

DEFAMATION ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 3: Honest opinion

19. This section replaces the common law defence of fair comment¹ with a new defence of honest opinion. The section broadly reflects the current law while simplifying and clarifying certain elements, but does not include the current requirement for the opinion to be on a matter of public interest.
20. *Subsections (1) to (4)* provide for the defence to apply where the defendant can show that three conditions are met. These are condition 1: that the statement complained of was a statement of opinion; condition 2: that the statement complained of indicated, whether in general or specific terms, the basis of the opinion; and condition 3: that an honest person could have held the opinion on the basis of any fact which existed at the time the statement complained of was published or anything asserted to be a fact in a privileged statement published before the statement complained of.
21. Condition 1 (in *subsection (2)*) is intended to reflect the current law and embraces the requirement established in *Cheng v Tse Wai Chun Paul*² that the statement must be recognisable as comment as distinct from an imputation of fact. It is implicit in condition 1 that the assessment is on the basis of how the ordinary person would understand it. As an inference of fact is a form of opinion, this would be encompassed by the defence.
22. Condition 2 (in *subsection (3)*), reflects the test approved by the Supreme Court in *Joseph v Spiller*³ that “the comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based”. Condition 2 and Condition 3 (in *subsection (4)*) aim to simplify the law by providing a clear and straightforward test. This is intended to retain the broad principles of the current common law defence as to the necessary basis for the opinion expressed but avoid the complexities which have arisen in case law, in particular over the extent to which the opinion must be based on facts which are sufficiently true and as to the extent to which the statement must explicitly or implicitly indicate the facts on which the opinion is based. These are areas where the common law has become increasingly complicated and technical, and where case law has sometimes struggled to articulate with clarity how the law should apply in particular circumstances. For example, the facts that may need to be demonstrated in relation to an article expressing an opinion on a political issue, comments made on a social network, a view about a contractual dispute, or a review of a restaurant or play will differ substantially.
23. Condition 3 is an objective test and consists of two elements. It is enough for one to be satisfied. The first is whether an honest person could have held the opinion on the basis of any fact which existed at the time the statement was published (in *subsection (4)(a)*). The subsection refers to “any fact” so that any relevant fact or facts will be enough. The

¹ The Supreme Court in *Spiller v Joseph* [2010] UKSC 53 referred to this as honest comment.

² (2000) 10 BHRC 525.

³ [2010] UKSC 53 (at para 105).

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

existing case law on the sufficiency of the factual basis is covered by the requirement that “an honest person” must have been able to hold the opinion. If the fact was not a sufficient basis for the opinion, an honest person would not have been able to hold it.

24. The second element of condition 3 (in *subsection (4)(b)*) is whether an honest person could have formed the opinion on the basis of anything asserted to be a fact in a “privileged statement” which was published before the statement complained of. For this purpose, a statement is a “privileged statement” if the person responsible for its publication would have one of the defences listed in *subsection (7)* of the section if an action was brought in respect of that statement. The defences listed are the defence of absolute privilege under section 14 of the 1996 Act; the defence of qualified privilege under section 15 of that Act; and the defences in sections 4 and 6 of the Act relating to publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal.
25. *Subsection (5)* provides for the defence to be defeated if the claimant shows that the defendant did not hold the opinion. This is a subjective test. This reflects the current law whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice.
26. *Subsection (6)* makes provision for situations where the defendant is not the author of the statement (for example where an action is brought against a newspaper editor in respect of a comment piece rather than against the person who wrote it). In these circumstances the defence is defeated if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion.
27. *Subsection (8)* abolishes the common law defence of fair comment. Although this means that the defendant can no longer rely on the common law defence, in cases where uncertainty arises in the interpretation of section 3, case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.
28. *Subsection (8)* also repeals section 6 of the 1952 Act. Section 6 provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. This provision is no longer necessary in light of the new approach set out in *subsection (4)*. A defendant will be able to show that conditions 1, 2 and 3 are met without needing to prove the truth of every single allegation of fact relevant to the statement complained of.