeguard Children guidelines were drawn up by the Department of Health, the Home Office and the Department for Education.<sup>58</sup> The guidance sets out how agencies and professionals should work together to promote the welfare of children and protect them from neglect. It is aimed mainly, but not exclusively, at working under the Children Act 1989, which sets out a comprehensive framework for the care and protection of children. The current version, produced in 1999, replaces “Working Together under The Children Act 1989”, published in 1991.
- 8.58 The guidance was issued under section 7 of the Local Authority Social Services Act 1970.<sup>59</sup> Local authorities, according to the guidance, are to comply with its provisions unless local circumstances indicate exceptional reasons which justify a variation.<sup>60</sup>
- 8.59 Part 8 of Working Together provides for case reviews to be established in certain situations. A case review must be undertaken where a child dies, and abuse or neglect are known or suspected to be a factor in the death.<sup>61</sup> Additionally, a case review may be undertaken where a child has sustained a potentially life-threatening injury through abuse or neglect, serious sexual abuse, or sustained serious and permanent impairment of health or development through abuse or neglect, and the case gives rise to concerned about the way in which local professionals and services work together to safeguard children.<sup>62</sup>
- 8.60 Part 8 provides for a two-tier review process. Each relevant service that is involved with the child and the family is to conduct an individual management review.<sup>63</sup> The review should look at individual and organisational practice, with the aim of identifying whether change is necessary, and how those changes can be brought about.<sup>64</sup> The Area Child Protection Committee (ACPC) then examines all these individual reports, along with any other reports commissioned by the ACPC. The local authority takes lead responsibility for the establishment of the ACPC. An overview report is produced, which includes an action plan for the relevant agencies involved.<sup>65</sup> The overview report, the executive summary of the

<sup>58</sup> Department of Health, Home Office and the Department for Education and Employment, Working Together to Safeguard Children (1999) (“Working Together”).

<sup>59</sup> Section 7 states “Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.”

<sup>60</sup> Working Together, p viii. The Working Together Guidance does not have any legal status: *Re G (A Minor)* [1996] 2 All ER 65, 68 *per* Butler-Sloss LJ but is nevertheless widely observed.

<sup>61</sup> Working Together, para 8.5.

<sup>62</sup> *Ibid*, para 8.6.

<sup>63</sup> *Ibid*, para 8.17.

<sup>64</sup> *Ibid*, para 8.21.

<sup>65</sup> *Ibid*, para 8.18.

action plan and the individual management reviews are forwarded to the Department of Health.<sup>66</sup>

- 8.61 The Working Together guidance provides outline formats for the individual management review and the overview report.<sup>67</sup> Further guidance is given on disclosure of the report, or executive summaries of the report, and dealings with interested parties.<sup>68</sup>

### **SOLACE 1978**

- 8.62 Another source of informed opinion on how to run an inquiry is to be found in the recommendations issued for the attention of local authorities in 1978, by a committee appointed by SOLACE and the Royal Institute of Public Administration.<sup>69</sup> It was appointed to study:

- (a) the circumstances in which ad hoc inquiries have been held
- (b) the circumstances in which they are an appropriate form of investigation, and
- (c) the procedures which should govern their establishment and conduct.<sup>70</sup>

- 8.63 It made a number of recommendations,<sup>71</sup> including (1) that a code of practice should govern the method of appointment, staffing and other related matters, and (2) various procedural rules. Those rules covered rights of hearing, rights to legal and other representation, evidence, rights of persons adversely criticised, rights of observers at private inquiries, reimbursement of witnesses' costs, and reporting.

- 8.64 The Local Authorities Association published its own response to the SOLACE report in August 1980 in which it “fully endorse[d] the proposition that a code of practice and rules of procedure are needed.”<sup>72</sup> It commended its own version of a code of practice and rules of procedure to its member authorities in which they closely followed the SOLACE recommendations.<sup>73</sup>

- 8.65 Our understanding, however, is that the SOLACE recommendations, and the Local Authority Association recommendations of 1980, are not widely known.

<sup>66</sup> *Ibid*, para 8.26.

<sup>67</sup> The individual management review format is produced at p92 of Working Together. The ACPC overview report format is on p 93.

<sup>68</sup> *Ibid*, para 8.29.

<sup>69</sup> SOLACE and RIPA, “Ad hoc Inquiries in Local Government” (1978).

<sup>70</sup> *Ibid*, p v.

<sup>71</sup> *Ibid*, pp 50–51.

<sup>72</sup> Local Authority Associations, “Ad hoc Inquiries in Local Government: Report of the Local Authority Associations” (1980) para 13.

<sup>73</sup> *Ibid*, para 14.

### **Contents of a Code: our suggestions**

8.66 As the Solace Review Group is in the process of drawing up guidance for local authorities and their Chief Executives on the practical issues to be faced when proposing to convene an ad hoc local inquiry or internal investigation, we confine ourselves here to setting out the headings under which we think guidance might be needed.

- (1) The kinds of inquiry covered by the guidance or code
- (2) The decision to institute an inquiry
- (3) The terms of reference
- (4) The provision of information to the public, and bodies representing different sections of the public, and particularly to those directly concerned and their families or carers
- (5) The approach of the authority as a participant in the inquiry
- (6) The taking of evidence
- (7) Connection with other proceedings
- (8) The writing of the report
- (9) Presentation of the report to the commissioning body
- (10) Publication

### **Question for consultees**

8.67 **Given our description of the principles that should underlie a Code of Practice, its content, and who should issue it, what would consultees want to see in a Code of Practice for the conduct of local authority ad hoc inquiries?**

8.68 We now turn to the possible legislative solutions in relation to the availability of the defence of qualified privilege in defamation, and canvas the possibility of a new type of statutory inquiry.

## **PART IX**

# **LEGISLATIVE SOLUTIONS**

- 9.1 In Part VI we described the law on defamation as it relates to local authority inquiry reports, and considered in particular the defence of qualified privilege. As we have said,<sup>1</sup> our provisional view is that the uncertainty of the law means that to leave it unchanged perpetuates the disincentives to publication of inquiry reports, and this is not in the greater public interest. In our provisional judgment, this is the one problem which is likely to require a legislative solution. In this Part we discuss, first, the policy arguments behind the defence. Those arguments inform the possible legal solutions, which are set out at paragraphs 9.14 – 9.91 below. We examine the impact of the European Convention on Human Rights on these possibilities. Lastly, we canvass opinion on the possibility of a wholly new kind of inquiry being available to local authorities.

### **THE POLICY CONSIDERATIONS**

- 9.2 The purpose of the defence of qualified privilege was described by Lord Nicholls thus:

The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end.<sup>2</sup>

### **Competing Convention rights**

- 9.3 The underlying values are those found in the ECHR. Freedom of expression (Article 10(1))<sup>3</sup> argues for the facilitation of publication, and in favour of a defence of qualified privilege. The need to protect a person's reputation (arising out of Article 8)<sup>4</sup> points towards accountability of the publisher and away from qualified privilege.
- 9.4 Courts must seek to balance the public interest in dissemination of information against the individual's right to access to a court<sup>5</sup> to defend his or her reputation. The exercise of balancing these competing rights must be itself compliant with the Convention jurisprudence. The approach must be as described by Lord Nicholls in *Reynolds*:

<sup>1</sup> See para 7.59 above.

<sup>2</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 195 *per* Lord Nicholls.

<sup>3</sup> See paras 9.5 – 9.7 below.

<sup>4</sup> See paras 9.8 – 9.9 below.

<sup>5</sup> A constituent part of the right to a fair trial under Art 6: see paras 9.82 – 9.84 below.

To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.<sup>6</sup>

### **Freedom of expression**

9.5 Freedom of expression, as stated in Article 10, entails both the freedom to express, and to receive and impart information. It reads:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

9.6 This is a qualified right in that it is “subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society...”<sup>7</sup> Case law suggests, however, that “freedom of expression is the rule, and regulation of speech is the exception requiring justification.”<sup>8</sup> Freedom of speech is one of the fundamental principles of a democratic society, and any attempt to curtail it should be both necessary and proportionate.<sup>9</sup>

9.7 Article 10 is of cardinal importance not only in its own right,<sup>10</sup> but also for its part in sustaining other values in a democratic society:

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. ... It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.<sup>11</sup>

<sup>6</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 200.

<sup>7</sup> Human Rights Act 1998, Sched 1, Art 10(2).

<sup>8</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 208 *per* Lord Steyn.

<sup>9</sup> *Ibid*, 201.

<sup>10</sup> *Ibid*, 208 *per* Lord Steyn. Consider also Human Rights Act 1998, s 12 which requires a court to have particular regard to freedom of expression, placing a statutory brake on an order which might affect another’s freedom of expression.

<sup>11</sup> *Per* Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 126 with the agreement of Lord Browne-Wilkinson and Lord Hoffmann.

### **Right to reputation**

9.8 Restrictions on the expression of free speech are required in order to protect reputation and other rights. These are values which feature in Article 10(2), which qualifies the right of freedom of expression in Article 10(1). They may also fall to be examined under Article 8,<sup>12</sup> which reads:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

9.9 The value in protecting reputation is not just for the benefit of the particular individual, but is for that of the public in general:

Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good.<sup>13</sup>

### **Who bears the risk?**

9.10 The task of balancing the competing policy interests entails deciding who should bear the risk that the allegations might be false. As Simon Brown LJ put it in *Grobbelaar v News Group Newspapers Limited*:

How is the balance to be struck? The ultimate question, of course, is whether the general public was entitled to receive the information contained in these publications irrespective of whether in the end it proved to be true or false. Who, in other words, is to bear the risk that allegations of this sort, convincing though no doubt they appear to the newspaper when published, may finally turn out to be false? Should the risk be borne by the publishers lest the defamed claimant goes uncompensated for his lost reputation – and, indeed, powerless

<sup>12</sup> See eg *Niemietz v Germany* Series A Vol 251 Case B (1993); 16 EHRR 97, paras 29, 37 and 40; *Rotaru v Romania* [2000] Application No 28341/95; (1999) 8 BHRC 449. The Court has similarly recognised that a right to protection of reputation is a "civil right" for the purposes of Art 6(1): *Fayed v UK* Series A Vol 294 case B (1994); 18 EHRR 393.

<sup>13</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 201, per Lord Nicholls. See also *Cabassi v Vila* (1940) 64 CLR 130.

to regain it unless (which is unlikely) he can prove malice? Or should it be borne by the claimant himself lest the fear of an adverse damages award discourages publishers from pursuing their investigatory role or, having pursued it, from informing the public of whatever misconduct they believe they have uncovered?<sup>14</sup>

9.11 In the case of the publisher being a media organisation (specifically newspaper publishers) Gray J thought the publisher should bear the risk, and the Court of Appeal agreed. It being a commercial organisation, the risk of being sued was one which it would calculate and take into account in deciding whether the interests of the newspaper warranted publication even in the event of losing a libel action.

9.12 It does not follow that a local authority should bear the risk where it seeks to publish the report of an inquiry, as very different considerations apply. For example, a local authority may be able to point to the following factors, where a media publisher might not:

- There is a genuine public duty on a local authority to investigate and to report its findings.<sup>15</sup>
- While a local authority may feel some public pressure to publish, and to do so hastily, time is not of the essence in the way that it is for news publishers.
- The rules of natural justice should mean that the person criticised will have had the criticisms put to him or her and been given a proper opportunity to comment upon them in advance of publication. Those explanations are likely to appear in the report too.
- Almost by definition, the inquiry report will be on a matter of some gravity, and of genuine public interest.
- Value judgments should not appear unsupported by facts in an inquiry report.
- Depending on the subject matter of the inquiry, the local electorate might need the information in order best to exercise their democratic rights.
- Publication promotes transparency and may make a local authority accountable for the manner in which it has discharged its statutory functions.

<sup>14</sup> *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, para [39]; [2001] 2 All ER 437, 448.

<sup>15</sup> It was held that the Arts Council of Wales had a duty to account and explain a decision on public funding and the reasons for the decision, so a fortiori a local authority has a duty to account and explain, especially where it is said that there has been some serious wrong: *Alexander v Arts Council of Wales* [2001] EWCA Civ 514; [2001] 4 All ER 205, approving the dictum of Eady J on the point.

- The local authority may improve its own practices and procedures as a result.
- Other agencies and people may need to know of the report to improve their own practice.
- A local authority will not be seeking to profit financially from publication.

### **The role of truth**

9.13 A defence of privilege is not founded on the truth of the report in question.<sup>16</sup> Privilege may be claimed even when it has been discovered since publication that the allegations are false. Nevertheless, the likelihood that the contents of a report are true is relevant to the policy issue behind the defence of privilege, namely to the question of who should bear the risk that the contents are false. If a defence of qualified privilege is pleaded, the likelihood that the contents of the report are true will bear on the decision as to whether publication is in the public interest or not. The court need not decide, for the purposes of qualified privilege, whether the allegations *are* true, but will look to see how they have been arrived at in resolving the issue of what is in the public interest.

### **THE LEGISLATIVE POSSIBILITIES**

9.14 We now turn to the possibilities for reform of the defence of qualified privilege. The first option which we consider is to extend statutory qualified privilege;<sup>17</sup> we conclude that simply creating a new category of report which attracts qualified privilege would not be the best way forward. We prefer the second possibility: extending statutory privilege, but tying it to the fairness of the inquiry and report.<sup>18</sup> Third, we discuss a procedural innovation which we think falls to be considered if statutory privilege is not to be extended and the issue is to remain a matter for the common law, namely permitting an advance ruling on whether the common law defence of qualified privilege is applicable in an individual case.<sup>19</sup> We then mention the idea of using Parliamentary privilege to protect local authority inquiry reports, but we do not think this can be taken further.<sup>20</sup> We then review all the possibilities for their compatibility with the European Convention.

#### **1: Extension of statutory qualified privilege<sup>21</sup>**

9.15 There are difficulties in having decisions on the availability of qualified privilege made on a case by case basis by the courts. While in any one case, a court,

<sup>16</sup> Truth is relevant to a defence of justification: see para 6.7 above for a very brief description of this defence.

<sup>17</sup> See paras 9.15 – 9.31 below.

<sup>18</sup> See paras 9.32 – 9.39 below.

<sup>19</sup> See paras 9.40 – 9.71 below.

<sup>20</sup> See paras 9.72 – 9.78 below.

<sup>21</sup> Statutory qualified privilege in the current law is described at paras 6.16 – 6.19 above.

applying the existing case law,<sup>22</sup> could find that the reasons underlying the defence of qualified privilege are relevant, and that they justify the defence being available to the authority, it is not an easy matter to predict whether the defence will be available, nor how wide publication may be. We therefore turn to the following question, posed by the Waterhouse Report:

Should there not be a general statutory provision enabling local authorities to institute inquiries into matters of wide public concern and to publish the reports of such inquiries to the public at large with the protection of qualified privilege, whether or not the public has a sufficient interest in receiving the report within the terms of present legislation?<sup>23</sup>

- 9.16 Under this possibility, a category of inquiry would be defined, and the defence of qualified privilege would be extended to all reports within that category, whether the inquiry was internal or independent, when publication of the report<sup>24</sup> had been officially approved by the appropriate body of the council.
- 9.17 As the defence would be that of qualified, not absolute, privilege, if the claimant could show “malice”, the defence would fail.

#### ***Arguments for a new statutory category***

- 9.18 All the circumstances listed at 9.12 above point towards publication of all local authority inquiry reports, although not without qualification. For example, it is an important aspect of the fairness of an inquiry and report that the inquiry panel will put criticisms to those criticised, and weigh their responses against other evidence, and present the criticisms fairly in the report. If an inquiry or report is unfair in some significant way, then it may be appropriate for the local authority to bear the risk of an action in defamation without being able to plead qualified privilege.
- 9.19 A report may cover a variety of subjects, and of people who might be criticised. Even in relation to a private individual, where the subject matter is of genuine public concern and the inquiry has been fair, publication should always be given priority over privacy. The advantage for the public at large is that publication is more likely, because the authority will not fear an action for defamation, and therefore not be at risk either of pressure being brought to bear not to publish, or

<sup>22</sup> There is scope for flexibility within the case law:

The main principle for which *Reynolds* stands is that the classical interest-duty test is adaptable to a great variety of circumstances. ... It seems to me that *Reynolds* was less a breakthrough than a reminder of the width of the basic common law principles as to privilege, although undoubtedly it is much more encouraging of their invocation than previous English decisions.

*McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 300 per Lord Cooke.

<sup>23</sup> The Waterhouse Report, para 32.61.

<sup>24</sup> Publication means communication to a person other than the claimant: see para 6.5 above.

of avoiding the contract of insurance. This pressure was referred to by Lord Nicholls as “the chill effect”.<sup>25</sup>

- 9.20 Moreover, though the ingredients are there in the case law for a decision in each case to be reached on its merits, the outcome of each case will be unpredictable. Unpredictability itself is a disincentive to publication.<sup>26</sup> This is particularly so in relation to the breadth of publication. Their Lordships did not think, in *Reynolds*, that the necessity for a new category of privilege for political speech was made out, but the need is evidently greater in the case of local authority inquiry reports.

### ***Arguments against a new statutory category***

- 9.21 In *Reynolds* the defendant newspaper sought to persuade the court that there should be a new common law category of political speech which should attract qualified privilege (and that the article it had published fell within that category). Their Lordships were unanimous in rejecting the newspaper’s contention. Not all the powerful arguments rehearsed in *Reynolds* bear on the possibility of a new statutory category for local authority inquiry reports, but many may usefully be considered.

### DEFINING THE CATEGORY

- 9.22 It must be possible to describe the category accurately, so that it is neither too wide nor too narrow. If the category is for communication to a specified group of people, the argument for certainty and a generic approach is stronger; “[b]ut where the category involves communication to the public, the question must be whether the public interest in the receipt of the information will always outweigh the general public interest in protecting the reputation of the individual.”<sup>27</sup>
- 9.23 The definition of the kind of report to which this privilege could attach could be problematic. Local authority inquiries range from an informal internal review to an external panel with highly formalised procedures.<sup>28</sup> One possible definition might be “one which is established by a principal local authority, in circumstances which are not already governed by a statutory or other procedural code, involving serious complaints against the authority or a failure in its services”.<sup>29</sup>

<sup>25</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 202.

<sup>26</sup> Note the diversity of opinion among their Lordships in *Reynolds* and the difficulties in applying that decision in practice: eg, *Al-Fagih v HH Saudi Research and Marketing (UK) Ltd* [2001] EWCA Civ 1634; [2001] All ER (D) 48 (Nov) and *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805; [2002] 1 All ER 652.

<sup>27</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 230, *per* Lord Hope.

<sup>28</sup> See paras 2.27 – 2.32 above.

<sup>29</sup> See para 2.47 above. It is possible that, if a new statutory category is developed, it should include regulated inter-agency inquiries too (see type 7 in Part II above, at paras 2.34). Where inquiries are governed by statute, qualified or absolute privilege attaches to the report. For example, reports of the Local Ombudsman have absolute privilege by virtue of Local Government Act 1974, s 32. See further para 6.10 above.

#### LACK OF FLEXIBILITY

- 9.24 Lord Nicholls emphasised the advantage of decisions being made on a case by case basis: “The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case.”<sup>30</sup> In his discussion of the argument, Lord Hope stated: “The advantage of certainty, which is the product of recognising that cases falling within a certain class or category will always attract qualified privilege, must be measured against the disadvantages which tend to flow from rigidity.”<sup>31</sup>
- 9.25 Lord Steyn’s second reason for rejecting a new category for political speech was that “a test expressed in terms of a category of cases, such as political speech, is at variance with the jurisprudence of the European Court of Human Rights which in cases of competing rights and interests requires a balancing exercise in the light of the concrete facts of each case.”<sup>32</sup> This is true, but not intended to be an absolute rule: qualified, and absolute, privilege is available in a range of situations and it is not suggested that the existence of such categories is itself incompatible with Convention rights.<sup>33</sup>
- 9.26 A connected point is that if the issue is left to be determined on a case by case basis, the decision as to where the public interest lies is taken by the courts; if a new category is developed within the common law, again it is a judicially-created privilege; if the privilege is made statutory, the power to accord the privilege is Parliament’s, and the decision whether to publish lies with the local authorities. (Whereas, in the case of *Reynolds* if a new category had been created the decision on publication would have lain with the commercial organisations.)

#### THE RIGHTS OF THOSE CRITICISED

- 9.27 If there is a category where the privilege is available, then proving malice makes a claimant’s success dependent on proving what approach and motive the publisher had. If privilege is accorded on a case by case basis, the test is an objective one, with reference to the public interest.
- 9.28 There has to be a real possibility that a claimant could succeed in showing malice: “the less open the communicator is to scrutiny, the more important it is likely to be to retain the benefits of flexibility. Qualified privilege, in other words, should not be given to a category where the occasion of the communication is such that the privilege is at risk of becoming, in practice, absolute.”<sup>34</sup> Given the definition of

<sup>30</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204.

<sup>31</sup> *Ibid*, 229.

<sup>32</sup> *Ibid*, 210–211.

<sup>33</sup> Although the point is currently being taken: see n 75 below. See also *Matthews v Ministry of Defence* [2002] EWHC 13 (QB); [2002] All ER (D) 137 (Jan) where Crown immunity from a claim in tort was itself held by Keith J to be incompatible with a person’s rights under Art 6(1); its blanket nature meant it was not rationally or proportionately connected to the objective of preserving the efficiency of military training. The Ministry is appealing the decision.

<sup>34</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 230, *per* Lord Hope.

malice<sup>35</sup> it will be unusual for a claimant to succeed. If an inquiry errs, it is more likely to do so on the grounds of genuine error or incompetence, than because the inquiry panel is reckless as to the truth of its report or has an ulterior motive.

- 9.29 But the first requirement for an individual to be able to show “malice” is to be able to identify the source, and one of Lord Steyn’s reasons for rejecting the generic approach in *Reynolds* was that newspapers cannot generally be forced to disclose their sources. Whereas a person defamed by a newspaper may not be able to find out the source of the allegation,<sup>36</sup> this will be much less true (if at all) in the case of inquiry reports.

#### WHO SHOULD BEAR THE RISK?

- 9.30 We noted above that whether the public interest warrants publication with a defence of qualified privilege depends on who it is thought should bear the risk of allegations being false. If qualified privilege is made available as a defence on a generic basis, the individuals who may have been defamed bear the risk. If qualified privilege is only available on a case by case basis, then the authority (and their insurers) bear the risk. In practice, this means that those who pay for the local authority carry the financial risk, and those who would have benefited from publication bear the risk of non-publication. If the argument is for a new *category* for qualified privilege, then the greater the likelihood that the contents of such reports generally are true, the more reasonable it is that, in general, the risk should be borne by the individual, and the category should be created.

#### **Conclusion**

- 9.31 Our provisional view is that merely extending statutory privilege to cover all local authority inquiry reports is not desirable because of the blanket nature of the extension: if a new category of local authority inquiries could be defined with sufficient precision, it would be available irrespective of the fairness of the particular inquiry and report. We take account of the devastating effect that false allegations can have on the person criticised, the fact that qualified privilege may well be available in an individual case, and the risk that less care might be taken than it ought in ensuring a fair inquiry and report if it is known that a defence will be available to any defamation action. Local authority inquiries may vary considerably in the seriousness of the subject matter and the degree of formality fairness requires. We provisionally conclude that the risks of injustice do not justify a new category without some guarantee of the fairness of reports within that category.

#### **2: Extending statutory privilege, conditional on the fairness of the inquiry and the report**

- 9.32 The “chill” effect nonetheless points towards a generic approach, so that local authorities know what they may safely publish, and are encouraged to publish.

<sup>35</sup> That is, knowing it to be untrue, recklessly (without considering or caring whether or not it was true), or with some indirect or improper motive: *Horrocks v Lowe* [1975] AC 135.

<sup>36</sup> Contempt of Court Act 1981, s 10.

The risk that a particular inquiry is poorly conducted, or a report unfairly written, points towards an approach which allows a case by case assessment. If the benefit of qualified privilege were tied to the quality of the inquiry and report, any unfairness in the individual bearing the risk that the allegations might be false would be reduced, as far as is possible within a generic approach.

9.33 One possibility is to limit the extension of statutory qualified privilege to those inquiries that comply with a Code of Practice on the establishment and reporting of such inquiries.<sup>37</sup> However, if the Code of Practice was more a guide and reminder than a rule book, as we suspect it would have to be, it would not be prescriptive, so no inquiry could be said to compliant or non-compliant.

9.34 It could be argued, however, that there are some irreducible requirements of fairness, and therefore the benefit of qualified privilege should be made available to any local authority inquiry report where

- (1) the inquiry has been fairly conducted,<sup>38</sup> *and*
- (2) the report
  - (a) is about a serious matter of genuine public interest
  - (b) only contains judgments and apportionment of blame where they are relevant and supported by the factual findings of the inquiry panel, and
  - (c) only contains criticisms of people which have been put to them in advance of publication, with an opportunity for them to respond and, subject to the requirements of observing confidentiality, those responses are fairly represented in the report.

9.35 These would be minimum requirements. Any Code of Practice or Guidance would be relevant for the purpose of determining, if it were necessary, whether the inquiry had been fairly conducted.

9.36 The wider public interest would be served because publication would be encouraged,<sup>39</sup> and there is also a public interest in inquiries and reports being fair. The interests of the original complainant would also be served by publication. The local authority's interests would be served in that, if an inquiry had been fairly conducted and the report met these minimum requirements of justice, it could publish the report with the protection of qualified privilege, and it would have no cause to fear being in breach of its insurance contract. The interests of any individual criticised would be protected in that only reports which met these minimum requirements would benefit from the new category of immunity, and it would still be open to him or her to bring an action in

<sup>37</sup> Such a Code of Practice or Guidance will, we hope, result from the investigations of the Review Group chaired by SOLACE: see para 1.28 above.

<sup>38</sup> See paras 7.10 and 7.11 above.

<sup>39</sup> See para 7.5 above for the reasons that publication is desirable.

defamation where either it could be shown that the inquiry was unfair, or that the report did not meet the requirements, or malice could be proved.

9.37 We therefore provisionally prefer this possibility.

***Questions for consultees***

9.38 **We provisionally propose extending statutory qualified privilege to any local authority inquiry report where**

- (1) **the inquiry has been fairly conducted, and**
- (2) **the report**
  - (a) **is about a serious matter of genuine public interest**
  - (b) **only contains judgments and apportionment of blame where they are supported by the factual findings of the inquiry panel, and**
  - (c) **only contains criticisms of people which have been put to them in advance of publication, with an opportunity for them to respond and, subject to the requirements of observing confidentiality, those responses are fairly represented in the report.**

9.39 **Do consultees agree that this change in the law is necessary and practicable? If not, why not? If consultees prefer a different legislative solution, whether one canvassed in this Part or not, we should be interested to know what it is, and in what way it would be an improvement on the current law.**

**3: A procedural innovation: advance ruling on common law qualified privilege**

9.40 It is possible that consultees will not be convinced that the case is made out for devising a new category of statutory qualified privilege, conditional on the quality of the inquiry and the report, and would prefer that the issue be left to the common law. In that event, if the common law itself does not develop a new category, then it is our provisional view that publication would remain a hazardous business for local authorities, and for individuals. A procedural way of alleviating that problem, for both the authority and individuals, might be to allow a local authority to seek a ruling in advance of publication on the applicability of qualified privilege in the instant case.

9.41 If, for argument's sake, a local authority published the report of an ad hoc inquiry and faced a defamation action, and sought to argue qualified privilege as a defence, the court might well rule in its favour. The disadvantages of resolving the issue by litigation, which are considerable, are the damage to the reputation of the person defamed, and the cost to the authority of defending the action. The costs of the authority are ultimately borne out of their own public funds. This will inevitably lead to a reduction in the level of services the authority could otherwise have afforded. The protection that a right to bring a defamation action offers

after the defamatory material has been published is limited in practice, because of the prohibitive costs of legal action. (Public funds are not available for such an action, but a conditional fee arrangement might be appropriate. In addition, where the person who claims to be defamed is a member of a body representing his or her interests it might be feasible for that body to fund an action.)

- 9.42 The possibility of litigation may, however, have an inhibitory effect: litigation and its costs may be avoided by simply not publishing the report. However, this will be at the expense of the benefits of publication, and the objectives of openness and transparency which local authorities should strive to achieve.
- 9.43 It would be preferable, for both the authority and any person who would be defamed if the report were published, if a ruling could be obtained in advance of publication of the report. A possibility, therefore, is a swift court procedure available after the report is written, but before it is published.
- 9.44 The ABI suggested something along these lines in its Response to the Waterhouse Report:<sup>40</sup>

the would-be publisher [would] submit the report with an application to a court, accompanied by an affidavit certifying:

- (a) why publication is in the public interest; and
- (b) that the report was compiled in good faith and without malice.

If satisfied, the Court would then make an order to this effect which would give the publisher protection against a defamation action, but only in the absence of malice. Further thought should be given to whether the Court should be asked to scrutinise all of what will inevitably be lengthy reports.

The application hearing need not take long at all, especially as there need not be any other parties involved. It might even be as short and simple as, say, applying to a Magistrate for an arrest warrant.

The Court could also determine which persons or classes of person are entitled to a copy of the report, and perhaps on what conditions. A control on the use of the procedure could be that if malice was subsequently proved, the maker of the affidavit could be subject to proceedings for contempt.

- 9.45 The possibility we describe here is not identical to the ABI suggestion. We envisage rather that the terms on which the protection should be granted should follow those of the common law defence, namely, whether there is the necessary reciprocal duty to publish and interest in receiving the information, as amplified in the case law.<sup>41</sup> If a court rules that the common law defence of qualified privilege *is* available in the instant case, then it may be pleaded with confidence by the authority in any subsequent litigation. The existence of malice (which, if

<sup>40</sup> The ABI Response, section 3, para G 7 – 11. See para 8.38 above.

<sup>41</sup> See paras 6.20 – 6.32 above.

proved, would defeat the common law defence) would be a matter of fact to be proved at any trial, and not a matter for an advance ruling.

- 9.46 Thus this possibility consists in making the common law defence of qualified privilege available (a) where it is currently uncertain whether it will be available, and (b) in advance rather than after the event. The court is the appropriate body to extend that legal protection. The court in question would be the Queen's Bench Division of the High Court, where defamation actions are currently heard.

### ***Civil procedures available in defamation actions***

- 9.47 Although there are several procedures that are already available to parties in a defamation action, none enables the local authority to determine in advance of a full trial whether or not it can publish a report, safe in the knowledge that qualified privilege will attach to that report.
- 9.48 When faced with a claim for defamation, the authority can apply for summary disposal of the case under Defamation Act 1996, section 8<sup>42</sup> if it is clear that qualified privilege will attach to the statement.<sup>43</sup> If it is clear that the defendant will not be able successfully to plead qualified privilege, after having regard to the *Reynolds* guidelines,<sup>44</sup> the case may be disposed of summarily, if the claimants are willing to limit themselves to the maximum £10,000 damages set out in section 9(1)(c) of the Defamation Act 1996.<sup>45</sup>
- 9.49 Alternatively, the authority could apply for summary judgment under Part 24 of the Civil Procedure Rules.<sup>46</sup> Summary judgment is appropriate where the issue to be litigated is one of law, but not where there are additional issues of fact.<sup>47</sup> Where, therefore, the only issue is the applicability of qualified privilege as a defence (and there is no allegation of malice), the authority can combine an

<sup>42</sup> Sections 8–10 of the Defamation Act 1996 provide that if there is no realistic prospect of success for the claimant, or of defence for the defendant, and there is no reason why the case should be tried, the court can summarily dispose of the case. They entered into force 28 February 2000: Defamation Act 1996 (Commencement No 2) Order 2000 SI 2000 No 222.

<sup>43</sup> D Price, *Defamation Law Practice and Procedure* (2nd ed 2001) para 29–06.

<sup>44</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127. See para 6.28 above.

<sup>45</sup> *James Gilbert Ltd v MGN Ltd* [2000] EMLR 680.

<sup>46</sup> CPR Part 24 enables the court to enter summary judgment against a claimant or a defendant if there is no real prospect of the claimant succeeding on, or the defendant defending, the claim, and there is no other reason why the case should go to trial.

<sup>47</sup> *Safeway Stores plc v Tate* [2001] QB 1120. In *Alexander v Arts Council of Wales* [2001] EWCA Civ 514; [2001] 4 All ER 205 Lord Woolf CJ remarked that “[p]roperly understood, the decision of this court in the Safeway case has not altered what has hitherto been regarded as the proper role of the CPR.”

application under Part 24 CPR with an application under Part 3.4 to strike out the claim as an abuse of process.<sup>48</sup>

- 9.50 However, the section 8 mechanism cannot be invoked at the same time as the other two procedures.<sup>49</sup> Similarly, all three devices have the added disadvantage that they can only be invoked once an action has already been commenced.
- 9.51 Injunctions, whether interim or final, are also not particularly pertinent to the situation of the local authority.<sup>50</sup> Designed to prevent, rather than expressly authorise publication, they are of much more use as a tactic to the person who claims to have been libelled.
- 9.52 In contrast to these measures, our proposal would be engaged at an earlier stage. We envisage a procedure whereby the authority, prior to publication<sup>51</sup> of potentially defamatory material, and certainly prior to the commencement of proceedings, can obtain a binding ruling on whether the defence of common law qualified privilege is available if the report is placed in the public domain.
- 9.53 We understand that courts are traditionally hostile to requests for advisory opinions and advance rulings on discrete points, but we think an advance ruling on the availability of the common law defence in defamation could be said to be a special case (1) because of the simple fact that if the publisher waits until after publication then the damage is done, and (2) if the point at issue – is this a case where qualified privilege may be granted? – can be severed from other possible points of dispute.
- 9.54 We believe that this would sit harmoniously with the post-Woolf principles as stated in the overriding objectives of the Civil Procedural Rules.<sup>52</sup> The Pre-Action Protocol for Actions in Defamation emphasises the importance of the avoidance of lengthy trials. It states that the court will take into account, when dealing with liability for costs and making other orders, the extent to which the parties have availed themselves of independent neutral evaluation, mediation or other forms of alternative dispute resolution.<sup>53</sup> Although the advance ruling

<sup>48</sup> CPR, r 3.4 enables the court to strike out a statement of case if it discloses no reasonable grounds for bringing or defending the claim, or it is an abuse of process, or there has been a technical defect in the statement of case.

<sup>49</sup> CPR, r 53.2 (3).

<sup>50</sup> An injunction is a court order prohibiting a person from doing something or requiring a person to do something: CPR 2001, Glossary G1-001. The High Court can grant injunctions, interim or final, by virtue of Supreme Court Act 1981, s 37(1), on such terms or conditions as it sees fit: s 37(2).

<sup>51</sup> Meaning communication to someone other than the claimant.

<sup>52</sup> The overriding objective to deal with a case justly includes, so far as is practicable, with regard to the parties' relative strengths, saving expense; and dealing with the case in ways which are proportionate to the money involved, the importance of the case, the complexity of the issues, the financial position of each party; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases: CPR r 1.1.

<sup>53</sup> CPR Pre-Action Protocol for Defamation C6-002, para 2.

possibility does not fall into any of these categories, it would take place early on in the litigation process, thus providing for a speedier disposal of the issue.

### ***The application***

- 9.55 Application would be made to a judge of the High Court for a Qualified Privilege Ruling. The issue on which the judge would be asked to rule would be purely a matter of law. The judge's ruling would then be as conclusive as any other ruling on a point of law in the course of ordinary civil proceedings. The ruling would purely be on whether the common law test applies.<sup>54</sup>
- 9.56 The application would be made by the authority before the act of publication (in the sense of communication). The application would state what the authority intended to publish, when, and how, including a statement as to the anticipated audience.
- 9.57 The authority would have to give notice of its application to any person or body who might reasonably be affected, namely a person who was going to be criticised in the report, but there would be no compulsion on that person to be represented in the proceedings.<sup>55</sup> (It should not, we think, be a problem to identify the people who ought to be notified because the inquiry panel will already have had to be conscious of the need to put criticisms to those criticised, and to take account of their response, in the course of writing the inquiry report. Absolute privilege will attach to communications made in the course of judicial proceedings before a court of justice, so disclosure for the purposes of the application for an advance ruling will be privileged.)<sup>56</sup>
- 9.58 It would be possible for the court to appoint an advocate to the court to advise it, if the judge thought it expedient in the particular case. The court would not be ruling on the truth of the adverse comments, nor on whether they were made with malice, but on whether the necessary genuine public interest in receiving the information existed, and thus whether the necessary duty to publish pertained.
- 9.59 The court could make an order akin to an injunction, permitting or prohibiting publication to certain people, bodies or in certain forms. If it held that the common law defence of qualified privilege was not applicable to the report, it could make a ruling to that effect. That ruling would be binding on the parties in any subsequent litigation.

<sup>54</sup> See paras 6.20 - 6.32 above.

<sup>55</sup> Section 12 of the Human Rights Act 1998 has the effect that if a party seeks an order which might affect another's freedom of expression, then the party must notify that other. The court may only make an order affecting the exercise of the freedom of expression if all practicable steps have been taken to notify those affected or there are compelling reasons why they should not be notified. An advance ruling could be said to affect the local authority's freedom of expression, but as we envisage that it would be the local authority who would seek the advance ruling, there would be no need for it to notify itself.

<sup>56</sup> *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431.

- 9.60 An application would be a matter of choice for a local authority, not a compulsory procedure. The authority might prefer not to seek an advance ruling, for example because it was confident that, in a particular case, on any interpretation of the duty-interest test, qualified privilege would attach to the report it planned to publish.

***Connection with the quality of the inquiry and the report***

- 9.61 There would be no explicit tie between the quality of the report and the entitlement to the ruling: the common law question is whether there is a duty or interest on the part of the publisher to communicate the information and on the part of the recipient to receive it, not on whether the report would be defamatory or true. That said, it could be argued, and we think it *would* be argued, that if an inquiry had not been established or conducted fairly, or in accordance with the Code of Practice that we propose, then it is unlikely any court would find there was any duty to publish the report or any interest in receiving it. Put the other way, there can be no duty on an authority as a public body to publish ill-founded or unfair assertions of fact or opinion.
- 9.62 Conversely, if the inquiry has been properly established and conducted, this would be likely to influence the court in determining that qualified privilege could properly apply to the publication in question.

***Advantages and disadvantages***

- 9.63 The first benefit to the public and to a complainant would be that if such an avenue were to be available, an authority need not resist publication, and so publication would be more likely. A second general public benefit would be that, if the court ruled that there was no protection from defamation in the circumstances, and so the report was not published, the issue would at least have been considered by a court, rather than in private discussions between the authority and its insurer.
- 9.64 The advantage for the allegedly maligned person is that if the court rules that the report is not entitled to qualified privilege, then it is very unlikely to be published. This potential advantage is, however, offset by the fact that the advance ruling application itself would entail making the contents of the inquiry report known at least to those participating in the application, and the application itself might be more widely reported.
- 9.65 The advantage to the authority would be the option to seek a ruling from a judge in advance of publication, rather than have to rely on a defence whose parameters are uncertain after publication.
- 9.66 The difficulties are, however, considerable. One main disadvantage would be the likely delay between completion of an inquiry report, and its publication.
- 9.67 A second significant problem might be that it would not in practice be possible for the decision-maker to keep the issue before him or her distinct from the more onerous question of whether the allegations are sufficiently well-founded for it to be in the public interest for them to be published. This is especially so as in each

case the court or certifying body would have to be mindful of Articles 8 and 10. The danger is that the judge would have to conduct such a wide-ranging inquiry that the advantages of the procedure are wholly lost.

- 9.68 Against this, it could be said that a ruling on the availability of qualified privilege does not require a court to engage with the truth of the contents of the report, and that the question of whether there is the necessary duty to publish and interest in receiving the information can be kept distinct.
- 9.69 A third difficulty with an advance ruling might be that the issue could not be resolved in relation to an occasion of publication, irrespective of whose reputation is under consideration. The court ought to consider the interests of all those who could potentially be affected, even though they might not be represented in the advance ruling procedure, and this could not be done.

### ***Conclusion***

- 9.70 Our provisional conclusion is that in theory, if possibility 2 is not to be pursued, such a procedural innovation would be advantageous, but that in practice it is not workable.

### ***Question for consultees***

- 9.71 **Do consultees think that it would be practicable and useful to have a new procedure whereby a party may obtain an advance ruling on the availability of the defence of qualified privilege? If not, why not?**

### **4: Expanding the scope of Parliamentary privilege**

- 9.72 We now mention one theoretical possibility, namely an expansion of Parliamentary privilege to local authority inquiry reports. Our provisional view is that it does not have any merit, but we describe it briefly here so consultees may tell us if there are benefits to it which we have not seen.
- 9.73 The presentation of a report to Parliament confers on it absolute privilege<sup>57</sup> provided the report is done in the course of, or for the purposes of or incidental to proceedings in Parliament.<sup>58</sup> This may occur, for example, where an inquiry has been ordered by the Secretary of State under section 81 of the Children Act 1989.
- 9.74 One way of ensuring that a report is done in the course of or for the purposes of or incidental to proceedings in Parliament is to use the “unopposed return procedure”.<sup>59</sup> This procedure is only used where the public interest in publishing

<sup>57</sup> See para 6.9 above on the difference between absolute and qualified privilege.

<sup>58</sup> See Article 9 of the Bill of Rights (1688) and Defamation Act 1996, s 13(4), (5).

<sup>59</sup> A minister can obtain the authority of the House for the publication of a potentially defamatory document by presenting it to the House in a motion which by convention will not be opposed by other members. Such “unopposed returns” are always ordered to be printed by the House, and the document will have absolute privilege as a result.

the document outweighs the public interest in withholding the document for the protection of individuals or companies.<sup>60</sup>

- 9.75 Our provisional view is that, as a matter of principle, this solution is undesirable. The legal immunity afforded by Parliamentary privilege, although very useful, is not one which should be extended lightly. Although there are occasions where the public interest in publication outweighs the need for legal recourse in the event of defamation, this is not the case for all Parliamentary reports. The unopposed return procedure is one way in which a document can become absolutely privileged but it has been criticised as perhaps too easily open to exploitation.<sup>61</sup>
- 9.76 Indeed, the Joint Committee on Parliamentary Privilege recently recommended that “unless there are strong reasons in the public interest, no paper other than one emanating from the House or its committees should be absolutely privileged.”<sup>62</sup> Thus in practice, government backing would be required for any given report. Any inquiry report will be the creature of a local authority, and there is no reason for it to be made subject to the supervision of central government.
- 9.77 A further reason that expanding the scope of Parliamentary privilege is undesirable in principle is that it is absolute, which means that the publisher is protected from a defamation action even where malice is alleged by the claimant.<sup>63</sup> There does not seem to be any reason in principle for a local authority or the authors of an inquiry report to be shielded from an action where the statements were made with malice.<sup>64</sup>
- 9.78 For all these reasons, we do not propose expanding the scope of Parliamentary privilege.

<sup>60</sup> See the Joint Committee on Parliamentary Privilege First Report (1999) HL 43-1/HC 214-1, ch 8, para 347. This occurs, on average between two and three times per year: see, for example, the Report of the Sierra Leone Arms Investigation (Legge Report) (1997-98) HC 1016; the Review of the circumstances surrounding an application for nationalisation by Mr S P Hinduja in 1998. (Hammond Report) (2000-01) HC 287.

<sup>61</sup> P Leopold, “The Publication of Controversial Parliamentary Papers” [1993] 56 MLR 690, 693.

<sup>62</sup> (1999) HL 43-1/HC 214-1, ch 8, para 352. Leopold has commented that the unopposed return procedure is rather undemocratic, and may create a misleading impression of Parliamentary approval for potentially defamatory statements. Members voting have no chance to inspect the documents concerned, or to vote against the motion, so the decision to publish is actually taken by the Minister who presents it to Parliament. P Leopold, “The Publication of Controversial Parliamentary Papers” [1993] 56 MLR 690, 693. Leopold has considered the possibilities for changing the unopposed return procedure and concluded they are somewhat restricted: *ibid*, at p 694.

<sup>63</sup> “Malice” is defined at para 6.15 above.

<sup>64</sup> There is also a practical difficulty with extending Parliamentary privilege, in that the procedure can only be used when Parliament is sitting: any controversial documents received by a Minister during recess cannot be published until the House returns.

### **Compatibility with the European Convention on Human Rights**

- 9.79 We now turn to discuss the question of compatibility of each of possibilities 1 – 3 with the European Convention on Human Rights.
- 9.80 Any legislative reform must be a proportionate response to the problem. Any restriction of an individual's right to pursue a defamation claim may risk contravening the European Convention on Human Rights,<sup>65</sup> which protects an individual's right to:
- (1) a fair trial,<sup>66</sup>
  - (2) respect for private life,<sup>67</sup> and
  - (3) freedom of expression.<sup>68</sup>
- 9.81 It is unlawful for a public authority (including any court or tribunal) to act in a manner which is incompatible with any Convention right unless it is a legitimate derogation.<sup>69</sup> In relation to defamation claims, conflicting parties are seeking to rely on conflicting rights: respect for private life and freedom of expression. Any claim to privilege by the publisher may impinge on a claimant's right to a fair trial. In such cases, courts must seek to balance the public interest in dissemination of information against the individual's right to access to a court to defend his or her reputation.

### **Right to a fair trial and access to a court**

- 9.82 The right to institute proceedings and have access to a court is part of the right to a fair trial.<sup>70</sup> Access to the courts is a fundamental constitutional right: "Such a constitutional right ... is said to derive from two sources: the common law, and art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms...".<sup>71</sup> This right is not absolute but is subject to limitations.<sup>72</sup> These are permitted by implication, since the right of access by its very nature calls for regulation by the State.<sup>73</sup> Member States also enjoy a "margin of appreciation" in that they are considered to be in the best position to decide on the measures necessary in a particular area. However, the European Court of Human Rights (and now the domestic courts) must be satisfied that any

<sup>65</sup> The Human Rights Act 1998 came into force on 2nd October 2000: The Human Rights Act 1998 (Commencement No. 2) Order 2000 SI 2000 No 1851.

<sup>66</sup> Human Rights Act 1998, Sched 1, Art 6.

<sup>67</sup> Human Rights Act 1998, Sched 1, Art 8.

<sup>68</sup> Human Rights Act 1998, Sched 1, Art 10.

<sup>69</sup> Human Rights Act 1998, s 6(1).

<sup>70</sup> *Golder v UK* Series A Vol 18 (1975); 1 EHRR 524.

<sup>71</sup> *R v Lord Chancellor ex p Witham* [1998] QB 575, 580, *per* Laws J.

<sup>72</sup> *Lithgow v UK* Series A Vol 102 (1986); 8 EHRR 329.

<sup>73</sup> See K Starmer, *European Human Rights Law* (1999) p 354.

limitations on the right of access do not reduce it to an extent which impairs its very essence. Most importantly, however, the limitation must be in pursuit of a legitimate aim and be proportionate between the means employed and the aim sought.<sup>74</sup>

- 9.83 The defence of privilege restricts the access to the courts of the person who claims to have been defamed, but thus far has been found to do so with a legitimate aim in a proportionate manner, and as such is compatible with the right to a fair trial and respect for family or private life.<sup>75</sup> In *Fayed v UK* an allegedly defamatory Department of Trade and Industry report was found to have a legitimate aim to report in the public interest. The means employed were held to be proportionate, as the Inspectors and Secretary of State of the Department were bound by rules of rationality, legality and procedural propriety.<sup>76</sup>
- 9.84 There is thus scope for a proportionate extension of the defence of qualified privilege, with the legitimate aim of facilitating the dissemination of a report which is genuinely in the public interest, to be compatible with Article 6.

### ***Freedom of expression***

- 9.85 Article 10 is set out in full at paragraph 9.5 above. Again, this is a qualified right in that it is “subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others”.<sup>77</sup> Case law suggests, however, that “freedom of expression is the rule, and regulation of speech is the exception requiring justification.”<sup>78</sup> Freedom of speech is one of the fundamental principles of a democratic society, and any attempt to curtail it should be both necessary and proportionate.<sup>79</sup>
- 9.86 Restrictions on the expression of free speech are required in order to protect character and reputation: freedom of speech does not equate to freedom to circulate libellous statements,<sup>80</sup> and the restrictions that follow from the tort of defamation are a necessary derogation from the fundamental right to freedom of speech. In *Loutchansky v Times Newspapers Ltd* Brooke LJ commented that:

<sup>74</sup> *Ashingdane v UK* Series A Vol 93 (1985); 7 EHRR 528, referring to *Golder v UK* Series A Vol 18 (1975); 1 EHRR 524.

<sup>75</sup> *Fayed v UK* Series A Vol 294 case B (1994); 18 EHRR 393. We note that a case is currently being brought on the basis that the system of Parliamentary privilege is incompatible with the Convention: *The Guardian* 6 March 2002, p 6.

<sup>76</sup> *Fayed v UK* Series A Vol 294 case B (1994), 18 EHRR 393; see also K Reid, *A Practitioner's Guide to the European Convention of Human Rights* (3rd ed 1998) pp 174–177.

<sup>77</sup> Human Rights Act 1998, Sched 1, Art 10(2).

<sup>78</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 208 *per* Lord Steyn.

<sup>79</sup> *Ibid*, 200.

<sup>80</sup> *Ibid*, 201.

The delicate balance between the right to freedom of expression and the individual's right to the protection of his reputation has now been struck by the decision of the House of Lords in *Reynolds'* case. To talk of a public right to know, without more, is misleading. The Convention explicitly states that the right to freedom of expression carries with it duties and responsibilities, and its jurisprudence shows how the right to freedom of expression is circumscribed by what is strictly necessary and proportionate in a democratic society for the protection of individuals' reputations.<sup>81</sup>

9.87 The *Reynolds* case concerned qualified privilege for newspaper reporting of allegations that the claimant had misled the Dáil. The House of Lords held that the correct balance between protection of reputation and freedom of expression was struck in that case, and expounded principles to be applied where similar issues arise.<sup>82</sup> The question is, therefore, whether extending the benefit of qualified privilege to local authority reports would be similarly compatible with the Convention.

***Necessary, prescribed by law, and proportionate?***

9.88 Our provisional view is that extension of the statutory defence is compatible with the Convention. Extending the ambit of privilege to include a potentially larger group of publishers could prevent more people from pursuing claims in defamation, but such a reform would be necessary in a democratic society, prescribed by law and proportionate and therefore lawful. It would be necessary because it would:

- (1) enable local authorities to be accountable in a transparent way for the manner in which they discharge their statutory functions;
- (2) improve the way in which local authorities discharge their functions;
- (3) encourage the possibility that lessons learned by one local authority can be publicised so that improvements in practice will spread; and
- (4) encourage the publication of findings of fact in matters where there is a genuine public interest.

9.89 If it is enacted by Parliament it will be prescribed by law. If the defence is qualified so that malice will defeat it then it is proportionate. It provides a suitable level of protection, within the margin of appreciation, for the local authority while ensuring that an individual's right to defend his or her reputation will not be unduly restricted.

<sup>81</sup> [2001] EWCA Civ 536 para [45]; [2001] 3 WLR 404, 426. Brooke LJ's judgment is on an interlocutory point on which the defendant appealed. The judgment of the Court of Appeal on the substantive appeal was handed down on 5 Dec 2001 and is reported at [2001] EWCA Civ 1805; [2002] 1 All ER 652. See paras 6.29 – 6.32 above.

<sup>82</sup> See paras 6.27 – 6.28 above.

- 9.90 Our only caveat on the question of compatibility with the ECHR is that it might be relevant exactly *how* the extension is to be achieved. Possibility 2,<sup>83</sup> where statutory immunity is related directly to the fairness of the inquiry and the report, represents less interference with a person's Article 6 and Article 8 rights than does possibility 1,<sup>84</sup> whereby statutory qualified privilege is extended to a new category of inquiry, irrespective of its actual quality. It could therefore be argued that a blanket extension of the privilege is not "necessary", because there is an alternative which allows for finer balancing of competing rights in individual cases.
- 9.91 Turning to the Advance Ruling, this would represent a procedural change rather than a substantive change. The availability of the defence itself would not be affected and, as the common law defence may be made available to a local authority compatibly with the Convention under the current law,<sup>85</sup> so any earlier ruling would also be capable of being compatible with the Convention.

#### **A NEW KIND OF INQUIRY**

- 9.92 We now consider an additional legislative reform which would go wider than simply making qualified privilege available as a defence in defamation to local authorities. The Waterhouse Report drew attention to the recommendation in the SOLACE report "that local authorities should, by a change in the law, be given the power to set up formal inquiries empowered ... to summon witnesses, require the production of documents and take evidence on oath."<sup>86</sup> It continued,

In response to this report the Local Authorities Associations published in 1980 their own comments on the Marre committee's proposals.<sup>87</sup> That response indicated that the Associations had decided not to pursue a request for statutory powers to hold inquiries at that stage; but they endorsed the call for a code of practice and procedural rules, putting forward their own suggested versions of such a code and rules. In our judgment, however, the Associations' proposals on the reporting of inquiries did not deal satisfactorily with the problems that subsequently arose in relation to the Jillings report and the time has come for further consideration to be given to those problems on the lines that we have suggested.<sup>88</sup>

- 9.93 Under the current law, a local authority may set up an ad hoc inquiry under its implied powers or the general power to promote or improve the economic, social

<sup>83</sup> See paras 9.32 – 9.39 above.

<sup>84</sup> See paras 9.15 – 9.31 above.

<sup>85</sup> See the words of Brooke LJ cited at para 9.86 above.

<sup>86</sup> The SOLACE Report, para 4.13.

<sup>87</sup> Ie, the SOLACE Report, which was chaired by Sir Alan Marre.

<sup>88</sup> The Waterhouse Report, para 32.63.

and environmental well-being of its area.<sup>89</sup> The SOLACE proposal would give local authorities a new *express* power to establish an inquiry. The inquiry panel could be given the powers to: secure the attendance of witnesses and the production of documents; to take evidence on oath, affirmation or otherwise;<sup>90</sup> to issue a commission or request to examine witnesses abroad; and to compel the disclosure of confidential information.<sup>91</sup>

9.94 Witnesses before such an inquiry could be accorded the same immunities and privileges as a witness before the High Court, following the pattern of a tribunal set up under the Tribunals of Inquiry (Evidence) Act 1921.<sup>92</sup>

9.95 It is true that there may be less need for a statutory solution in respect of less serious matters than there was when the SOLACE report was published: many of the inquiries mentioned in the SOLACE report would now be dealt with by way of the Part 8 of the Working Together Guidance,<sup>93</sup> and allegations of maladministration or ethically inappropriate behaviour can be investigated by the Local Government Ombudsman or the Standards Board.<sup>94</sup>

9.96 There may, however, still be a need for a new form of inquiry for matters which do not result in a public inquiry as instigated by a Secretary of State or by Parliament,<sup>95</sup> but which nevertheless call for a greater degree of formality and publicity than an ad hoc inquiry with no formal powers, because, for example, of the seriousness of the subject matter.

9.97 The recent decision of *Edwards v UK*<sup>96</sup> lends weight to the argument that a new form of inquiry is needed for the most serious matters where an inquiry is not established by a minister, or at the insistence of Parliament. In *Edwards v UK* the European Court of Human Rights found that there had been a violation of

<sup>89</sup> Local Government Act 1972, s 111 and Local Government Act 2000, s 2(1) respectively. See further paras 2.49 – 2.55 above.

<sup>90</sup> See for example Children Act 1989, s 81(4); National Health Service Act 1977, s 84(2); Police Act 1996 s 49(3) for the Victoria Climbié inquiry; Local Government Act 1972, s 250(2)–(5).

<sup>91</sup> In a similar manner to disclosure before a court, as under s 1(1)(b) Tribunals of Inquiry (Evidence) Act 1921. A statutory duty to disclose information overrides any common law duty of confidence.

<sup>92</sup> As provided by s 1 Tribunals of Inquiry (Evidence) Act 1921, as amended by Civil Evidence Act 1968, s 17(1), s 20(3). See also the Taxes Management Act 1970, s 20B(8), s 20C(4); Fair Trading Act 1973, s 29(5) and 85(3), Solicitors Act 1974, s 46(11). For more examples, see C Passmore, *Privilege* (1998) p 12. The powers available under a Tribunal of Inquiry inquiry were made available to Sir Richard Scott for his ad hoc inquiry into the failure of the Matrix-Churchill prosecutions. See para 2.16 above.

<sup>93</sup> See para 2.34 above.

<sup>94</sup> See paras 2.20 – 2.22 and 2.23 – 2.26 above respectively.

<sup>95</sup> See type 1 inquiries as described in Part II at paras 2.15 – 2.16 above.

<sup>96</sup> [2002] ECHR Application No 46477/99. Judgment 14 March 2002.

Article 2<sup>97</sup> of the Convention because there had not been an effective investigation into the death of the applicants' son, Christopher Edwards, while in custody.<sup>98</sup>

9.98 Article 2 places positive obligations on the state, including procedural obligations. The court stated that it “requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force”.<sup>99</sup> A private non-statutory inquiry was established into Christopher Edwards' death by the Prison Service, Essex County Council and North Essex Health Authority. It was thorough and “meticulous”, but the court found that it was not an “effective” investigation as required by Article 2 for two reasons: it was held in private, and it lacked the power to compel witnesses.

9.99 A local authority can, of course, establish an inquiry which sits in public, but there is, under the current law, no form of inquiry which a local authority can establish with powers to compel witnesses and the production of documents.

9.100 If a new kind of inquiry were available to local authorities, along these lines, it is possible that, because of the degree of formality and the potential costs involved,<sup>100</sup> it would only be made use of in very exceptional situations, and the existing powers<sup>101</sup> would continue to be used to set up less formal inquiries. If this style of inquiry became common for local authority inquiries, authorities might be vulnerable to the charge that they were too easily giving themselves exemption from liability to defamation. The general public benefit of such a new kind of inquiry might, then, depend on how they were used.

#### **Question for consultees**

9.101 **We invite consultees' views on whether a new kind of statutory scheme for local authority inquiries is necessary, and why. If consultees favour such a scheme, what powers should an inquiry set up under it have?**

<sup>97</sup> Article 2 provides “Everyone's right to life shall be protected by law ...”

<sup>98</sup> [2002] ECHR Application No 46477/99, para 87.

<sup>99</sup> *Ibid*, para 69, citing *mutatis mutandis* the *McCann v UK*, Series A Vol 1 324 (1995); 21 EHRR 97; and *Kaya v Turkey*, 1998 part 1 p 65; 28 EHRR 1.

<sup>100</sup> The actual costs would depend on how the inquiry was conducted, unless that was prescribed. For example, if legal representation was permitted, or even required, the costs would be higher than where witnesses were not legally represented.

<sup>101</sup> See para 2.49 – 2.55 above.

# **PART X**

## **COLLECTED QUESTIONS FOR CONSULTEES**

### **SUMMARY OF COLLECTED CONSULTATION QUESTIONS**

In this consultation paper we have addressed a range of issues relating to the publication of local authority ad hoc inquiry reports. Here, we summarise our provisional conclusions and proposals, and the other issues on which we seek consultees views. More generally, we invite comments on *any* of the matters contained in, or the issues raised by, this consultation paper, and any other suggestions that consultees may wish to put forward.

In particular we would be grateful to learn of any problems encountered in the instigation, conduct, or publication of local authority inquiry reports from those involved in the local authority inquiry process; any information that consultees wish to volunteer about their experience of inquiries will be gratefully received. If possible when responding, it would be useful to include a brief factual background, for example:

the subject matter and type of investigation;

the manner in which the investigation was commissioned, debated and acted upon;

the roles of councillors, officers, insurers and other agencies or individuals;

the outcome, in terms of publication, of the report.

For the purpose of analysing the responses it would be very helpful if, as far as possible, consultees could refer to the question numbers in this summary.

The consultation period will close on 31 July 2002.

### **THE PROBLEMS**

#### **Admissions of liability**

1. Is it the experience of consultees that, even though liability may be inferred from an admission of fact, witnesses to local authority non-statutory inquiries are free to give all relevant facts to an inquiry (subject to requirements of confidentiality)?

(paragraph 7.26)

2. Is it the experience of consultees that publication of an inquiry report, whether internal or independent, is treated in practice as amounting to acceptance of any findings of fact and conclusions reached in that report, and thus to an admission of liability?

(paragraph 7.27)

3. Is it the experience of consultees that inquiry reports are ever withheld from publication for fear that statements in them will amount to admissions of liability?

(paragraph 7.28)

4. Is it the experience of consultees that consent to an admission of liability is ever withheld by an insurer in circumstances where the local authority would have wanted to make that admission? If so, we should be interested to know the circumstances.

(paragraph 7.29)

### **Waiver of rights**

5. In consultees' experience, does the need not to waive the right to confidentiality which may be claimed by the authority lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?

(paragraph 7.34)

6. Does the fear of waiving legal professional privilege lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?

(paragraph 7.35)

7. Does the fear of disclosing a document which might be subject to public immunity privilege lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?

(paragraph 7.36)

8. In the experience of consultees, has insurance cover ever been lost through waiver of rights to confidentiality, legal professional privilege or through disclosure of a document subject to public interest immunity?

(paragraph 7.37)

### **Defamation**

9. In consultees' experience, are inquiry reports ever withheld from publication because of defamatory statements in them? If this has occurred, was it because of fear of an action in defamation, *or* because of the risk of invalidating the insurance cover, or both?

(paragraph 7.39)

### **SOLUTIONS**

10. Our provisional view is that, without some clarification or change in the law, authorities and insurers can only avoid the risk of publishing, being sued, and finding that the defence of qualified privilege is not applicable, by a very cautious approach, which is not in the public interest, and legislative reform in relation to qualified privilege is therefore desirable. Do consultees agree?

(paragraph 7.55)

11. Do consultees agree that the other legal difficulties are best addressed by (1) a binding agreement between local authorities and their insurers, *and* (2) by development of a Code of Practice for the conduct of local authority ad hoc inquiries?

(paragraph 7.56)

#### **NON-LEGISLATIVE SOLUTIONS**

12. Given our description of how an agreement between the local authorities and their insurers could be developed, do consultees agree that this would be the right way forward? If not, what additional points would consultees say should be included, or what alternative would consultees propose?

(paragraph 8.46)

13. Given our description of the principles that should underlie a Code of Practice, its content, and who should issue it, what would consultees want to see in a Code of Practice for the conduct of local authority ad hoc inquiries?

(paragraph 8.67)

#### **THE LEGISLATIVE POSSIBILITIES**

##### **Conditional statutory privilege**

14. We provisionally propose extending statutory qualified privilege to any local authority inquiry report where

- (1) the inquiry has been fairly conducted, *and*
- (2) the report
  - (a) is about a serious matter of genuine public interest
  - (b) only contains judgments and apportionment of blame where they are supported by the factual findings of the inquiry panel, and
  - (c) only contains criticisms of people which have been put to them in advance of publication, with an opportunity for them to respond and, subject to the requirements of observing confidentiality, those responses are fairly represented in the report.

15. Do consultees agree that this change in the law is necessary and practicable, and if not, why not? If consultees prefer a different legislative solution, whether one canvassed in Part IX or not, we should be interested to know what it is, and in what way it would be an improvement on the current law.

(paragraph 9.39)

### **Advance ruling**

16. Do consultees think that it would be practicable and useful to have a new procedure whereby a party may obtain an advance ruling on the availability of the defence of qualified privilege, and if not, why not?

(paragraph 9.71)

### **A NEW KIND OF INQUIRY**

17. We invite consultees' views on whether a new kind of statutory scheme for local authority inquiries is necessary, and why. If consultees favour such a scheme, what powers should an inquiry set up under it have?

(paragraph 9.101)

### **THE IMPACT OF OUR PROPOSALS**

18. What practical and economic impact, in financial and non-financial terms, do consultees think our provisional proposals would have?

(paragraph 1.40)

# **APPENDIX A**

## **LGA/ABI JOINT GUIDANCE**

### **LOCAL GOVERNMENT ASSOCIATION**

#### **AD HOC INQUIRIES : INSURANCE ASPECTS**

1. Before setting up an inquiry, the local authority should consider the possibility that any of the issues under inquiry might be the subject of an insurance indemnity.

2. Often there will be no insurance element involved. It is impossible to give comprehensive guidance as to when there will or will not be such an issue to consider; each case has to be looked at in the light of its own circumstances. Where the subject matter of the inquiry involves personal injury (including illness, mental anguish or stress), or damage to property not belonging to the authority, it is recommended that the local authority makes an initial presumption of probable insurance involvement

3. If there is (or is likely to be) insurer involvement, early liaison with the insurer(s) is strongly recommended. Note that:

(a) the insurer(s) concerned will usually be the insurer(s) on risk when the injury or damage occurred. These may not be the same as the local authority's current insurers. Actual injuries sustained, or the time they were caused, may have been spread over many years, and involve different insurers;

(b) it is for the authority alone to decide whether or not to hold an inquiry. Insurers would not expect or wish to be involved in such a decision, though it is important that the authority informs the insurer of its decision.

4. It is important to ensure that the contents of the report of an inquiry are accurate and reasonable, and can be sustained. A report might prejudice the position of an insurer, for example if it makes inaccurate statements regarding liability and the entitlement of individuals to compensation. This risk of this happening can be mitigated by:

(a) restricting the inquiry's terms of reference to findings of fact and recommendations for the avoidance of a recurrence;

(b) instructing the inquiry that comment, opinion or criticism should only be introduced into its report if it is justified; to avoid introducing any inference or supposition into its report; and to ensure that any unproven allegations and unsubstantiated statements are represented as such;

(c) ensuring that the inquiry avoids reference to liability or matters of compensation; these issues should be strictly reserved to the authority liaising with the insurer(s).

#### **Protocol and public statements**

5. a) The local authority and insurer(s) should meet early on to seek a full understanding of each other's position and concerns, including informing each

other of key developments, or key statements they propose to make, particularly where sensitive issues are involved.

b) It is recommended that the local authority and insurer(s) seek to agree a protocol. Elected members should be fully informed and support the protocol; it may be beneficial for relevant members to be involved in meetings with the insurer(s). These meetings can be used to identify the true legal position, which is equally binding on local authorities and insurers. The opportunity can also be taken to acquaint the insurers with any particular sensitivities on the part of the authority and its members.

6. A protocol should identify:

a) who is authorised to speak officially, and to the press.

It is for the local authority and the insurer(s) individually to decide who their respective spokesperson will be. If a joint statement is appropriate, a joint spokesperson should be agreed.

b) the extent to which (if at all) liability should be admitted.

Where there are unsubstantiated allegations or incomplete information, the local authority should proceed with caution. Detailed investigation will often reveal a very different state of affairs from that indicated by initial observation.

In any circumstances where an admission of liability is contemplated, the local authority is advised to ensure full liaison with insurers before making any admission. All correspondence on the matter should be addressed “without prejudice”.

If an insurer finds its position so prejudiced by an ill informed admission of liability, it may seek to rely on the policy condition that allows it to avoid providing an indemnity in such circumstances. This could result in the full amount of any damages awarded having to be met by the authority.

The more remote in time and the more complex the issues the greater the caution needed by the authority. If the incident is very recent and the position clear cut, then insurers may wish to admit liability and get on with quantification and settlement.

c) expressing sympathy - phraseology and general approach to be adopted.

Avoid emotive language, but do not feel that an expression of sympathy cannot be made. A simple expression of sympathy for the affected parties and their families, coupled with an announcement that a full investigation is to be held into the circumstances, can be an appropriate response and does not amount to an admission of liability. Something on the lines of “Z Council expresses its sympathy to the people affected and their families and will be making a full investigation into the circumstances” should be appropriate and cause no harm.

Local Government Association

September 1999

(annexed to LGA Circular 631/99)

# APPENDIX B

## ACCESS TO INFORMATION

### INTRODUCTION

- B.1 In this Appendix, we turn our attention to the various statutory regimes which govern access to information held by a local authority. In contrast to our approach in the body of the consultation paper, we discuss the issue from the position of the potential litigant who wishes to make a claim against the local authority. Hence our focus is on what *rights* a private individual has to information held by the local authority, in contrast to the *duties* placed upon a local authority in its control and use of that information.
- B.2 We focus particularly on the right of an individual to gain access to two crucial sources of information. These are:
- (1) the report of an inquiry that has not been “published” in the formal sense; and
  - (2) the transcripts of evidence given to an inquiry under the control of the local authority.
- B.3 Transcripts under the control of the local authority would be those produced during the course of an internal investigation, rather than an independent inquiry. Where an inquiry is independent, we believe that only the report will be presented to the authority.
- B.4 The reason why these issues are being addressed in an appendix rather than the main body of the consultation paper is because they are somewhat tangential to the main thrust of the legal issues that we examine. Our terms of reference direct us towards the publication of reports of ad hoc inquiries.<sup>1</sup> Here we are concerned with pre-publication access, not only to the final report itself but also to transcripts that are used to support the report’s conclusions. If a right of access is granted to the public, this will impose a parallel duty upon the authority to transmit that material. Hence there is little use in insurers seeking to prevent formal publication of material at a later date if the authority is already subject to a legal obligation to supply it.
- B.5 The right of access to information controlled or in the possession of the local authority has a bearing on the question of admissions of liability. Rights to transcripts of evidence received in private, if released to members of the public, might contain admissions of fact or liability that would be of great relevance to any future claim against the council.

<sup>1</sup> Set out at para 1.5 above.

- B.6 Similarly, rights of access impact on the law of confidentiality.<sup>2</sup> If material must be disclosed then any argument against disclosure that the authority advances, based on the confidentiality of that material, is likely to be undermined. As confidentiality is a pre-requisite to claims of legal professional privilege, a general right of access to that confidential information would preclude the claim.<sup>3</sup>
- B.7 Defamation issues may also arise where material is subject to a public right of access. Publication is a necessary condition of a defamation action.<sup>4</sup> Publication entails communication by the defendant of the defamatory matter to a third party, that is, to someone other than the claimant. Therefore where a local authority transmits a defamatory statement to someone other than the person defamed in that material, a libel action might lie.

#### **SUMMARY OVERVIEW OF ACCESS RIGHTS**

- B.8 Access to information held by a local authority is governed by three statutory regimes. These are the Local Government (Access to Information) Act 1985, the Data Protection Act 1998 and the Freedom of Information Act 2000. These last two Acts are not fully implemented, with the result that the current legal position is somewhat in a state of flux. In addition, local authorities now may operate under a traditional committee structure, or under new executive arrangements as laid down by the Local Government Act 2000. These new arrangements have significantly changed the ways in which local councils take, and scrutinise decisions. The Department of Transport Local Government and the Regions (DTLR) will be undertaking a review of access to information held by local authorities with a view to dovetailing the provisions of the three Acts, so as to provide a comprehensive and clear code for disclosure of information to the public.
- B.9 The Freedom of Information Act 2000 enacts a presumption of access for information held by a public authority unless an exemption is applicable. This is the first time that a general “right to know” has been imposed on all public authorities. For local government, however, the impact of the Act is not as dramatic as for other public bodies such as central government. The Local Government (Access to Information) Act 1985 already contained a prima facie right of access to reports held by the authority where the report and related documents are to be discussed in a meeting of the council.
- B.10 All three statutes are subject to exemptions. These may be mandatory, discretionary, absolute or involve the application of a public interest test. The exact scope of these exemptions is explored in greater detail below. The types of exemption that are potentially applicable to reports and transcripts, when all the Acts are in force, can be categorised thus:

<sup>2</sup> See above, Part V of the consultation paper.

<sup>3</sup> See above, paras 5.11 – 5.20 of the consultation paper.

<sup>4</sup> *Hebditch v MacIlwaine* [1894] 2 QB 54; *Riddick v Thames Board Mills Ltd* [1977] QB 881. See further, paras 6.1–6.6 above of the consultation paper.

- (1) information about vulnerable groups in society the disclosure of which may cause physical or mental harm;
  - (2) information held by the authority about its employees, members and officers;
  - (3) information that has been imparted in confidence, including legal advice that may be subject to a claim of legal professional privilege;
  - (4) information relating to the prevention, prosecution or investigation of criminal offences,
  - (5) information which is intended for future publication.
- B.11 The subject matter of local authority inquiries would suggest that it is likely that an exemption could apply to prevent access to the report and evidence received. Thus a right of access to either the transcripts of the inquiry or the finished report is likely to be the exception rather than the norm.
- B.12 In spite of this, it is important to recognise that occasionally no exemptions may apply to an inquiry report and transcript. This may arise where the subject matter is not particularly sensitive, no issues of confidentiality or privilege arise and criminal offences are not at issue. Such an inquiry may be, for example, into why a particular team or department is performing particularly well, with the aim of disseminating best practice. For this reason alone, it is useful to outline the rights available to members of the public.

## **LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985**

### **Authorities operating under the committee system**

- B.13 This Act inserted a new Part<sup>5</sup> into the Local Government Act 1972 to govern the rights of members, the press and public to principal<sup>6</sup> local authority meetings and documents. Under the scheme, meetings of these authorities must be open to public and press;<sup>7</sup> the agenda, reports and background papers must be available to the public and press three clear days before the meeting.<sup>8</sup> Information is defined to include “an expression of opinion, any recommendations and any decisions taken”.<sup>9</sup> Background papers are defined as:

<sup>5</sup> Local Government Act 1972, Part VA.

<sup>6</sup> In addition to principal authorities as defined in Part II, this includes joint authorities, the Common Council of the City of London, joint boards and joint committees of two or more principal councils, and a combined fire authority: Local Government Act 1972, s 100J.

<sup>7</sup> Local Government Act 1972, s 100A(1).

<sup>8</sup> *Ibid*, s 100B(1), (3).

<sup>9</sup> *Ibid*, s 100K(1).

those documents relating to the subject matter of the report which

- (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
- (b) have, in his opinion, been relied on to a material extent in preparing the report,

but do not include any published works.<sup>10</sup>

- B.14 “Reports” in this context will include a report produced by an ad hoc inquiry. It is likely to include recommended courses of action, and expressions of opinion of the inquiry team for discussion by the commissioning body. Any report of an inquiry will normally be accompanied by the relevant officer’s report responding to the inquiry’s findings. Again, this must be considered by the commissioning body in order that the inquiry report be noted in the minutes, or endorsed by resolution.
- B.15 The definition of a background paper could include transcripts of evidence given to an internal inquiry. The evidence would obviously relate to the subject-matter of the report, and, if the inquiry reached defensible conclusions based on the evidence received, the transcripts would reveal facts and be relied upon, at least to a material extent, in the production of the report of the inquiry. It is unlikely that the authority would be provided with the transcripts of the inquiry where an external panel undertook the investigation; hence these would not be included within the definition of a background paper.

### **Authorities operating under the new executive structures**

- B.16 The Local Government 2000 Act introduced new models of working for local authorities. Instead of the present system based upon decision-making by the council and committees, three new models were proposed. These were: (1) a mayor and cabinet executive, (2) a leader and cabinet executive, and (3) a major and council manager executive.<sup>11</sup>
- B.17 Where a local authority discharges its executive functions under the new models, new regulations apply to govern access to information and decisions made by members of the executive.<sup>12</sup> For members of the public, the regulations do little more than transfer the previous arrangements governing access to meetings and documents. There is however increased access to documents for members of

<sup>10</sup> Local Government Act 1972, s 100D(5).

<sup>11</sup> Local Government Act 2000, s 10.

<sup>12</sup> English local authorities are governed by the Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000 No 3272. Welsh local authorities are governed by Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 SI 2001 No 2290 (W 178).

overview and scrutiny committees. A similar definition of a background paper is given.<sup>13</sup>

B.18 We consider that background papers listed in accordance with the Act will similarly include any transcripts of evidence in the possession of the local authority. Therefore the public will have a prima facie right to the report and transcripts of evidence if they are to be debated by the council, operating either under the committee structure or the new executive models.

B.19 However, this right is not absolute. The right of public inspection under the Act and the regulations is subject to two categories of exemptions. First, press and members of the public do not have a right to see any documents or attend any meetings<sup>14</sup> where confidential information would be disclosed in breach of that confidence.<sup>15</sup> Secondly, public inspection may be refused if the subject matter of the information falls within a category listed in Schedule 12A to the Local Government Act 1972.<sup>16</sup> These qualifications are applicable regardless of whether the authority is discharging its functions under the committee structure or a new executive model.

### **Breach of confidence**

B.20 “Confidence” is defined, for the purposes of the section, as:

- (1) information furnished to the authority by a government department on terms (however expressed) which forbid the disclosure of the information to the public, and
- (2) information the disclosure of which to the public is prohibited by or under any enactment or by the order of a court.<sup>17</sup>

B.21 This definition of confidence is narrower than the common law definition of confidentiality, which we examine in Part V.<sup>18</sup> This is because a breach of confidence at common law encompasses more than disclosure forbidden by a

<sup>13</sup> Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000 No 3272, reg 2; Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 SI 2001 No 2290 (W 178), reg 2.

<sup>14</sup> Local Government Act 1972, s 100A(2), (4).

<sup>15</sup> Local Government Act 1972, s 100A(2); Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000 No 3272, reg 21; Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 SI 2001 No 2290 (W 178), reg 4(2).

<sup>16</sup> Local Government Act 1972, s 100A(4); SI 2000 No 3272, reg 21; SI 2001 No 2290 (W 178), reg 5(2).

<sup>17</sup> Local Government Act 1972, s 100A(3). SI 2000 No 3272, reg 2; SI 2001 No 2290 (W 178), reg 2.

<sup>18</sup> See above, paras 5.4 – 5.7 of the consultation paper.

statute or by an order of the court.<sup>19</sup> “By the order of a court” in this context refers to a specific instance, such as an injunction, where disclosure has been prohibited. This will not protect those who write, for instance, to the council “in confidence.”<sup>20</sup>

### **Exempt information**

B.22 Schedule 12A to the Local Government Act 1972 lists the types of material that may be exempt from the requirement to grant the public the right of attendance or access to the information to be discussed at the meeting. The most relevant categories, for our purposes, are:

- (1) information relating to past or present employees or office holders of the local authority;<sup>21</sup>
- (2) information relating to recipients of any service provided by the local authority;<sup>22</sup>
- (3) information relating to the adoption, care fostering or education of any particular child;<sup>23</sup>
- (4) instructions to, and advice received from, counsel on existing or contemplated proceedings or determinations (ie administrative hearings such as inquiries);<sup>24</sup>
- (5) action in connection with the prevention, investigation or prosecution of crime;<sup>25</sup>
- (6) the identity of a protected informant.<sup>26</sup>

B.23 In order to engage the Schedule 12A exemptions, a resolution must be passed<sup>27</sup> which identifies the proceedings, or parts of proceedings, to which it applies, and the type of exemption that is being sought.<sup>28</sup> Hence the Schedule 12A exemptions

<sup>19</sup> See above, para 5.4 of the consultation paper.

<sup>20</sup> P Birkinshaw, *Government and Information: the Law relating to Access, Disclosure and their Regulation* (2nd ed 2001) p 260.

<sup>21</sup> Local Government Act 1972, Sched 12A, para 1.

<sup>22</sup> *Ibid*, para 4.

<sup>23</sup> *Ibid*, para 6.

<sup>24</sup> *Ibid*, para 12.

<sup>25</sup> *Ibid*, para 14.

<sup>26</sup> *Ibid*, para 15. A protected informant is someone who provides information to the authority that tends to show that a criminal offence, breach of a statutory duty, breach of planning control or a nuisance has been, is being, or is about to be committed: *Ibid*, Sched 12A, Part III, para 1(1).

<sup>27</sup> Local Government Act 1972, s 100A(4).

<sup>28</sup> *Ibid*, s 100A(5).

are discretionary, whereas the first type of exclusion, based upon confidentiality, is mandatory.

- B.24 Unless the material that contains the admission is exempt from disclosure by virtue of the confidentiality requirement or the applicability of a Schedule 12A exemption, any potential claimant will be able to have access to the report or the transcripts. However, it is likely that many reports of, and transcripts of evidence received at, inquiries will be covered by one or more of the exemptions. The areas of local authority business that are particularly susceptible to an ad hoc inquiry, such as abuse in council-run homes, harassment at schools, the provision of accommodation by the authority or allegations of misconduct by members, officers or employees will be covered at least in part by one or more of the Schedule 12A exemptions.
- B.25 The DTLR is currently revising the exemptions set out in Schedule 12A to the Local Government Act 1972 in order to bring them in line with the Freedom of Information Act 2000. The proposed changes, which were subject to consultation between 11 May and 30 June 2001, involve tightening up the categories of exemptions listed in Schedule 12A. The overwhelming response to the consultation exercise was that the current exemptions needed to be dovetailed with the Freedom of Information Act 2000 scheme. A comprehensive review of Access to Information in Local Authorities is planned for summer 2002.

### **Defamation**

- B.26 The 1996 Defamation Act grants qualified privilege to a fair and accurate copy or extract from any document required by law to be open to public inspection.<sup>29</sup> Therefore where the report must be open to inspection, in accordance with the public's right of access to local authority papers,<sup>30</sup> the supply of that information will attract qualified privilege.
- B.27 In addition to this right under the Defamation Act itself, the Local Government Act 1972, section 100H(5) grants a defence of qualified privilege to any transmission of an "accessible document." This is defined to include any copy of the whole or part of a report,<sup>31</sup> or background paper<sup>32</sup> for the meeting.
- B.28 The regulations for the access to information and meetings of local authorities under the new executive structures provide that where information is to be open for public inspection, the documents will similarly attract qualified privilege.<sup>33</sup>

<sup>29</sup> Defamation Act 1996, Sched 1, Part I, para 5.

<sup>30</sup> See above, paras B.13 – B.19.

<sup>31</sup> Local Government Act 1972, s 100H(6)(d).

<sup>32</sup> Local Government Act 1972, s 100H(6)(e).

<sup>33</sup> See above, paras B.16 – B.19: Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000 No 3272, reg 22, para (4)(a); Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 SI 2001 No 2290 (W 178), reg 13, para (4)(a).

B.29 There is no statutory qualified privilege where the material need not be open to inspection, due to a mandatory confidentiality exemption or a Schedule 12A exemption – for instance, where information relating to employees or the identity of whistleblowers is disclosed – applying.<sup>34</sup> These exemptions are most likely to be engaged where the subject matter is particularly sensitive – for instance, inquiries into maltreatment of the elderly or allegations of assault by school teachers.<sup>35</sup> But it is exactly these types of reports that are more likely to contain defamatory statements. Thus where the report alleges that a person is guilty of a criminal offence, for example, of assault, that statement is defamatory.<sup>36</sup> In a similar manner, imputations on the character of an employee of the council, or a statement that that person lacks some essential quality to carry on the office, trade or profession successfully, are defamatory.<sup>37</sup> The reports which would benefit most from a statutory defence of qualified privilege are thus not covered by the defence.

### **THE DATA PROTECTION ACT 1998**

B.30 Although we examine the Data Protection Act 1998 and the Freedom of Information Act 2000 sequentially, it is apparent that there is a certain amount of interaction between the two Acts. Similarly, some provisions of both Acts are already in force, with other parts still awaiting implementation. The discussion will focus primarily on the rights that individuals have at present under the two regimes. It will become apparent that the more substantive rights are not currently in force, and so we include a brief overview of the rights that can be anticipated.

#### **The present regime**

B.31 The substantive parts of the Data Protection Act entered into force on 1 March 2000.<sup>38</sup> The Act implements a European Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data.<sup>39</sup> The Data Protection Act also gives effect to the judgement of the European Court of Human Rights in *Gaskin v United Kingdom*<sup>40</sup> concerning the right of access to social work records. The Act imposes obligations upon those who hold and process data to act in accordance with the Six Data Protection Principles. Additional obligations are imposed when the data

<sup>34</sup> See above, paras B.20 – B.25.

<sup>35</sup> See above, para B.24.

<sup>36</sup> *Gray v Jones* [1939] 1 All ER 798; *Berry v BTC* [1961] 1 QB 149.

<sup>37</sup> *Skuse v Granada TV* [1996] EMLR 278.

<sup>38</sup> Data Protection Act 1998 (Commencement) Order 2000 SI 2000 No 183.

<sup>39</sup> European Parliament and Council Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L281, 23.11.1995, p 31), which entered into force on 24 October 1998 (Art 3 of the Directive).

<sup>40</sup> (1989) 12 EHRR 36.

in question is “sensitive.”<sup>41</sup> The application of these Principles is limited to the use of that data by the authority and is therefore separate from the right of access to that data by the individual.

- B.32 Guidance on the Act has been produced both by the Data Protection Commissioner and central government. Section 51(1) imposes a duty on the Data Commissioner to promote good practice under the Act, who has produced legal guidance to that end.<sup>42</sup> The Department of Health has produced guidance which addresses the issues surrounding sharing of data between authorities in the context of social services,<sup>43</sup> and other departments have similar summaries of the Act’s impact on their websites.
- B.33 The Data Protection Act currently applies to automated data, data forming a filing system, health, educational and public records.<sup>44</sup> The Freedom of Information Act 2000 will extend the scope of the Data Protection Act 1998 to all recorded information held by a public authority from January 2005.<sup>45</sup>
- B.34 The definition of data, prior to 2005, will not include transcripts or inquiry reports. This is because such information will not be “automated”<sup>46</sup> or incorporated into a filing system, due to the ad hoc nature of the inquiry. Neither will the transcripts of evidence, nor the inquiry itself, constitute health, educational or public records, even though these records may be referred to by those giving evidence to the inquiry.
- B.35 However, when the broader definition of personal data is engaged in January 2005, transcripts or reports of inquiries will be subject to the regime, as they will be recorded information held by the local authority.

### **The future regime**

- B.36 The right to information under the 1998 Act is limited to personal data held in relation to the individual. The individual must write to the authority requesting

<sup>41</sup> Sensitive data is defined as information as to the subject’s racial or ethnic origin; their political opinions; their religious or other similar beliefs; whether a member of a trade union; their physical or mental health or condition; their sexual life; the commission or alleged commission of any offence by the subject; or proceedings for any offence committed or alleged to have been committed by the subject and their disposal or any sentence: Data Protection Act 1998, s 2.

<sup>42</sup> The Data Commissioner, “Data Protection Act 1998: Legal Guidance” updated on the website [www.dataprotection.gov.uk](http://www.dataprotection.gov.uk)

<sup>43</sup> Department of Health, “Data Protection Act: Guidance to Social Services” March 2000.

<sup>44</sup> Data Protection Act 1998, s 1(1)(a)–(d) and s 68.

<sup>45</sup> The Freedom of Information Act 2000 s 68(1)(2)(a), Sched 8, Part III gives a default date of 30 November 2005 for the individual right of access to information to be implemented. However, the Lord Chancellor indicated, in response to a written question in the House of Lords, that the individual right of access would be in force in January 2005. See *Hansard* (HL) 13 November 2001, vol 628, cols 457–458.

<sup>46</sup> Within the meaning of Data Protection Act 1998, s 1(1)(a).

the information; if the authority has the information it must tell the individual and communicate the data to him or her in an intelligible manner.<sup>47</sup>

- B.37 If the material relates to a second, identifiable individual, the authority must not supply that information unless the second party has consented, or it is reasonable, in all the circumstances, to comply with the request without their consent.<sup>48</sup> In determining whether it is reasonable to supply the information, the authority must pay due regard to any duties of confidentiality owed to the other individual, the steps taken to secure consent, their capacity to give that consent, and any express refusal of consent by the other individual.<sup>49</sup>
- B.38 As the operation of the Act is limited to personal data, its provisions are unlikely to be of particular use to an individual who is seeking access to a report. The report of the inquiry will not concern itself solely with one particular individual.
- B.39 However, the Data Protection Act 1998 may be of use where an individual is seeking to gain access to a transcript of a witness to the inquiry. If the individual gave evidence to the inquiry, which related only to him, that will be personal data held in relation to him; hence, subject to the exemptions discussed below, it must be communicated to him. Similarly, if an individual sought access to a transcript of someone else's evidence which referred solely to the individual, this would be personal data about the individual to which he would have a right of access.
- B.40 Where the evidence given relates to a second, identifiable person, then disclosure is not automatic. If a recipient of a service provided by the authority merely gave evidence about his personal circumstances, this would, subject to the exceptions below, be information that the individual had a right of access to. But if the individual gave evidence which identified, for example, particular social workers, then the authority will have to exercise its discretion in deciding whether to disclose the information.
- B.41 If the evidence was given by another person, and referred not only to the individual seeking the information but referred as well to identifiable other people, then their consent would need to be obtained. In the absence of consent, the authority will have to weigh the factors set out in paragraph B.37 above in order to determine whether or not the data is communicable.
- B.42 One of the key factors in deciding whether or not to disclose the transcript will be any duties of confidentiality owed to the individual. Therefore if the inquiry guaranteed to the witnesses that the information provided would be treated as confidential, then this duty would weigh against disclosure to the individual. The reason why we believe many local authority ad hoc inquiries receive evidence in private is to guarantee confidentiality to the witnesses. Thus it is likely that the

<sup>47</sup> Data Protection Act 1998, s 7(1).

<sup>48</sup> Data Protection Act 1998, s 7(4).

<sup>49</sup> *Ibid*, s 7(6).

authority can refuse to disclose the information where doing so would undermine the guarantee of confidentiality given to witnesses.

### **Exemptions**

B.43 Even if the individual does have a prima facie right to the data, the broad obligation to communicate the data is subject to limitation. Part IV of the Data Protection Act 1998 lists the categories of excluded matters. The exemptions are:

- (1) national security;<sup>50</sup>
- (2) crime and taxation;<sup>51</sup>
- (3) health, education and social work;<sup>52</sup>
- (4) regulatory activity;<sup>53</sup>
- (5) journalism, literature and art;<sup>54</sup>
- (6) research, history and statistics;<sup>55</sup>
- (7) Parliamentary privilege;<sup>56</sup>
- (8) domestic purposes.<sup>57</sup>

#### HEALTH, EDUCATION AND SOCIAL WORK

B.44 The most relevant category of exemptions for our purposes is the health, education and social work exemption. Section 30 enables Orders to be made which remove the duty to disclose information to an individual.<sup>58</sup> Three Orders have been made under section 30.<sup>59</sup>

B.45 Under the Health Order, there is no duty to disclose information where the information is a report or other evidence to be supplied to a court for the purposes of health, wardship or childcare proceedings, such as care proceedings

<sup>50</sup> Data Protection Act 1998, s 28.

<sup>51</sup> *Ibid*, s 29.

<sup>52</sup> *Ibid*, s 30.

<sup>53</sup> *Ibid*, s 31.

<sup>54</sup> *Ibid*, s 32.

<sup>55</sup> *Ibid*, s 33.

<sup>56</sup> *Ibid*, s 35A.

<sup>57</sup> *Ibid*, s 36.

<sup>58</sup> *Ibid*, ss 28–36.

<sup>59</sup> The Data Protection (Subject Access Modification) (Health) Order 2000 SI 2000 No 413; The Data Protection (Subject Access Modification) (Education) Order 2000 SI 2000 No 414; The Data Protection (Subject Access Modification) (Social Work) Order 2000 SI 2000 No 415.

under the Children Act 1989.<sup>60</sup> In addition, where disclosure is likely to cause serious harm to the physical or mental health or condition of the individual, or of any other person, the information will not be divulged.<sup>61</sup> The Education Order exempts similar material from the disclosure obligation.<sup>62</sup>

- B.46 The Social Work Order exempts from disclosure data held by a local authority in connection with its social services functions, and data held in the exercise of other functions but obtained or consisting of information obtained in connection with any of those functions.<sup>63</sup> Hence any data that is collected by the authority in pursuance of its social services functions, even if it is personal to the individual, is not to be disclosed under the Data Protection Act.
- B.47 In addition to the specific power to make regulations under section 30, section 67 of the Data Protection Act 1998 confers a general power to make further orders under the Act. The Data Protection (Miscellaneous Subject Access Exemptions) Order 2000<sup>64</sup> was enacted under this power and exempts certain further categories of record from the right of access provisions. These are: human fertilisation and embryology information in the United Kingdom; information contained in adoption and parental order records and reports, and statements and records of the special educational needs of children in England or Wales.

#### REGULATORY ACTIVITY

- B.48 Under the regulatory exemption,<sup>65</sup> information need not be disclosed where it is likely to prejudice the proper discharge of functions which are designed to protect certain groups. A relevant function is defined as:
- (1) any function conferred on any person by or under any enactment,
  - (2) any function of the Crown, a Minister of the Crown or a government department, or
  - (3) any other function which is of a public nature and is exercised in the public interest.<sup>66</sup>
- B.49 Hence where the local authority is charged with a function exercised in the public interest, which is designed to protect certain groups, and disclosure of the personal data would prejudice this, the material need not be disclosed. Obviously this may overlap with the Orders made under section 30.

<sup>60</sup> SI 2000 No 413, para 4(2).

<sup>61</sup> SI 2000 No 413, para 5(1).

<sup>62</sup> SI 2000 No 414, paras 4(2), 5(1).

<sup>63</sup> SI 2000 No 415, paras 4, 5(1), Sched 1 para 1(a).

<sup>64</sup> The Data Protection (Miscellaneous Subject Access Exemptions) Order 2000 SI 2000 No 419.

<sup>65</sup> Data Protection Act 1998, s 31.

<sup>66</sup> *Ibid*, s 31(3).

## **Defamation**

- B.50 There is no explicit mention of any defence to a defamation action in the Data Protection Act. However, paragraph 5 of Part I Schedule 1 to the Defamation Act 1996 grants qualified privilege to a fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.
- B.51 Thus, where a communication is made in accordance with the Act, the transmission of that copy of the data, so long as it is fair and accurate, will benefit from a defence of qualified privilege. This will apply notwithstanding the lack of any explicit mention of qualified privilege as a defence to defamation in the Data Protection Act itself.

## **FREEDOM OF INFORMATION ACT 2000**

- B.52 From January 2005, members of the public will be able to request that a local authority communicate to them any information in its possession.<sup>67</sup> "Information" is defined as "information recorded in any form."<sup>68</sup> Where information is personal in nature, access to that information will be governed by the Data Protection regime.<sup>69</sup> A refusal to transmit the information will be reviewed by the Information Commissioner,<sup>70</sup> with a right of appeal to the Information Tribunal.<sup>71</sup>
- B.53 Reports and transcripts will not be communicated at all if the transmission of the information would constitute an actionable breach of confidence.<sup>72</sup> Hence where guarantees of confidentiality have been given to witnesses, the information must not be divulged where the common law duty of confidentiality is engaged.<sup>73</sup> This exemption is inapplicable where there have been no such guarantees or the common law duty of confidentiality has not been engaged.<sup>74</sup>
- B.54 Public access to the report may be withheld if the report is intended for future publication where the public interest in withholding the information is greater than the public interest in granting immediate access.<sup>75</sup> This is likely to be applicable where the publication of the report is timed to coincide with press releases and any responses to the report's findings. Birkinshaw comments that

<sup>67</sup> Freedom of Information Act 2000, s 1(1).

<sup>68</sup> *Ibid*, s 84.

<sup>69</sup> Freedom of Information Act 2000, s 40.

<sup>70</sup> *Ibid*, s 50.

<sup>71</sup> *Ibid*, s 57.

<sup>72</sup> *Ibid*, s 41(1).

<sup>73</sup> P Birkinshaw, *Government and Information: the Law relating to Access, Disclosure and their Regulation* (2nd ed 2001) p 35.

<sup>74</sup> See above, paras 5.4 – 5.7 of the consultation paper.

<sup>75</sup> Freedom of Information Act 2000, s 2(1)(b) and s 22.

“This is a useful device to prevent access to information where a matter is under internal investigation and report, and eventual publication”.<sup>76</sup>

- B.55 Public access to reports and transcripts may be withheld if the transmission of the information would endanger the physical or mental health, or safety of any individual;<sup>77</sup> the material is legally privileged;<sup>78</sup> or disclosure would prejudice the commercial interests of a local authority-controlled company;<sup>79</sup> and, with due regard to all the circumstances of the case, the public interest in withholding the information outweighs the public interest in disclosing the information.<sup>80</sup>
- B.56 Where the subject-matter is particularly sensitive, it will be more likely that the public interest in withholding the information will be satisfied. It is envisaged that the exemptions of legally privileged information and trade secrets will not be applicable as often as the health and safety category.
- B.57 In any event, the decision on whether or not to disclose the information may be reviewed by the Information Commissioner, with a further right of appeal to the Information Tribunal.<sup>81</sup>

### **Defamation**

- B.58 Section 79 of the Freedom of Information Act 2000 states that

Where any information communicated by a public authority to a person (“the applicant”) under section 1 was supplied to the public authority by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice.

- B.59 Thus any communication made under the Freedom of Information Act 2000 will benefit from qualified privilege to a defamation action. This provision states explicitly, in the context of the Act, the effect of paragraph 5 Schedule 1 to the Defamation Act 1996.
- B.60 Hence, where an individual has a right of access to certain information under the Data Protection Act 1998, or the Freedom of Information Act 2000 the authority could not rely on the Schedule 12A exemptions. This ties in with section 78 of the Freedom of Information Act 2000,<sup>82</sup> which prevents the 2000 Act from limiting existing rights of access under other enactments.

<sup>76</sup> P Birkinshaw, *Government and Information: the Law relating to Access, Disclosure and their Regulation* (2nd ed 2001) p 23.

<sup>77</sup> Freedom of Information Act 2000, s 30.

<sup>78</sup> *Ibid*, s 42.

<sup>79</sup> *Ibid*, s 43.

<sup>80</sup> *Ibid*, s 2(1)(b).

<sup>81</sup> The procedure regulating appeals and enforcement is governed by Parts IV and V of the Freedom of Information Act 2000.

<sup>82</sup> Section 78 of the Freedom of Information Act 2000 states “Nothing in this Act is to be taken to limit the powers of a public authority to disclose information held by it.”