

2013 - MoJ Consultation on draft Defamation Act Regulations

This is a joint response from Janet, operator of the UK's National Research and Education Network, and UCISA, the Universities and Colleges Information Systems Association whose members include nearly all the Higher Education Institutions in the UK

We welcome the opportunity to comment further on the proposed Regulations and Guidance under Clause 5 of the Defamation Bill. We believe that customer universities and colleges will be grateful for the opportunity these Regulations offer to have courts resolve future conflicts between their statutory duties to promote free speech and to protect reputation.

UCISA, the professional body for IT staff in higher education, and Janet, the UK's national research and education network and part of the Jisc group, seek to ensure that the higher and further education sectors receive high quality, cost effective services and collaborate on a range of activities, including this joint response.

Our comments consist of suggestions where we believe the current wording of the Guidance could be made clearer and questions about situations that do not appear to be covered by the current documentation. The latter may require changes to the Guidance or the Regulations.

Suggested Clarifications

FAQ.7 should state that a Notice of Complaint must say explicitly either that contact details may be disclosed or that they may not. If the Notice says nothing then the operator must return it as invalid rather than guessing the complainant's intention and risking making an unintended disclosure.

FAQ.15 should clarify that the repeat posting provisions apply from the second re-posting (i.e. the third complaint). The current wording of "if this occurs" is open to misinterpretation that "this" is the sending of a complaint, implying that the process is available from the first re-posting.

The Guidance should describe the process if the poster wishes to modify their posting to remove the defamatory meaning. The Regulations mean that in this case they still need to provide contact details to the operator or the post will be removed.

Situations not Covered

Removal by Poster

If the poster removes the posting themselves, either before or after receiving notice of a complaint, then, according to the Regulations, the operator appears likely to lose the s.5 defence, since the most likely paths through the process require that the “operator must ...remove” the posting (Schedule sections 2(2), 4(2), 5(2), 6(2), 8(2)). If the operator cannot remove the posting because the poster has already done so, the conditions for the defence cannot be achieved.

Removal by the poster also appears to prevent the repeat posting provisions from coming into effect since, according to Schedule section 8(1)(b) those only apply where “the operator has removed the statement”, not where the poster has done so. Paragraph 50 of the Guidance mis-quotes this Regulation wording as “has been removed”.

Duplicate/Repeat Complaints

We consider it very likely that complainants will send multiple copies of the same complaint. The experience of universities and colleges is that, even where an e-mail address is advertised for complaints, those complaining often send their message to as many addresses as they can find on the website and in Internet directories. The Regulations are unlikely to reduce this practice, as they give no guidance to either complainants or operators as to who is considered the “operator” of a site: for a blog is it the “owner”, their employer, or the organization on whose equipment the service is run? We are therefore concerned that Regulations and Guidance will prevent operators who receive multiple copies of complaints from handling them efficiently.

If the same complaint is sent by the same complainant about the same posting, either to multiple e-mail addresses or in rapid sequence, it appears that the operator who receives them must process all the Notices even if the time limits for the first complaint have not expired, if the first process has completed without removal of the post in accordance with paragraph 7 of the Schedule, or if the recipient knows that another “operator” is already dealing with the Notice.

If sufficient contact details are available to bring proceedings against the poster but a Notice of Complaint is nevertheless sent to the operator, paragraph 13 of the Guidance implies that the operator must nonetheless incur the full cost of processing the complaint if they wish to benefit from the defence.

We believe that these inefficiencies will create unnecessary additional costs for operators, and could even be used deliberately by complainants to overload an operator and make it more likely that they will remove a posting, contrary to the law’s intention.

Undeliverable Messages

If the operator’s notification to the poster, in accordance with section 1(1) of the Schedule, is returned as undeliverable (for example because their mailbox is full, or unreachable), this should be treated as an incomplete response under section 5, not a failure to respond under

section 4 or not having means of contacting the poster under section 2 (since the delivery failure may take more than 48 hours to be reported).

Finally, although we agree that failure to do so should not prejudice the operator's defence, we are likely to recommend to our customers that they should, as a matter of good practice, inform senders of incomplete or invalid complaints which part of their complaint did not comply with the law.

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