EXPLANATORY MEMORANDUM TO

THE DEFAMATION (OPERATORS OF WEBSITES) REGULATIONS 2013

2013 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations make provision relating to the process to be followed by the operators of websites hosting user-generated content on receipt of a notice of complaint relating to allegedly defamatory material that has been posted on the website, if they wish to benefit from the defence provided by section 5 of the Defamation Act 2013 in an action for defamation.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Section 5 of the Defamation Act 2013 creates a new defence for an operator of a website where a defamation action is brought against it in respect of a statement posted on the website.

4.2 The defence applies if the operator can show that it did not post the statement on the website, but is defeated if 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.

4.3 This instrument makes provision about the contents of notices of complaint and sets out the process for the operator to follow in order to make use of the new defence.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 Lord McNally (Minister of State at the Ministry of Justice) has made the following statement regarding Human Rights:

In my view the provisions of the Defamation (Operators of Websites) Regulations 2013 are compatible with the Convention rights

7. Policy background

- What is being done and why

7.1 The purpose of the Defamation Act 2013 is to rebalance the law on defamation to provide more effective protection for freedom of speech while ensuring that people who have been defamed are able to protect their reputation. Among the provisions reflecting this aim, section 5 of the Act creates a new defence for website operators.

7.2 Under the existing law, a website operator hosting user-generated content can be sued in relation to defamatory content that is posted on the site. Defences may be available at common law or under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 (S.I. 2002/2012) and under section 1 of the Defamation Act 1996. However the current law can lead to website operators automatically removing material on receipt of a complaint to avoid the risk of being sued. This chills free speech, as it means that material which is not genuinely defamatory may often be removed from circulation. It also means that, where defamatory material is posted, action is usually taken against the operator rather than against the person who was actually responsible for posting the statement. Given the substantial growth of the internet and scope for user-generated material to be posted online, this potentially affects a wide and increasing amount of material.

7.3 Section 5 of the Act rebalances the law by providing additional protection for website operators in the form of a new defence in the circumstances set out in paragraph 4.2 above. The regulations set out what must be included in a notice of complaint and what the operator must do in response to it in order to retain its defence. It also sets out what the website operator is required to do when a notice is sent to a website operator in relation to a statement on its website which does not satisfy the requirements necessary for it to be regarded as a notice of complaint..

7.4 The process is not compulsory, and the operator can choose, outside of the process, whether to remove the material or to allow it to remain and seek to rely on other defences to the defamation action.

7.5 Where a complainant already has sufficient information in relation to the identity and contact details of the poster to bring legal proceedings against him or her, the website operator will have a defence to the defamation action without being required to rely on the procedure set out in the Schedule to these Regulations. In this situation, it will

be open to the complainant to resolve the complaint directly with the poster (either by agreement or through legal proceedings if necessary).

7.6 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.

- Consolidation

7.7 This instrument does not relate to or contain any material for consolidation.

8. Consultation outcome

8.1 The Government consulted on the policy underlying section 5 of the Act as part of the public consultation on the Draft Defamation Bill published in March 2011[1]. The consultation ran for 12 weeks, and a total of 129 responses were received, 86 of which answered the main question on this issue (Question 23 at page 54)[2]. Approximately three-quarters of those responses supported a change to the law to give greater protection to website operators. The consultation sought views on how this could best be achieved. The main options were an approach whereby the complainant would be required to obtain a court order for removal of the allegedly defamatory material before any obligation could be placed on the operator to remove it; and an approach involving the operator acting as a liaison point between the complainant and the person who had posted the material. The latter option was favoured by the majority of those supporting change, and formed the basis of the approach taken in section 5 of the Act.

8.2 Informal engagement took place with key stakeholders on the proposed contents of these Regulations during passage of the Act (formal consultation was not considered necessary given the full public consultation that had already taken place on the policy governing the Regulations and informal discussions on their content that had taken place with stakeholders). A total of 18 responses were received from a range of stakeholders including internet organisations, members of the legal profession representing both claimant and defendant interests, media bodies and non-governmental organisations.

8.3 Key issues raised in the responses were as follows:

[1] https://consult.justice.gov.uk/digital-communications/draft_defamation_bill/supporting_documents/draftdefamationbillconsultation.pdf
[2] https://consult.justice.gov.uk/digital-communications/draft_defamation_bill/results/draft-defemation-bill-consult-summary-responses.pdf

- Contents of communications (notice of complaint, communication from website operator to poster, and response from poster). There was substantial majority support for the proposed contents of these communications, and these are reflected in paragraph 2 of the Regulations and the Schedule. A number of suggestions were made for additions to each communication. The Government is concerned to ensure that the process is kept as simple and straightforward as possible for all those involved, and the suggested additions were not considered appropriate. However, where appropriate, certain of the points raised are addressed in the accompanying guidance (see section 9 below).

- Time limits. Mixed views were expressed on the time limits proposed for different actions. A significant number of responses argued that non-working days should not be included in calculating time limits for actions by a website operator, and this is reflected in Regulation 1(3). However, the time limit for action on receipt of a notice of complaint has been reduced from 72 hours to 48 hours to offset this change and meet the concern of other responses that the timescales should not be too long. In addition, the period given for the poster to respond to the notification from the website operator has been reduced and, rather than being 7 days, now concludes at the end of the 5th day after the day on which the notification was sent. In the light of the support of the great majority of responses, Regulation 5 gives the court discretion to waive time limits where it considers it in the interests of justice to do so.

- Defective notices. Views were sought on the proposal that responsibility should rest with the complainant to complete a notice of complaint in accordance with the requirements of section 5(6) of the Act and the Regulations, and that if a defective notice were submitted the operator should be required to inform the complainant that the notice was defective and tell them what is necessary in order for a notice to be valid, but should not be required to tell the complainant what is wrong with the notice in question. A small majority of responses agreed with this approach, on the basis that requiring the operator to guide the complainant would be unduly burdensome and could inadvertently lead to the operator giving legal advice. Others considered that the operator should give further information to the complainant on how the notice is deficient. On balance the Government considers that the proposed approach is fair and proportionate and that it should not be the role of the operator to give proactive guidance to the complainant. This is reflected in Regulation 4.

- Repeated postings. The Government proposed that on the first occasion that defamatory material about the complainant is reposted on the same website by the same poster, the website operator should follow the process in the Regulations and forward the notice of complaint to the poster, but that if the poster persists in reposting the same or substantially the same material on further occasions the operator should be required to remove it upon receipt of the notice of complaint. A majority agreed, although others considered that any reposting of material should be removed immediately. The Government believes that the proposed approach strikes a fair balance which gives the poster an opportunity on a first reposting to engage with the process and express a view in circumstances where, for example, he or she was not aware of the original notice of complaint, but which tackles

persistent reposting by immediate removal. This is reflected in paragraph 9 of the Schedule.

- False contact details. In view of the possibility that the poster might provide false contact details, we proposed that in the event that the details were obviously false, the website operator should be required to take down the posting in order to keep the defence. Mixed views were expressed on this proposal, and concerns raised over how it would be apparent in many cases that details were false. This is a difficult issue. On the one hand, allowing operators to accept whatever details are provided without any obligation to check them would reduce the protection for complainants, but on the other hand requiring the operator to carry out detailed checks to verify the information provided in all cases would be very burdensome and would complicate the process considerably. On balance the Government considers that a requirement to take down the posting where the details given are obviously false represents an appropriate compromise position, and this is reflected in paragraph 6(3) of the Schedule.

9. Guidance

9.1 The Ministry of Justice intends to publish guidance explaining the process contained in the Regulations to those directly affected – namely complainants, posters of material and website operators – when the provisions come into force, in order to assist them in understanding and following the new process. Copies of the latest draft of the guidance have been sent to the libraries of both Houses for information.

10. Impact

10.1 The impact on business, charities or voluntary bodies. There are significant difficulties with attempting to monetise the impacts of these Regulations. However, the main businesses affected will be those responsible for operating websites. Operators will incur additional staff costs of acting as a liaison poin, but will benefit from a clear process to follow to avoid liability. There will also be an impact on the legal profession as both defendants and claimants may choose to engage lawyers in respect of the section 5 process, but there may also be a cost for legal professionals who are no longer instructed to act in court proceedings if the process helps resolve issues more quickly. We do not expect there to be any significant impacts on charities or voluntary bodies, although organisations such as the Citizens Advice Bureau may advise parties involved in disputes.

10.2 The impact on the public sector is expected to be minimal. Public sector websites which host user-generated content will be able to benefit from the section 5 defence if, on receipt of a notice of complaint, they choose to follow the process set out in the Regulations.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk. This contains the relevant extracts from the Impact Assessment prepared prior to the passage of the Defamation Act 2013. The information contained therein remains up to date.

11. Regulating small business

11.1 The legislation contained in the Defamation Act 2013 and this instrument applies to small business. We consider that the policy reflected in this instrument is beneficial to business as it gives additional protection to website operators against the risk of being sued for defamation.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to ensure that the process is as straightforward and simple to operate as possible.

11.3 The basis for the final decision on what action to take to assist small business was that exempting small businesses from the Act as a whole or any part of it would have left a gap in the new legislation which would affect the overall balance of the law of defamation between freedom of expression and the protection of reputation both in relation to the remedies available to claimants and the defences available to defendants. In particular, website operators which are small businesses would not benefit from the greater degree of protection offered against the risk of being sued for defamation. A waiver of the micro-business exemption was therefore obtained for the Act to ensure businesses of all sizes are able to benefit.

12. Monitoring & review

12.1 The policy objective for this instrument is to provide a process for website operators to follow aimed at putting complainants in contact with the poster of allegedly defamatory material so that disputes can be resolved directly between the complainant and the poster where possible. The aim is for the process to be as straightforward and simple to operate as possible, while taking into account the need to ensure that a fair balance is struck between the interests of all the parties involved. It would be difficult to assess the extent to which any behavioural shifts which may occur in relation to defamatory material online may be attributable to this instrument. However, one measure of the instruments's effectiveness will be the extent to which website operators choose to use the process rather than remove material immediately on receipt of a complaint or allow it to remain and seek to rely on other defences.

12.2 The operation of section 5 and this instrument will be formally reviewed by the Ministry of Justice alongside other provisions of the Defamation Act 2013 within three to five years of the Act receiving Royal Assent on 25 April 2013 in accordance with the usual arrangements for post-legislative scrutiny. However, informal monitoring of the operation of the Regulations will take place in the meantime.

13. Contact

Anthony Jeeves at the Ministry of Justice Tel: 0203 334 3215 or email: anthony.jeeves@justice.gsi.gov.uk can answer any queries regarding the instrument.