



Ministry
of Justice

Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations

INTRODUCTION

1. The purpose of the Defamation Act 2013 is to rebalance the law on defamation to provide more effective protection for freedom of speech while at the same time 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 Section 5 defence applies if the operator can show that the operator did not post the statement on the website. However, the defence is defeated if the person bringing the claim (the claimant) can show:
 - that it was not possible for the claimant to identify the person who posted the statement (that is, the claimant did not have sufficient information to bring legal proceedings against the person);
 - that the claimant 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 the Defamation (Operators of Websites) Regulations 2013.
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 who wish to use the Section 5 defence. It explains the provisions which are set out in section 5 of the Act and the above Regulations. It is intended to provide assistance in using the new process to:
 - A person making a complaint ("the complainant"),
 - A person who has posted a statement which is the subject of a complaint ("the poster") and
 - An operator of a website where a statement which is the subject of a complaint has been posted ("the operator").
4. Where a complainant already has sufficient information about the identity and contact details of the poster to bring proceedings against the poster, the operator will have a defence to any defamation action irrespective of whether the complainant sends a Notice of Complaint or not.
5. Section 5 only relates to the operators of websites hosting user-generated content, and does not affect other internet services such as search engines, services that simply transmit information or services that provide access to a communications network. There is no obligation on the operator to follow the process set out in the Regulations. On receipt of a Notice of Complaint, the operator can choose to remove the posting at any point, or to allow it to remain posted. If the operator chooses not to follow the process, the Section 5 defence will not be available to the operator. However, this does not affect the availability of any other defences which may apply.
6. The process is designed to be as straightforward as possible for people to use, and therefore there is no requirement on anyone involved to seek legal advice when following the process. However, anyone involved may seek legal advice at any stage if they wish.

The Section 5 defence will also be defeated if the claimant can show that the operator acted with malice in relation to the posting of the statement, but is not defeated just because the operator moderates statements posted on the website.

DETAILS OF SECTION 5 PROCESS

Stage 1 – Notice of Complaint

7. A Notice of Complaint should be sent 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, which we encourage complainants to use. Operators may also wish to provide an online form that complainants can use to submit a Notice of Complaint.

BOX A

CONTENTS OF NOTICE OF COMPLAINT

The Notice of Complaint must contain the following information:

- The name of the complainant and an e-mail address at which the complainant 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 Box A

- Where on the website the statement complained of was posted
8. This should provide sufficient information to direct the operator to where the posting can be found. Whenever possible, complainants are encouraged to provide the Uniform Resource Locator (URL) of the webpage where the statement appears, but other information may also be included. Where more than one statement is being complained about, each should be identified and the location of each provided. To keep the Section 5 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
9. This should provide an explanation of the reasons why the complainant thinks the statement is defamatory of the complainant. 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 to the reputation of the claimant must be serious, and in the case of a body that trades for profit, the harm caused or likely to be caused to that body 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
10. The complainant need not provide detailed evidence to support what is said, but the information should be sufficient to enable the poster to assess whether the poster agrees that the statement is, or might be, defamatory and to reach an informed decision on how to respond.
- Confirmation that the complainant does not have sufficient information about the person who posted the statement to bring proceedings against that person
11. 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. This provision simply requires the complainant to confirm that the complainant does not have sufficient information about the poster to bring legal proceedings. However, in the event that the complainant subsequently brings defamation 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
12. This provision has been included because the complainant may not wish these details to be released to the poster.

Defective Notices of Complaint

13. It is the complainant's responsibility to ensure that the Notice of Complaint contains the information set out above, and an operator may reject it if it does not do so.
14. Where the operator rejects a Notice of Complaint, to keep the Section 5 defence the operator must inform the complainant in writing that the notice does not comply with the above requirements within 48 hours of receiving it. 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).
15. 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).
16. The time period begins to run from the point when the Notice of Complaint is received by the operator – ie when it arrives at the operator's e-mail address or other form of electronic inbox - whether or not this is within office hours. So for example if the Notice of Complaint was received at 2100 on a Monday, the 48 hour period would end at 2100 on the Wednesday of that week. Proof of receipt of a Notice of Complaint and the time when it was received would be a matter for evidence in any proceedings in which the operator relied on the Section 5 defence.
17. If a complainant brings proceedings against an operator for defamation and argues that the operator 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.
18. The requirement to notify the complainant in writing can be satisfied by notification by e-mail or another means of private electronic messaging.
19. Where the operator informs the complainant that, in the operator's opinion, the Notice of Complaint does not comply with the necessary requirements, the operator is not required to tell the complainant what is wrong with the Notice of Complaint that the complainant has sent. However, in order to keep the defence the operator must tell the complainant what the requirements are for a valid Notice of Complaint (that is the items set out in Box A above), so that the complainant can reconsider the contents of the notice and submit it again. If the operator wishes to tell the complainant what is wrong with the Notice of Complaint, it is open to them to do so.
20. If the complainant considers that an operator has wrongly rejected a Notice of Complaint, in addition to seeking a court order against the operator for disclosure of information identifying the poster, it is open to the complainant to bring proceedings against the operator for defamation and to argue that the operator had failed to follow the process and had thereby forfeited the Section 5 defence. The question of whether the Notice of Complaint was or was not valid would then be a matter for the court to decide in those proceedings, as would the consideration of whether there may be other defences available to the operator.

Stage 2 – action required of operator on receipt of a valid Notice of Complaint

21. 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).
22. If the operator is unable to contact the poster, for example because it does not have an e-mail address for the poster or cannot contact the poster by another means of private electronic messaging, then to keep the defence the operator must remove the statement complained of from the locations on the website specified in the Notice of Complaint, and inform the complainant that the statement has been removed within 48 hours of receipt of the Notice of Complaint. This time period does not include any time falling on a non-business day in England and Wales.
23. If the operator is able to contact the poster, it must send the following information to the poster. The communication from the operator to the poster must be in writing (this requirement is satisfied if the communication is sent by private electronic communications, for example e-mail or another means of private electronic messaging).

BOX B

CONTENTS OF COMMUNICATION FROM OPERATOR TO POSTER

The communication must contain the following information:

- A copy of the Notice of Complaint (altered to conceal the complainant's name and/or address if the complainant has indicated that the complainant 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 5th day after the day on which the Notice of Complaint was sent.
- The communication must indicate that the statement may be removed unless the poster:
 - informs the operator whether or not the poster 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 the poster's full name and details of the postal address at which the poster resides or carries on business and
 - indicates whether the poster consents to the operator sending these details to the complainant
- Notification that, where the poster does not consent to the operator sending the poster's contact details to the complainant, the operator will not release them to the complainant under the Section 5 process and will only release them where ordered to do so by a court

Guidance on specific points in Box B

- A copy of the Notice of Complaint
24. The operator will need to delete the complainant's name and/or address if the complainant has asked for this information 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 5th day after the day on which the Notice of Complaint was sent.
25. This time limit is midnight United Kingdom time. For example, if an operator sends a Notice of Complaint to a poster at 1100 on a Thursday, the time limit would expire at midnight in the United Kingdom 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.

26. The operator must make clear to the poster exactly when the time period for the poster to respond expires (for example "at midnight in the United Kingdom on Tuesday 21 January 2014"). The operator will only be required to treat the poster as having responded where the response is in writing (which includes by e-mail or another means of private electronic messaging).
- The notification must indicate that the statement may be removed unless the poster:
 - informs the operator whether or not the poster 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 the poster's full name and details of the postal address at which the poster resides or carries on business and
 - indicates whether the poster consents to the operator sending these details to the complainant
 - Notification that, where the poster does not consent to the operator sending the poster's contact details to the complainant, the operator will not release them to the complainant under the Section 5 process and will only release them where 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 directly with the poster, through legal proceedings if necessary. However, where the poster does not want his or her contact details to be released to the complainant a court order will be required before the operator is obliged to release these details to the complainant.
28. To avoid any possible difficulty that may arise from inaccurate or out of date details, even where the operator already has a name and address for the poster the operator should still ask the poster to provide the relevant details.

Notification from operator to complainant

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

BOX C

POSTER'S RESPONSE TO THE OPERATOR

There are five main 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 the poster 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 the poster does not wish the statement complained of to be removed, and consenting to the operator sending the poster's contact details to the complainant
- The poster replies to the operator within the specified time period indicating that the poster does not wish the statement complained of to be removed, and refusing to consent to the operator sending the poster's contact details to the complainant.

31. The action required of the operator in each of the situations in Box C is as follows:

The poster fails to reply to the operator within the specified time period

32. If the poster fails to respond within the specified time period (ie by midnight at the end of the 5th day after the day on which the operator contacted the poster in writing), 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.
33. If the operator is unable to remove the statement from a particular location because it has already been removed, then the operator is taken to have complied with the requirement to remove the statement and will keep the defence. However, if the poster has altered the statement but has not removed it, then to keep the defence the operator must remove the statement.
34. Within the same 48 hours, to keep the defence the operator must also inform the complainant in writing that the statement has been removed. This time period does not include any time falling on a non-business day in England and Wales. The requirement to inform the complainant in writing includes communication by e-mail or another means of private electronic messaging.

The poster replies to the operator within the specified time period indicating that the poster wishes the statement complained of to be removed

35. 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.
36. If the operator is unable to remove the statement from a particular location because it has already been removed, then the operator is taken to have complied with the requirement to remove the statement and will keep the defence. However, if the poster has altered the statement but has not removed it, then to keep the defence the operator must remove the statement.
37. Within the same 48 hours, to keep the defence the operator must also inform the complainant in writing that the statement has been removed. This time period does not include any time falling on a non-business day in England and Wales. The requirement to inform the complainant in writing includes communication by e-mail or another means of private electronic messaging.
38. Where the poster agrees to removal of the statement, the poster does not have to provide identity and contact details to the operator. However in this situation it may be open to the complainant to seek a court order for release of any identity and contact details for the poster that the operator already holds in order to pursue an action for damages against the poster.

The poster replies to the operator within the specified time period but fails to provide the required information

39. If the poster replies within the specified time period (ie by midnight in the United Kingdom at the end of the 5th 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 the poster wishes the statement complained of to be removed
 - b) If the poster does not wish the statement to be removed, the poster's full name and details of the postal address at which the poster resides or carries on business
 - c) whether the poster 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. The operator is not required to send any further communication to the poster.

40. If the operator is unable to remove the statement from a particular location because it has already been removed, then the operator is taken to have complied with the requirement to remove the statement and will keep the defence. However, if the poster has altered the statement but has not removed it, then to keep the defence the operator must remove the statement.
41. The operator must also remove the statement if the operator considers that the name and address provided by the poster are obviously false. This does not require the operator to carry out checks on the validity of the information provided, but will involve the operator making a judgement about whether it is obviously false.
42. In the event that a complainant brings proceedings against the operator for defamation and argues that the operator 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. Posters who are concerned that a website operator may consider their name to be obviously false may wish to consider providing evidence of their identity, although there is no obligation on them to do so.
43. Within 48 hours of receiving the poster's response, to keep the defence the operator must also inform the complainant in writing that the statement has been removed. This time period does not include any time falling on a non-business day in England and Wales. The requirement to inform the complainant in writing includes communication by e-mail or another means of private electronic messaging.

The poster replies to the operator within the specified time period indicating that the poster does not wish the statement complained of to be removed, and consenting to the operator sending the poster's contact details to the complainant

44. 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 the statement 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

45. This time period does not include any time falling on a non-business day in England and Wales. The requirement to inform the complainant in writing includes communication by e-mail or another means of private electronic messaging.
46. 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 the operator chooses to do so, but whether the operator does so or not will not affect whether the operator keeps the section 5 defence in any subsequent proceedings.

The poster replies to the operator within the specified time period indicating that the poster does not wish the statement complained of to be removed, and refusing to consent to the operator sending the poster's contact details to the complainant.

47. 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 the statement 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 the poster's contact details
48. This time period does not include any time falling on a non-business day in England and Wales. The requirement to notify in writing includes by e-mail or another means of private electronic messaging.
49. In this situation, if the complainant wishes to take further action it may be open to the complainant to seek a court order requiring the operator to release the poster's contact details to the complainant. An operator which is served with notice of such an application may wish to inform the poster of this, though this is not a requirement of the Regulations.

Reposting of material

Persistent reposting of the same or substantially the same material

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 of Complaint 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, the poster has not been aware of the original Notice of Complaint, or where new information has come to light which the poster considers justifies the original statement.
52. On the second or any subsequent occasion on which a statement has been removed and the poster reposts the same or substantially the same statement on the same website, to keep the defence the operator must remove the statement within 48 hours of receiving the Notice of Complaint from that complainant. This will ensure that the complainant is not forced to follow the process repeatedly in situations where the poster is persistently reposting material. This time period does not include any time falling on a non-business day in England and Wales.
53. When sending a Notice of Complaint in these circumstances it is the responsibility of the complainant to inform the operator that the complainant has sent a Notice of Complaint to the operator relating to the statement on two or more previous occasions. Complainants are encouraged to provide information which enables the operator to identify the previous Notices of Complaint.
54. If the operator is unable to remove the statement from a particular location because it has already been removed then the operator is taken to have complied with the requirement to remove the statement and will keep the defence. However, if the poster has altered the statement but has not removed it, then to keep the defence the operator must remove the statement.
55. Where the complainant informs the operator that the complainant has sent a Notice of Complaint relating to the statement to the operator 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.
56. 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.
57. These provisions only apply where the same poster posts the same or substantially the same material about the same complainant on the same website (this means a specific website operated by the operator, eg www.forum.co.uk). In circumstances where a different poster posts the same or substantially 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.

