

DEFAMATION ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 4: Publication on matter of public interest

29. This section creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in *Reynolds v Times Newspapers*¹ and is intended to reflect the principles established in that case and in subsequent case law. *Subsection (1)* provides for the defence to be available in circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention in this provision is to reflect the existing common law as most recently set out in *Flood v Times Newspapers*². It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.
30. In relation to the first limb of this test, the section does not attempt to define what is meant by “the public interest”. However, this is a concept which is well-established in the English common law. It is made clear that the defence applies if the statement complained of “was, or formed part of, a statement on a matter of public interest” to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.
31. *Subsection (2)* requires the court, subject to subsections (3) and (4), to have regard to all the circumstances of the case in determining whether the defendant has shown the matters set out in subsection (1).
32. *Subsection (3)* is intended to encapsulate the core of the common law doctrine of “reportage” (which has been described by the courts as “a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper”³). In instances where this doctrine applies, the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture. In determining whether for the purposes of the section it was reasonable for the defendant to believe that publishing the statement was in the public interest, the court should disregard any failure on the part of a defendant to take steps to verify the truth of the imputation conveyed by the publication (which would include any failure of the defendant to seek the claimant’s views on the statement). This means that a defendant newspaper for example would not be prejudiced for a failure to verify where *subsection (3)* applies.

¹ [2001] 2 AC 127.

² [2012] UKSC 11. See, for example, the judgement of Lord Brown at 113.

³ Per Simon Brown in *Al-Fagih* [2001] EWCA Civ 1634.

*These notes refer to the Defamation Act 2013 (c.26)
which received Royal Assent on 25April 2013*

33. *Subsection (4)* requires the court, in considering whether the defendant's belief was reasonable, to make such allowance for editorial judgement as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of *Flood*, but is not limited to editors in the media context.
34. *Subsection (5)* makes clear for the avoidance of doubt that the defence provided by this section may be relied on irrespective of whether the statement complained of is one of fact or opinion.
35. *Subsection (6)* abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is intended essentially to codify the common law defence. While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied. It is expected the courts would take the existing case law into consideration where appropriate.