

## **Guidance on Section 5 of the Defamation Act 2013 and complaints about material posted on websites**

### **Introduction**

1. The core aim underlying the Defamation Act 2013 is to rebalance the law on defamation to provide more effective protection for freedom of speech while ensuring that people who have been defamed are able to protect their reputation. In accordance with this aim, Section 5 of the Act creates a new defence to an action for defamation brought against the operator of a website hosting user-generated content where the action is brought in respect of a statement posted on the website.
2. The defence applies if the website operator can show that it did not post the statement on the website. However, the defence is defeated if the person bringing the claim (the claimant) can show:
  - that he or she did not have sufficient information to bring legal proceedings against the person who posted the statement;
  - that he or she gave the operator a notice of complaint in relation to the statement; and
  - that the operator failed to respond to that notice in accordance with the procedure set out in Regulations to be made by the Secretary of State for Justice.

The defence is also defeated if the claimant can show that the operator acted with malice in relation to the posting of the statement.

3. This guidance provides information on what has to be included in a Notice of Complaint and the process to be followed by website operators receiving a Notice of Complaint as set out in the Defamation (Operators of Websites) Regulations 2013. It is intended to assist complainants, posters of user-generated content and website operators in using the new process.
4. Where a complainant already has sufficient information in relation to the identity and contact details of the poster to bring proceedings against him or her, the website operator will have a defence to the defamation action. In that case it will still be open to the complainant to resolve the complaint direct with the poster (either by agreement or through legal proceedings if necessary). In this situation, there is no need for the complainant to use the section 5 process.
5. There is no obligation on the website operator to follow the process set out in the Regulations. On receipt of a Notice of Complaint, the operator can still choose to remove the posting straight away (or at any point during the process), or to allow it to remain posted. In those cases the section 5 defence will not be available to the operator and it will remain at risk of being sued by the complainant, although it may be able to defend the defamation action on other grounds.
6. This process reflects the Government's view that disputes should be resolved directly between the complainant and the poster where possible. It aims to

support freedom of expression by giving the poster an opportunity to express his or her views. It also aims to enable complainants to protect their reputation by resolving matters with the person who is responsible for the defamatory posting where they can be identified, while ensuring that material is removed where the poster cannot be identified or is unwilling to engage in the process. The Government believes that this strikes a fair balance between all the interests involved.

7. There is no requirement on anyone involved to seek legal advice when following the process, and it is designed to be as straightforward as possible for people to use. However, it is open to anyone involved to seek legal advice at any stage should they wish to do so.

### **Details of section 5 process**

#### **Stage 1 – Notice of Complaint [Regulation 2 (and section 5(6) (a) to (c) of the Act]**

8. Where the complainant does not have sufficient information to identify the poster, he or she can send a Notice of Complaint to the operator of the website on which the allegedly defamatory posting has been published. The Government encourages operators to set up and publicise a designated email address for this purpose as a matter of good practice.
9. The Notice of Complaint must contain the following information:
  - The name of the complainant and the e-mail address at which he or she can be contacted
  - Where on the website the statement complained of was posted
  - What the statement complained of says and why it is defamatory of the complainant
  - What meaning the complainant attributes to the statement complained of
  - The aspects of the statement which the complainant believes are factually inaccurate or opinions not supported by fact
  - Confirmation that the complainant does not have sufficient information about the person who posted the statement to bring proceedings against that person
  - Confirmation of whether the complainant consents to his or her name and/or email address being provided to the poster

#### **Guidance on specific points in the above list**

- Where on the website the statement complained of was posted
10. This should provide sufficient information to direct the operator to where the posting can be found (for example a Uniform Resource Locator (URL)). Where more than one statement is being complained about, each should be identified and the location of each provided. To keep the defence, an operator only has to comply with the process in relation to statements in the locations identified in the Notice of Complaint.

- What the statement complained of says and why it is defamatory of the complainant
11. This should provide an explanation of the reasons why the complainant thinks the statement is defamatory of him or her. The courts have used a range of tests in deciding what is defamatory (for example, whether the material “tends to lower the claimant in the estimation of right-thinking members of society generally”), but broadly speaking the complainant should focus on explaining the harm that the statement has caused or is likely to cause to his or her reputation. Section 1 of the Defamation Act 2013 requires that for a statement to be defamatory the level of harm caused or likely to be caused must be serious (and in the case of a body that trades for profit, the harm caused or likely to be caused must amount to serious financial loss).
- What meaning the complainant attributes to the statement complained of, and the aspects which the complainant believes are factually inaccurate or are opinions not supported by fact
12. This information is intended to enable the poster to assess whether he or she agrees that the statement is, or might be, defamatory and to reach an informed decision on how to respond. The complainant need not provide detailed evidence to support his or her position (this would be a matter for any subsequent legal proceedings).
- Confirmation that the complainant does not have sufficient information about the person who posted the statement to bring proceedings against that person
13. This provision simply requires the complainant to confirm that he or she does not have sufficient information to bring proceedings (for example the poster’s name and postal address). It is not necessary for the complainant to set out in detail any steps he or she has taken to identify the poster or why this has not been possible (in the event that the complainant subsequently decides to bring proceedings against an operator which fails to comply with the process, this may be a matter on which the court will require evidence).
- Confirmation of whether the complainant consents to his or her name and/or email address being provided to the poster
14. This provision has been included as the complainant may not wish these details to be released to the poster.

#### Defective Notices of Complaint [Regulation 4]

15. The onus rests with the complainant to ensure that the Notice of Complaint contains the information set out above, and an operator is entitled to reject it if it does not do so.
16. Where an operator rejects a Notice of Complaint, to keep the defence it must inform the complainant in writing that the notice does not comply with the

above requirements within 48 hours of receiving it (not including non-business days – see guidance at Stage 2 below). The requirement to notify the complainant in writing includes notification by e-mail or private messaging.

17. The operator must also tell the complainant what the requirements are for a valid Notice of Complaint (ie the items set out at the bullet points above), so that the complainant can reconsider the contents of the notice and submit it again. However, the operator is not required to tell the complainant what is wrong with the notice that he or she has sent.
18. If a complainant considers that an operator has wrongly rejected a Notice of Complaint, it would be open to them to bring proceedings against the operator on the basis that the operator had failed to follow the process and had thereby forfeited the section 5 defence. The question of whether the notice was or was not valid would then be a matter for the court to decide in those proceedings.

### **Stage 2 – action required of operator on receipt of a valid notice of complaint**

19. On receipt of a valid Notice of Complaint, to keep the defence the operator must contact the person who posted the statement complained of within 48 hours. This time period does not include any time falling on a non-business day in England and Wales (ie Saturday, Sunday, Good Friday, Christmas Day or a Bank Holiday). [Regulation 1(3)]
20. For example, if a Notice of Complaint was received at 1100 on a Tuesday, the 48 hour period would end at 1100 on the Thursday of that week. If the Notice was received at 1100 on a Friday, the 48 hour period would end at 1100 on the following Tuesday (as Saturday and Sunday would be discounted).
21. If a complainant brings proceedings against an operator on the basis that it has not complied with the process by failing to meet this or any other of the time limits involved, the court has a discretion to waive the time limit (and hence allow the operator the section 5 defence) if it considers it to be in the interests of justice to do so. [Regulation 5]

### **Contents of notification from operator to poster [Paragraph 1 of Schedule]**

22. The notification from the operator to the poster must be in writing (this requirement is satisfied if the notification is sent by private electronic communications eg e-mail or private e-messaging).
23. The notification must contain the following information:
  - A copy of the Notice of Complaint (altered to conceal the complainant’s name and address if the complainant has indicated that he or she does not wish this to be released to the poster)
  - Notification that the statement complained of may be removed from the locations on the website specified in the Notice of Complaint unless the operator receives a response in writing from the poster including the

information set out in the next bullet point, by midnight at the end of the 5<sup>th</sup> day after the day on which the Notice of Complaint was sent.

- The notification must indicate that the statement may be removed unless the poster:
  - informs the operator whether or not he or she wishes the statement complained of to be removed from the locations on the website specified in the Notice of Complaint
  - (if the poster does not wish the statement to be removed) provides the operator with his or her full name and details of the postal address at which he or she resides or carries on business and
  - indicates whether he or she consents to the operator sending these details to the complainant
- Notification that, where the poster does not consent to the operator sending his or her contact details to the complainant, the operator will not release them under the section 5 process and will only release them where ordered to do so by a court

#### Guidance on specific points in the above list

- A copy of the Notice of Complaint
24. The operator will need to make appropriate redactions if the complainant has asked for his or her contact details not to be given to the poster.
- Notification that the statement complained of may be removed from the locations on the website specified in the Notice of Complaint unless the operator receives a response in writing from the poster setting out the information below, by midnight at the end of the 5<sup>th</sup> day after the day on which the Notice of Complaint was sent.
25. For example, if an operator sends a Notice of Complaint at 1100 on a Thursday, the poster would have until midnight on the following Tuesday (ie 5 full days not including the day on which the notification was sent). The provision excluding non-business days does not apply to this period, as generally speaking it is unlikely that the poster will be subject to the constraints that may apply to the operator.
26. The operator must make clear to the poster exactly when the time period for him or her to respond expires (for example “at midnight on Tuesday 6 August 2013”). The requirement for the poster to respond in writing includes by e-mail or private messaging.
- The notification must indicate that the statement may be removed unless the poster:
    - informs the operator whether or not he or she wishes the statement complained of to be removed from the locations on the website specified in the Notice of Complaint
    - (if the poster does not wish the statement to be removed) provides the operator with his or her full name and details of the postal address at which he or she resides or carries on business and

- indicates whether he or she consents to the operator sending these details to the complainant
  - Notification that, where the poster does not consent to the operator sending his or her contact details to the complainant, the operator will not release them unless ordered to do so by a court
27. The purpose of asking for the poster's name and postal address is so that the complainant is able to resolve the complaint direct with the poster (through legal proceedings if necessary). However, the poster may have a valid reason for not wanting his or her contact details to be released to the complainant (for example where the poster is a whistleblower or is concerned that the complainant may use the information improperly), and so unless the poster consents a court order is required.
28. There may be instances where the operator already has a name and address for the poster. However, in these circumstances the operator should still ask the poster to provide the relevant details, and the poster must again provide them. This is to avoid any possible difficulty that may arise eg from inaccurate or out of date details being held.

Notification from operator to complainant [Paragraph 3 of Schedule]

29. To keep the defence, the operator must inform the complainant in writing within 48 hours of receiving the Notice of Complaint that it has received the Notice and that it has notified the poster in accordance with the above requirements.
30. As noted above, this time period does not include any time falling on a non-business day. The requirement to notify in writing includes by e-mail or other private e-messaging.

Action where operator is unable to contact poster [Paragraph 2 of Schedule]

31. If the operator does not have an e-mail address or private messaging contact (or similar) for the poster then, to keep the defence, it must remove the statement complained of from the locations on the website specified in the Notice of Complaint, and notify the complainant that this has been done within 48 hours of receipt of the Notice.
32. As noted above, this time period does not include any time falling on a non-business day.

**Stage 3 – Poster's response to the operator**

33. There are five different situations that can arise in relation to the poster's response:
- The poster fails to reply to the operator within the specified time period

- The poster replies to the operator within the specified time period indicating that he or she wishes the statement complained of to be removed
- The poster replies to the operator within the specified time period but fails to provide the required information
- The poster replies to the operator within the specified time period indicating that he or she does not wish the statement complained of to be removed, and consenting to the operator sending his or her contact details to the complainant
- The poster replies to the operator within the specified time period indicating that he or she does not wish the statement complained of to be removed, and refusing to consent to the operator sending his or her contact details to the complainant.

34. The action required of the operator in each of these situations is as follows:

The poster fails to reply to the operator within the specified time period [Paragraph 4 of Schedule]

35. If the poster fails to respond within the specified time period (ie by midnight at the end of the 5<sup>th</sup> day after the day on which the Notice of Complaint was forwarded to the poster), to keep the defence, the operator must remove the statement from the locations on the website specified in the Notice of Complaint within 48 hours of the end of that period.
36. The operator must also within the same time period inform the complainant in writing that this has been done. As noted above, this time period does not include any time falling on a non-business day. The requirement to notify in writing includes by e-mail or private messaging.

The poster replies to the operator within the specified time period indicating that he or she wishes the statement complained of to be removed [Paragraph 6 of Schedule]

37. Where the poster replies agreeing to removal of the statement, to keep the defence the operator must remove the statement from the locations on the website specified in the Notice of Complaint within 48 hours of receiving the poster's response.
38. The operator must also within the same time period inform the complainant in writing that this has been done. As noted above, this time period does not include any time falling on a non-business day. The requirement to notify in writing includes by e-mail or private messaging.
39. Where the poster agrees to removal of the statement, he or she does not have to provide identity and contact details to the operator. In this situation it may be open to the complainant to pursue an action for damages against the poster, seeking the poster's identity by other means.

The poster replies to the operator within the specified time period but fails to provide the required information [Paragraph 5 of Schedule]

40. If the poster replies within the specified time period (ie by midnight at the end of the 5<sup>th</sup> day after the day on which the Notice of Complaint was forwarded to the poster), but does not provide all the information requested – ie a) whether he or she wishes the statement complained of to be removed, b) (if he or she does not wish the statement to be removed) his or her full name and details of the postal address at which he or she resides or carries on business, and c) whether he or she consents to the operator sending those details to the complainant – then, to keep the defence, the operator must remove the statement from the locations on the website specified in the Notice of Complaint within 48 hours of receiving the poster’s response.
41. The operator must also remove the statement if it considers that the name and address provided by the poster are obviously false. This does not require the operator to carry out formal checks on the validity of the information provided, but will involve it making a judgement as to whether it is obviously false. In the event that a complainant brings a claim against an operator on the basis that it has failed to comply with the process in these circumstances, it will be a matter for the court to decide whether a reasonable operator would have considered the name or postal address provided by the poster to be obviously false.
42. To keep the defence, the operator must also within the same time period (48 hours) inform the complainant in writing that this has been done. As noted above, this time period does not include any time falling on a non-business day. The requirement to notify in writing includes by e-mail or private messaging.

The poster replies to the operator within the specified time period indicating that he or she does not wish the statement complained of to be removed, and consenting to the operator sending his or her contact details to the complainant [Paragraph 7 of Schedule]

43. If the poster does not wish the statement to be removed, provides the required contact details, and agrees to these being sent to the complainant, then, to keep the defence, the operator must contact the complainant in writing within 48 hours of receiving the poster’s response. This communication must inform the complainant a) that the poster does not wish the statement to be removed, b) that it has not been removed from the locations on the website specified in the Notice of Complaint, and c) provide the contact details given by the poster.
44. As noted above, this time period does not include any time falling on a non-business day. The requirement to notify in writing includes by e-mail or private messaging.
45. In this situation it is then for the complainant to engage with the poster direct. It is open to the operator to continue to assist the complainant if it chooses to

do so, but whether it does so or not will not affect whether the defence under section 5 can be established.

The poster replies to the operator within the specified time period indicating that he or she does not wish the statement complained of to be removed, and refusing to consent to release of his or her contact details to the complainant. [Paragraph 7 of Schedule]

46. If the poster does not wish the statement to be removed and provides the required contact details, but does not agree to these being sent to the complainant, then, to keep the defence, the operator must contact the complainant in writing within 48 hours of receiving the poster's response. This communication must inform the complainant a) that the poster does not wish the statement to be removed, b) that it has not been removed from the locations on the website specified in the Notice of Complaint, and c) that the poster has not consented to the release of his or her contact details.
47. As noted above, this time period does not include any time falling on a non-business day. The requirement to notify in writing includes by e-mail or private messaging.
48. In this situation, if the complainant wishes to take further action it may be open to him or her to seek a court order requiring the operator to release the poster's contact details to the complainant. If an operator is served with notice of such an application, it is encouraged as a matter of good practice to inform the poster of this.

Additional information provided by poster

49. If the poster chooses to provide further information or comment in his or her response to the operator in addition to what is required under the Regulations, there is no obligation for the operator to pass this to the complainant. However, it is open to the operator to do so if it wishes.

### **Other issues**

Persistent reposting of the same or substantially the same material [Paragraph 8 of Schedule]

50. Where a statement has been removed following a Notice of Complaint, and the poster reposts the same or substantially the same material on the same website, the complainant must submit a further Notice of Complaint.
51. On the first such occasion, the Section 5 process applies and, to keep the defence, the operator should deal with the Notice in accordance with the steps set out above. This will give the poster an opportunity to engage with the process and express a view in circumstances where, for example, he or she has not been aware of the original Notice (for example by being on holiday), or where new information has come to light which he or she considers justifies the original statement.

52. On the second or any subsequent occasion on which the same or substantially the same statement is reposted on the same website, to keep the defence, the operator must remove the statement within 48 hours of receiving the Notice of Complaint. This will ensure that the complainant is not forced to follow the process repeatedly in situations where the poster is persistently reposting material. As noted above, this time period does not include any time falling on a non-business day.
53. The onus is on the complainant when sending a Notice of Complaint in these circumstances to inform the operator that a Notice relating to the statement has been sent on two or more previous occasions. If the complainant does not do this, there is no requirement for the operator to check the position.
54. Where the complainant does inform the operator that a Notice relating to the statement has been sent on two or more occasions, the operator will need to check that the statement complained of conveys the same or substantially the same imputation as that contained in each of the statements which were the subject of the previous Notices of Complaint. The operator is required to remove statements which convey substantially the same imputation in order to address situations where the poster changes the wording of the statement so that it is not identical, but the defamatory content is the same (for example statements that “A is a thief” and “A stole my money” both convey substantially the same defamatory imputation whereas statements that “A is a thief” and “A is a murderer” do not). It may not always be straightforward to determine whether the imputation made by the new statement is substantially the same as that made previously and in such cases the operator will need to exercise its judgement.
55. These provisions only apply where the same poster posts the same or substantially the same material on the same website. In circumstances where a different poster posts the same material on the website, or where the original poster posts the same material on a different website, the operator should follow the full section 5 process in order to keep the defence.