Law Commission
Reforming the law

Contempt of Court

Supplementary Consultation Paper

Consultation Paper 269

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3 March 2025

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THE LAW COMMISSION – HOW WE CONSULT

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Topic of this supplementary consultation paper: The questions contained in this supplementary consultation paper were included in our 2024 consultation paper on contempt of court (No 262). This supplementary consultation paper provides a further opportunity for consultees to respond to narrow issues concerning liability for contempt by publication when criminal proceedings are active.

Team working on the project: The following members of the Criminal Law team have contributed to this supplementary consultation paper: David Connolly (team manager); Dr Nicholas Hoggard (lawyer); Dr Lawrence McNamara (lawyer); Yasmin Ilhan (legal assistant); Marianne Holbrook (research assistant).

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the supplementary consultation: We invite responses from 3 March 2025 to 31 March 2025.

Responding to the supplementary consultation:

Responses to the supplementary consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/contempt-supplementary. Where possible, it would be helpful if this form was used. Once you submit your response, you will receive a confirmation notice and will have the option to download a pdf version of your response.

Alternatively, comments may be sent:
By email to contempt-of-court@lawcommission.gov.uk
OR
By post to Contempt of Court Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

For information about how to contact the Law Commission, go to: https://lawcom.gov.uk/contact/

Availability of materials: The supplementary consultation paper is available on our website at https://lawcom.gov.uk/project/contempt-of-court-2/.

We are committed to providing accessible publications. If you require this supplementary consultation paper to be made available in a different format, please email contempt-of-court@lawcommission.gov.uk or call 020 3334 0200.

After the supplementary consultation: We will use the views and evidence received during this supplementary consultation to assist us in formulating proposals for law reform in this area.

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INTRODUCTION

This supplementary consultation paper

1. On 9 July 2024, we published our consultation paper on reform of contempt of court laws.[1] One of the issues that we addressed in that paper was liability for contempt of court by publication when proceedings are active, provision for which is made in the Contempt of Court Act 1981 ("CCA 1981").[2] In short, the question for that part of the paper was: from the time that a person has been arrested, what information or opinions can someone lawfully publish in relation to something for which that person has been arrested? Contempt operates here to prevent the publication of material that substantially risks seriously impeding or prejudicing the administration of justice in active criminal proceedings and, in so doing, is part of ensuring that the trial of the arrested person is fair.

2. In the months since we published that paper, there has been a renewed and acute focus on that aspect of contempt of court liability. On 29 July 2024, Axel Rudakubana murdered three young girls (and further attempted to murder a number of others) at a dance class in Southport.[3] In the days and weeks following the attacks, significant and widespread public disorder unfolded across the UK. Thousands of police officers were deployed, and violence resulted in injury to many hundreds of people, including innocent members of the public and three hundred officers, and led to hundreds of prosecutions.[4] Relevantly, it has been suggested that the disorder was an indirect result of contempt of court laws: in constraining what information public authorities could disclose in relation to the defendant, contempt law helped to create an information vacuum into which misinformation, disinformation and counter-narratives could spread unchecked.[5]

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1 Contempt of Court (2024) Law Commission Consultation Paper No 262.

2 See generally, above, paras 5.1-5.133. Liability is discussed from para 5.7. The "discussion of public affairs" defence is discussed at paras 5.120-5.133. Section 2 of the Contempt of Court Act 1981 ("CCA 1981") imposes liability for publication when proceedings are active. Under section 2(2), "The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced". Liability is strict as to that consequence, in that there is no corresponding fault element – the person need not have intended or even foreseen the risk.

3 On 20 January 2025, Axel Rudakubana pleaded guilty to murdering Elsie Dot Stancombe (age seven), Bebe King (age six), and Alice da Silva Aguiar (age nine), among other charges. He was sentenced to Detention at His Majesty's Pleasure, with a minimum term to be served in custody of 51 years and 190 days. See the sentencing remarks of Mr Justice Goose: *R v Axel Rudakubana* (23 January 2025).

4 See His Majesty's Inspectorate of Constabulary and Fire & Rescue Services ("HMICFRS"), *An inspection of the police response to the public disorder in July and August 2024: Tranche 1 capacity and capability, co-ordination and mobilisation, and well-being* (18 December 2024) ("HMICFRS report") pp 5-6, 11, 40. The report was published after the Home Secretary commissioned HMICFRS to conduct a rapid review into the policing response to the disorder. According to the National Police Chiefs' Council ("NPCC"), between 29 July 2024 and 30 August 2024, police made a total of 1,280 arrests in connection with the disorder, and together with the CPS brought 796 charges (see NPCC, Arrests and charges related to violent disorder continue (30 August 2024)).

5 See, for example, the letter written by Rebecca Camber (Crime and Security Editor for the Daily Mail) on behalf of the Crime Reporters Association to the Director of Public Prosecutions ("DPP"): Press Gazette, Crime journalists concerned over official secrecy around Southport dance class killings (21 January 2025). This point was also raised with us by the Media Lawyers Association in their response to our consultation paper.

3. The defendant was charged with murder and attempted murder very shortly after he was arrested. He was also, some months later, charged with terrorism offences. The police – consistently with standard practice and in line with the advice they received from the Crown Prosecution Service ("CPS") – released only limited information about the attacks and the attacker. This was to avoid creating a substantial risk of prejudice to any upcoming trial, an outcome that could potentially have resulted in liability for contempt of court and could have prevented the defendant from receiving a fair trial (and, indeed, could have been used to mount an application for a stay of proceedings on the grounds of abuse of process – ie, it could have resulted in there being no trial at all).[6]

4. However, whether the violence following the attacks would have been avoided or mitigated had more information been provided by the authorities is an open question. It is for others rather than for the Law Commission to reach any conclusion on that point. Nevertheless, it does raise an issue, now thrown into stark relief, that was not directly addressed in our consultation paper.[7] That issue is whether there should be contempt of court liability for those who risk prejudicing a criminal trial by releasing information in the interests of public safety or national security.

5. Given the public interest in these issues and their importance, we are publishing this supplementary consultation paper to provide a further opportunity for consultees to respond to some of our consultation questions in light of the events since we published our consultation paper in July 2024.

6. We received over 130 responses to our 2024 consultation paper, which covered issues across the entire field of contempt and which we are now analysing. The focus of this supplementary consultation paper is much narrower, though we will consider responses to this supplementary consultation paper in conjunction with the consultation responses that we have already received. Those who have submitted consultation responses and feel they have no more to add need not respond to this supplementary consultation paper. Equally, those who would like to respond to the specific questions that we ask in this supplementary consultation paper – whether or not they responded to the 2024 consultation paper – should feel free to do so.

Our timeline for reporting

7. We have been asked by the Government to expedite our reporting on the parts of the project that are relevant to the contempt of court issues that arose following the Southport attacks.

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6 See, for example, the response by the DPP to Rebecca Camber's letter: CPS, DPP's response to questions around the release of information relating to the trial of Axel Rudakubana (22 January 2025), in which he commented that "[n]o defence had been served, and so there was the potential that all evidence would be challenged. Public reporting of significant information before the conclusion of the trial, including about the actions of … Axel Rudakubana on the day and some elements of his past history would have posed a serious risk to the integrity of the trial and risked undermining justice for the victims and their families". The DPP also wrote to the Chair of the Chair of the Home Affairs Committee, the Rt Hon Dame Karen Bradley MP, on 21 February 2025 explaining the process and guidance around the publication of prosecution information.

7 We did discuss a public interest defence more generally. See paras 16-18 below for a summary.

8. Our intention is that our report (which will contain recommendations for reform of the law) will be published in two parts:

    (1) part one will be published in autumn 2025 and will cover liability for contempt (including contempt by publication, which will also address the issues raised in the Southport attacks), and the role of the Attorney General in contempt proceedings;

    (2) part two will be published in 2026 and will cover all remaining issues.

9. All of our project documents are publicly available on our project web page.[8] Any further project developments will also be posted there.

THE ISSUES IN THIS SUPPLEMENTARY CONSULTATION PAPER

10. We considered liability for contempt by publication when proceedings are active in Chapter 5 of our consultation paper. One of the issues we addressed was what the threshold of liability should be – or when a publication should constitute contempt.

11. Our provisional view was that the current threshold for liability for contempt by publication when proceedings are active[9] appropriately reflects the importance of protecting the right to a fair trial and the corresponding need to prohibit the publication of material that might seriously impede or prejudice those proceedings. We therefore provisionally proposed (at Consultation Question 31) that a person should be liable for contempt of court if it is proved that they published material that created a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

12. There are two questions that arise as a result of the events following the attacks at Southport and the subsequent disorder:

    (1) the extent to which misinformation and disinformation can be countered by a public authority without risking liability for contempt of court; and

    (2) whether there are circumstances that would justify the publication of information that would otherwise come within scope of contempt of court liability.

The scope of contempt of court

13. As to the first question, the issue is whether information published "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced" (regardless of whether there is any intent to interfere with the course of justice in particular proceedings).[10] In the context of widespread misinformation or disinformation – which may carry its own prejudicial effect – it is important to note that a publication by a public authority countering that false information may be less likely to reach the contempt threshold than in circumstances where there is no misinformation or disinformation. The context is relevant. However,

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8 See: https://lawcom.gov.uk/project/contempt-of-court-2/.

9 See footnote 2 above.

10 CCA 1981, ss 1 and 2(2).

a trial may potentially be prejudiced by information whether it is true or false. It does not follow that "correcting the record" also inexorably undoes any prejudicial effect; you may simply swap one prejudicial effect with another.

14. Nevertheless, in determining in any given case what information might meet the threshold for contempt liability, it is not difficult to understand the desire for clarity: a public authority would rightly wish to know with some certainty what information they can release. It is only sensible for laws to be understood by all, and for those laws to be clear. Public authorities wish to conduct themselves in accordance with the law. The joint response to our consultation paper from Counter Terrorism Policing, the National Police Chiefs' Council, and the College of Policing noted that police have three objectives that often exist in tension, namely open communication, avoiding legal prejudice, and the preservation of public order.[11] It is understandably difficult to balance those objectives if there is a lack of clarity as to contempt liability in the face of widespread misinformation or disinformation. Jonathan Hall KC (the Independent Reviewer of Terrorism Legislation and Independent Reviewer of State Threat Legislation), in his response to our consultation paper, suggested that:

> a statutory provision could be added to the 1981 Act to make it clear that certain matters would generally not be considered to give rise to a substantial risk of serious prejudice. These could include matters such as the name, nationality, and age of the individual; and potentially other matters where there could be no dispute about the facts.[12]

15. However, it is also not easy to generalise categories of information that would fall below the threshold. It may be, for example, that confirming a person's country of birth would rarely meet the threshold, but that would depend on the issues that fell to be determined at trial (which may not even be known at the relevant time). Similarly, the more commonplace the publication of certain categories of information, the more conspicuous would be its absence in a particular case.

The existing public interest defence

16. There is a form of public interest defence in section 5 of the CCA 1981, which limits liability for contempt of court in a different way. The section provides that the publication of material as part of a discussion of public affairs or other matters in the public interest is not to be treated as contempt if the risk of prejudice or impediment is merely incidental to the discussion.[13]

17. The word "incidental" is important: the more closely the discussion relates to the particular legal proceedings, the less likely it will be that the risk is merely "incidental",

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11 This response is publicly available at: Counter Terrorism Policing, *National policing response to Law Commission Contempt of Court Act consultation* (28 February 2025).

12 Jonathan Hall KC, consultation response, paras 25-26. This response is publicly available at Independent Reviewer of Terrorism Legislation, *Disinformation and Contempt of Court: Response to Law Commission Consultation CP262* (30 September 2024).

13 CCA 1981, s 5 provides: "A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion".

and so the more likely it is that a person will be liable for contempt.[14] On the basis that the defence only applies to risk that is incidental to discussion, it is not clear that it would be relevant to the Southport issues, since the information (or the lack of it) was expressly *about* the active proceedings.

18. In the consultation paper, we provisionally proposed retaining a form of public interest defence and asked an open question about what form that defence should take.[15] However, whilst we considered that section 5 lacks clarity in some respects (and thus may usefully be reformed), we did not provisionally propose materially altering the scope of the defence. Our view was that it struck the right balance between the protection of freedom of expression and the protection of the right to a fair trial.[16]

Exempting liability for material that would otherwise constitute contempt

19. The second question requires us to consider a much broader form of public interest defence than currently exists, and it cannot be considered in isolation from the right to a fair trial. Under article 6 of the European Convention on Human Rights, everyone charged with a criminal offence has an unqualified right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal…". Generally, then, either a person receives a fair trial, or if a fair trial is not possible, then they should not be tried at all.

20. Our view was that the need for such a defence had not yet been made out. In our consultation paper, we said that:

> we have provisionally proposed that contempt by publication where proceedings are active will only be established where the publication carries "a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced". As such, any defence that would have the effect of accepting that there is that degree of interference, and then permitting that interference, would need to be carefully justified by consultees, especially where such an interference could affect the fair trial rights of a defendant in a criminal case.[17]

21. In this context, then, the second question quickly distils to that more fundamental one, namely whether the law should permit the publication of material that risks undermining a person's right to a fair trial if the material were to be published for the purposes of public safety or national security.[18] For example, if some piece of information had been published widely by the police to mitigate the risk to public safety – such as some information about a suspect's past misconduct – that was

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14 See, for example, *Attorney General v Random House Group Ltd* [2009] EWHC 1727 (QB), [2010] EMLR 9 at [91] (Tugendhat J), citing with approval *Attorney General v TVS Television Ltd*, The Times, 7 July 1989 (Lloyd LJ).

15 Contempt of Court (2024) Law Commission Consultation Paper No 262, para 5.133, Consultation Question 40.

16 Above, paras 5.12-5.130.

17 Above, para 5.132.

18 We note public safety and national security in particular, because we were told that significant risk to public safety or national security are two of the "tipping points" established by Counter Terrorism Policing that would lead them to comment on inquiries where otherwise no comment would be made.

nevertheless held to be inadmissible at trial,[19] should the police be liable for contempt? If there were no liability – and there may be good reason for so holding – that would potentially license a substantial risk to the course of justice and potentially, by extension, to the ability of the court to hold a fair trial.

22. One of the problems with this form of defence would be how to establish which publications should benefit from the defence: how would it be established, for example, that the publication was for the purposes of enhancing public safety or protecting national security (whether on objective or subjective grounds)? Evidencing the claim that the publication was for the purposes of protecting national security may be particularly difficult if the relevant evidence cannot be submitted in open court.[20] Even a risk to public safety may be hard to establish (noting again the lack of consensus that the disorder that followed the Southport attacks was caused by a lack of information). Jonathan Hall KC summarised this problem well:

> [It] is difficult to see how an effective public interest defence could be worded, which would have the practical effect of both tolerating a substantial risk of serious prejudice to criminal proceedings in deserving cases, whilst preserving the prohibition in unmeritorious cases.[21]

23. It was suggested to us by the Media Lawyers Association ("MLA") that liability could be exempted insofar as it seriously impeded the course of justice but did not otherwise interfere with a defendant's right to a fair trial. This has a certain appeal if you are looking at the question of liability after the fact. The problem with such a defence (as the MLA recognised) is that it may be very difficult (or impossible) to know at the point of publication whether material would affect the fairness of proceedings, all the more so given the trial is likely to be some months away and the nature of the defence to the criminal charges is entirely unknown (as will very often be the case). Such a precarious form of defence to contempt liability would be cold comfort, both to the publisher and, indeed, to those with an interest in the legal proceedings.

Other measures to protect the right to a fair trial

24. Contempt of court is one way of protecting the right to a fair trial. We have already noted that, if liability is exempted for contempt on the basis of external factors, and so publication is permitted, there is the possibility that a defendant could not receive a fair trial, and so potentially may not be tried at all.

25. However, it is important to bear in mind that, even if a publication did create a substantial risk of serious impediment or prejudice, there are practical measures that can be taken to neutralise the effect of prejudicial material and so protect the defendant's right to a fair trial. These measures include postponing or moving the trial, as well as giving appropriate directions to the jury to disregard prejudicial material.[22]

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19 For example, because of the operation of the bad character evidence provisions in section 101 of the Criminal Justice Act 2003.

20 Closed proceedings, if necessary, may carry their own disadvantages in a context where perceived lack of transparency is the problem.

21 Jonathan Hall KC, consultation response, para 24.

22 See, for example, *R v Abu Hamza* [2006] EWCA Crim 2918, [2007] QB 659, [96].

The jury is already directed to ignore press reporting of the offence(s) that they are trying. Further, until someone is arrested, information about the facts of what has occurred is reported contemporaneously and widely.

26. If it were considered necessary to weaken the protections afforded by the law of contempt in light of the risk to, say, public safety, then one option might be to augment the range of other measures available to protect the right to a fair trial. For example, if extremely prejudicial material has been published, a judge could order that the trial is to be conducted without a jury when that is necessary to ensure the defendant receives a fair trial. A similar provision exists in section 44 of the Criminal Justice Act 2003, which allows a judge to order a trial without a jury if the likelihood of jury tampering is so substantial as to make it necessary in the interests of justice.[23]

27. Such potential reform falls well outside the terms of reference of our project on contempt of court (and so we do not make any proposals in relation it). However, it is worth considering as a possible consequence of allowing the disclosure of potentially prejudicial material. Such a measure (or others like it) to protect the trial process may or may not be a price worth paying for allowing potentially prejudicial public interest disclosures, but it is a price that might have to be paid nevertheless and so should be a factor in the consideration of whether to limit the role of contempt in protecting the trial process.

SUPPLEMENTARY CONSULTATION QUESTIONS

28. We are seeking further views in respect of two questions that we asked in our consultation paper and on which you may have new or different views since July 2024.

29. We are happy to receive responses to this supplementary consultation paper whether or not you responded to the earlier consultation paper. However, you will see that we ask a question about whether you responded to the 2024 consultation paper. This is so that, if you did reply, we can consider your response as a whole (even if your views have subsequently changed).

Supplementary Consultation Question 1. (Consultation Question 31)

30. 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?

[23] It is worth noting that there is no requirement in section 44 for the defendant to have been responsible for or in any way related to the risk of jury tampering; a person can thus lose their right to a jury trial without being blameworthy in relation to that decision.

Supplementary Consultation Question 2. (Consultation Question 40)

31. 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.

Supplementary Consultation Question 3.

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