Bar Council response to the Law Commission Supplementary Consultation on Contempt of Court

This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission Supplementary Consultation on Contempt of Court.[1]

The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

- Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
- Inspiring and supporting the next generation of barristers from all backgrounds
- Working to enhance diversity and inclusion at the Bar
- Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
- Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
- Sharing barristers' vital contributions to society with the public, media and policymakers
- Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
- Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

[1] Supplementary Consultation

1. The Bar Council considers that any proposal to amend the existing statutory regime for contempt where criminal proceedings are active should be approached with caution. As noted in the Supplementary Consultation, there is no proven link (nor realistically could there be) between the limited amount of information placed in the public domain by the authorities and the public disorder which followed the Southport murders. The purpose of the contempt jurisdiction is this context is to protect the arrested suspect's Article 6 ECHR rights should he be charged with a criminal offence. The law should not be framed for the purpose of acting as a policing tool to prevent social unrest. Whilst it is for others to address how a more liberal reporting regime could in fact impact on the behaviour of those otherwise determined to commit crime, common sense suggests that it is a complex question not readily resolved by the law of contempt.

Supplementary Consultation Question 1. (Consultation Question 31)

We provisionally propose that for contempt by publication where proceedings are active, the conduct threshold should be the same as that which currently applies under the Contempt of Court Act 1981. That is, the applicant should be required to prove that the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. Do consultees agree?

2. Yes. The current threshold is high yet is nevertheless effective in acting as a deterrent. Anecdotally, the incidence of jury trials which have been abandoned as a result of pre-trial publicity which led to an indictment being stayed as an abuse of the process of the court on the ground that the resultant risk of prejudice was so serious that the defendant could no longer receive a fair trial is extremely small. The reasons for this no doubt include that the reporting is at its most intense at the time of the incident which will inevitably be many months before the trial and before any jury is sworn. Juries are routinely asked by judges whether they have any knowledge of the events which they are about to hear in evidence and, if so, whether they are still able to perform their duty in accordance with their oath or affirmation, namely to try the defendant on the evidence adduced during the trial. A juror, who at the time was aware of publicity surrounding an incident which subsequently became the crime they are about to try, was self-evidently not a juror at that time and so, in the intervening period, had no reason to recall details of that incident as opposed to any other. To an extent, the cut-off point for contempt is artificial: prior to arrest a large amount of potentially prejudicial material can currently be legitimately reported and be the subject of speculation (regardless of information released by the authorities).

3. Indeed, the threshold test is sufficiently robust to allow for the publication of further information about the circumstances of a particular alleged crime post arrest. It is submitted that the issue here is not that the test does not allow for the release, and consequent reporting,

of more information about the crime or the suspect but rather that the authorities, principally the police, are too cautious in their approach to the application of it. The answer is improved guidance for the police.

4. There are two different periods of time after proceedings become active during which prejudicial publicity may affect the fairness of a trial (if there is one). Firstly, after the arrest of a suspect and secondly, after the first court appearance after charge. At the first court appearance, at which an indictable only offence is sent to the crown court, publicity is already limited by Section 52A(7) Crime and Disorder Act 1998 and, as the law is currently framed, a fair and accurate report of that and any subsequent court hearing pursuant to Section 4(1) Contempt of Court Act 1981. Whilst broad categories of additional information could be prescribed in statute (as reportedly suggested by Jonathan Hall KC), it is submitted that it will be difficult to legislate for further factual detail to be released and subject to publicity since each case will be fact-specific and it cannot be known in advance which aspects of a particular case have given rise to the social instability which it is thought that the further release will abate.

Supplementary Consultation Question 2. (Consultation Question 40)

We provisionally propose that there should be a defence that ensures that public discussion of matters of public interest is not unnecessarily or disproportionately restricted where proceedings are active. Do consultees agree? We invite consultees' views on the form that defence should take.

5. As the Bar Council proposed in answer to Question 40 in the first consultation, the terms of any statutory defence and on whom the burden of proof lies, should be expressed with precision.

6. The current defence as identified in Section 5 of the Act is sufficiently wide to encompass the publication of information in order to prevent inaccurate speculation about the circumstances of the event or the individual(s) involved.

7. The purpose of the contempt jurisdiction in this context is to prevent a trial being so prejudiced that it cannot fairly be continued. That issue cannot sensibly be pre-judged in the abstract. It is also a consequence of having a 'free press' with protected Article 10 ECHR rights, that Parliament does not prescribe in advance the detail of what information can be published. Currently, publishers routinely have to exercise judgment in what can be reported without breaching the law of contempt, defamation and privacy. The statutory defence could expressly refer to 'national security' as a justification for publication, but who is to determine what is in the interests of national security? There is a gulf of difference between, on the one hand, the considered and responsible release of specific information by the police, and to an

extent the many national publishers, based on an expert evaluation of the circumstances of the individual case and, on the other, the ill-informed speculative assertions and comments by media commentators.

8. The Law Commission posits (but does not propose) the possibility of a judge-alone trial to negate prejudicial publicity. The Bar Council would oppose such a measure. Not only would it amount to a serious erosion to the constitutional right to jury trial but it would significantly limit the deterrent effect of the contempt provisions.

Supplementary Consultation Question 3.

Did you submit a response to the contempt of court consultation paper which was published in July 2024?

9. Yes

Bar Council

31 March 2025

For further information please contact:

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