



Attorney
General's
Office

The Impact of Social Media on the Administration of Justice

A Call for Evidence

Launch date: 15 September 2017

Respond by: 8 December 2017

Contents

Foreword from Attorney General Jeremy Wright QC MP	3
Introduction	4
About this Call for Evidence	5
BACKGROUND	5
PURPOSE OF THIS CALL FOR EVIDENCE	6
DURATION OF THIS CALL FOR EVIDENCE	6
TERRITORIAL EXTENT	6
Evidence Requested	7
ACTIVE PROCEEDINGS IN WHICH SOCIAL MEDIA HAS HAD AN IMPACT	7
BREACHES OF REPORTING RESTRICTIONS	8
THEMATIC CONCERNS	9
ADDITIONAL COMMENTS	9
How to Respond	10



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Foreword from Attorney General Jeremy Wright QC MP



In 2015, a trial in a case of murder was halted after the judge decided that prejudicial comments online meant that the defendants could not have a fair trial. The judge concluded that it would have been impossible for jurors to deliver a verdict based on the evidence heard in court alone.

A retrial was ordered at a different court with significant reporting restrictions in place. The second trial continued unhindered and the defendants were convicted.

This case shows that social media is having some impact on the administration of justice in criminal trials, but it does not show to what extent. Was this an isolated incident or are there more examples of trials being affected by social media commentary?

I have decided to issue a Call for Evidence, aimed at organisations and individuals who work within the criminal justice system, to evaluate if there is a risk from the use of social media and, if so, whether the risk is increasing. We need to amass evidence to establish the level of risk, and whether any risk identified can be adequately managed using the tools currently available.

We will analyse the responses and publish a summary in due course, at which point we will consider whether it is necessary for any recommendations to be made.

Jeremy Wright QC MP

Introduction

- 1.1 The Contempt of Court Act 1981 (“the 1981 Act) provides the framework for what can be published in order to ensure that legal proceedings are fair and that the rights of those involved in them are properly protected. Sections 1 and 2 create the strict liability rule, which makes it a contempt of court to publish anything that creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice. The strict liability rule applies to all publications; defined very widely as including “any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large”.
- 1.2 Social media platforms allow individuals to reach thousands of people via a single post, making their views readily accessible to a potentially vast audience. Anyone posting a comment on a publicly available website which creates a substantial risk of causing serious prejudice in active proceedings faces the potential prospect of proceedings for contempt of court. Whilst the traditional mainstream media are well aware of the boundaries set out in the 1981 Act and the consequences of stepping outside them, social media presents new challenges to these fair trial protections and the criminal justice system must ensure that it keeps pace with the information age.
- 1.3 This Call for Evidence is aimed at gathering empirical and statistical evidence in order to inform an assessment of whether the use of social media is having an adverse impact on the administration of justice in relation to the fairness of criminal trials, the right to anonymity and the integrity of judicial orders in criminal proceedings.
- 1.4 The Attorney General, in his role as guardian of the public interest, welcomes views from across the criminal justice landscape from those with an interest in the risks arising from social media. Comment is also invited from the mainstream media and from social media providers as to their experience of constraints imposed by the criminal courts in seeking to protect a fair trial.
- 1.5 The evidence submitted will form the basis of a report prepared by the Attorney General's Office and inform a consideration of what changes, if any, are needed to strike a balance between the rights of the individual to express their views via social media and the protection of fairness in criminal proceedings.

About this Call for Evidence

BACKGROUND

2.1 The Attorney General is the principal legal adviser to the Government. He also has a number of other functions that he exercises independently of the Government. One of his duties is to act as guardian of the public interest in the rule of law and the integrity of the administration of justice.

2.2 The Attorney General can take legal action in the public interest if a contempt of court has been committed. He can also issue an advisory note to the media and public if there is a concern about a particular case, to bring attention to the need to take care.

2.3 In December 2013, the Attorney General published Advisory notes on the gov.uk website and Twitter to help prevent social media users from committing a contempt of court. The advisories, which had previously only been issued to print and broadcast media outlets on a 'not for publication' basis, were designed to ensure that trials were fair and warn people that any comment on a particular case must comply with the Contempt of Court Act 1981.

2.4 As was said by the Attorney General at the time, "*This is not about telling people what they can or cannot talk about on social media; quite the opposite in fact, it's designed to help facilitate commentary in a lawful way. I hope that by making this information available to the public at large, we can help stop people from inadvertently breaking the law, and make sure that cases are tried on the evidence, not what people have found online.*"

2.5 The Attorney General's website has also published infographics setting out what might be considered a contempt of court in the context of publishing comments on social media.

2.6 In February 2016, the Court of Appeal heard the case of Regina v F, D¹, which concerned the fairness of a trial of two teenage girls who were subsequently convicted of murder. As a result of comments posted on Facebook the trial judge felt constrained to discharge the jury and order a retrial at a different venue, creating considerable additional stress for the family of the victim, the witnesses, the defendants and their families and everyone else involved in the trial. Sir Brian Leveson, President of the Queen's Bench Division commented that;

'...we are conscious that although we have received comprehensive submissions from the media organisations, the DPP and the individual

¹ex parte British Broadcasting Corporation and eight other media organisations [2016] EWCA Crim 12

defendants, there is no doubt that there are wider issues involved than encompassed by this particular litigation. We have no doubt that the Attorney General (as guardian of the public interest in this area) should be involved in a general analysis of the overall position in order that a wider consultation can take place and appropriate guidance issued.'

PURPOSE OF THIS CALL FOR EVIDENCE

2.7 The Attorney General is seeking evidence from those most closely involved in the investigative and trial processes to assess the extent of the risk that prejudicial comment on social media poses to the integrity of criminal proceedings.

DURATION OF THIS CALL FOR EVIDENCE

2.8 Issued: 15 September 2017

2.9 Respond by: 8 December 2017

TERRITORIAL EXTENT

This consultation applies to England and Wales.

Evidence Requested

- 3.1 Below we outline the issues we are investigating and ask specific questions. When providing answers, please ensure that any personal details of the parties involved are anonymised, unless these details are inextricably linked to the response.
- 3.2 Please make it clear in your response whether you are responding as an individual or on behalf of a group or organisation.

ACTIVE PROCEEDINGS IN WHICH SOCIAL MEDIA HAS HAD AN IMPACT

- 3.3 The strict liability rule only applies once proceedings are “active”, which means that the relevant initial step must have been taken, such as placing a suspect under arrest.
- 3.4 We welcome responses from all criminal justice stakeholders with experience of active proceedings, whether pre or post charge, in which commentary on social media has had a significant impact. We are particularly interested in whether the existing tools were sufficient to deal with any problems arising in criminal cases and any examples of good practice showing how these issues were overcome.

Question 1

Have you been involved in a case in which comment on social media could or did have an adverse effect on the investigation or proceedings? Please provide details, including dates.

Question 2

If so, what steps, if any, were taken to address the problem and were these successful in resolving it?

BREACHES OF ORDERS RELATING TO ANONYMITY

- 3.5 Defendants, victims and witnesses may be made the subject of an order protecting their anonymity in the course of criminal proceedings. Victims of a wide range of sexual offences are given lifetime anonymity under the Sexual Offences (Amendment) Act 1992. The 1992 Act imposes a lifetime ban on reporting any matter likely to identify the victim of a sexual offence, from the time

that such an allegation has been made and continuing after a person has been charged with the offence and after conclusion of the trial. Section 71 of the Serious Crime Act 2015 imposes an automatic reporting restriction for the victims of female genital mutilation.

3.6 Discretionary powers of the criminal court include s.45/45A of the Youth Justice and Criminal Evidence Act 1999, granting anonymity to a juvenile defendant, victim or witness in adult criminal proceedings.

3.7 We are interested in gathering any evidence of automatic or discretionary anonymity orders being breached via social media in order to inform an assessment of whether this is a particular problem.

Question 3

Have you been involved in a case in which an order or statutory provision preventing the publication of any information which is likely to identify a particular individual has been breached by comments on social media? Please provide details, including dates.

Question 4

If so, were any steps taken to address the breach of the order?

BREACHES OF REPORTING RESTRICTIONS

3.8 Both automatic and discretionary reporting restrictions may be imposed during the course of a criminal trial. Reports of pre-trial hearings in the Crown Court cannot generally be published until after the trial is over. Reports of preparatory hearings in the Crown Court in long, complex or serious cases, complex fraud cases and unsuccessful dismissal applications are also prohibited (apart from a limited range of factual matters) until the trial is over. Similar restrictions apply in respect of sending and allocation proceedings in the Magistrates' Courts.

3.9 We are interested in the views of those with experience of any such reporting restrictions being breached via social media.

Question 5

Have you been involved in a case in which a reporting restriction has been

breached via social media? Please provide details, including dates.

Question 6

If so, were you aware of any action that was taken?

THEMATIC CONCERNS

3.10 Mainstream print and broadcast media are no longer the only mediums through which information about active criminal proceedings is published to a large audience. We are interested in whether there is a perception that the growth of social media has had an adverse impact on the fairness of criminal trials.

Question 7

Do you believe that the risks posed by social media to the administration of justice are greater than 5 years ago and, if so, what is the basis for your belief?

ADDITIONAL COMMENTS

3.11 We also welcome any additional comments you may have beyond the scope of the questions above.

How to Respond

4.1 The Call for Evidence will close on 8 December 2017 at 5pm.

4.2 Please send any response to Callforevidence@attorneygeneral.gsi.gov.uk

4.3 If you do not have access to email, please respond to;

Correspondence Unit (Call for Evidence)
Attorney General's Office
5-8 The Sanctuary
London
SW1P 3JS

4.4 This Call for Evidence is intended to be an entirely written exercise. Please contact the Correspondence Team at the Attorney General's Office if you require any other format or languages.

4.5 Comments have been specifically invited from;

- The Lord Chief Justice of England and Wales;
- The President of the Queen's Bench Division;
- Mr Justice Globe;
- Council of HM Circuit Judges – Criminal sub-committee;
- The Magistrates' Association;
- National Bench Chairs' Forum;
- The Chairman of the Bar Council;
- The Chairman of the Criminal Bar Association;
- The Criminal Law Solicitors Association;
- London Criminal Courts Solicitors' Association;
- National Police Chief's Council;
- Association of Police and Crime Commissioners;
- Victim Support;
- Social Media companies including Facebook and Twitter;
- The Society of Editors;
- The Director Of Public Prosecutions;
- The Law Commission;
- Liberty;
- Just for Kids Law;
- The Criminal Cases Review Commission;
- The Victims' Commissioner.

CONFIDENTIALITY AND DATA PROTECTION

4.6 Information provided in response to this Call for Evidence, including personal information, may also be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 ("FOIA") and the Data Protection Act 1998). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, please identify, and provide explanation for, any information that you consider confidential and do not wish to be disclosed.

4.7 If we receive a request for disclosure of the information, we will take account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. It would need to be considered appropriate under the relevant legislation. You should note that many email messages carry, as a matter of course, a statement that the contents are for the eyes only of the intended recipient. In the context of this consultation such appended statements will not be construed as being requests for non-disclosure unless accompanied by an additional specific request for confidentiality.