

## July 2019 Update for Chapter 19: Contempt of court

### Cases remain active when police release people 'under investigation'

Journalists must take care when reporting on crime stories in which police have arrested people then released them "under investigation" – because the cases are active for the purposes of the law of strict liability contempt.

Previously, the strict liability rule – which makes it a contempt to publish material which creates a substantial risk of serious prejudice or impediment to proceedings – ceased to apply when an arrested person was released without being charged or bailed.

But a strict new 28-day time limit on the use of police bail, introduced in the Policing and Crime Act 2017 after a series of scandals involving people being held on bail for months or even years, has led to police releasing people "under investigation" in order to get round the new bail restrictions.

When the Policing and Crime Act 2017 came into force, the case of someone being released "under investigation" would cease to be active for the purposes of the strict liability rule as the released individual had not been charged or bailed.

But the Government changed the law with a little-noticed change to the Contempt of Court Act 1981 which was slipped through Parliament in January and February last year in the Policing and Crime Act 2017 (Consequential Amendments) Regulations 2018 (2018 No. 226) – a statutory instrument which amended some 12 separate pieces of legislation, including the Trustee Investments Act 1961, the Local Government Finance Act 1988, and the Fire and Rescue Services Act 2004.

The change to the contempt law, which came into force in mid-March last year, means that a case involving someone released "under investigation" by police remains active for the purposes of strict liability contempt until the custody officers tells the suspect, in writing, that the investigation is being discontinued.

The Home Office, which introduced the Statutory Instrument, failed to consult media organisations on the change to the contempt law, and appears to have given it no publicity.

A Home Office spokesperson said: "The Government is clear that all suspects should be protected equally, regardless of whether they are released on bail or not.

"Individuals released by the police on bail have protections in place to ensure their cases cannot be prejudiced by adverse publicity pre-trial. Our changes ensured that individuals released under investigation receive the same protection as those released on bail.

"Journalists can still make inquiries to the police in such cases, as they would have previously in investigations where suspects were released on bail."

Junior Home Office minister Nick Hurd told the Fourth Delegated Legislation Committee in the Commons when the Regulations were discussed on February 6: "Regulation 4 of the draft regulations makes a consequential amendment to the Contempt of Court Act 1981, arising from the changes to pre-charge bail.

"The relevant provisions of the 1981 Act, known as the strict liability rule, are designed to ensure a defendant's right to a fair trial is not prejudiced by adverse publicity during the period of the police investigation and pre-trial. The restrictions on the publication of

potentially prejudicial material apply while an investigation is, in the jargon of the 1981 Act, 'active'.

"The draft regulations extend the definition of 'active' so that the protection afforded by the 1981 Act applies in a case in which a person is released without bail while the police investigation continues.

"I reassure the committee that we are not aware of any case in which the lack of protection from the strict liability rule under the reformed pre-charge bail system has been prejudicial to the case.

"Even where the strict liability rule does not apply, publications can still be convicted of contempt where an intent to prejudice a case can be shown. The draft regulations merely return the position on contempt to where it was before those reforms were made." Lawyers have already criticised the police use of releasing people "under investigation" – and the system seems set to become as great a scandal as the previous police mis-use of bail which led to the introduction of the 28-day limit.

The Law Society Gazette reported in May that the police bail reforms, which were intended to prevent people languishing for long spells under pre-charge bail, may instead have led to thousands of suspects "languishing in legal limbo". It said the London Criminal Courts Solicitors' Association was gathering data on the system, which was leaving suspects facing uncertainty without time limits or any constraints on the police.

The Daily Telegraph reported on March 18 that eight out of 10 suspects were now being released "under investigation" but that responses to Freedom of Information Act requests showed that while the average length of police bail before charge or release was 90 days, the delay had now risen to 139 days for those released "under investigation". In addition, suspects released under investigation were often even more in the dark as police were under no obligation to give them regular updates on the progression of their cases.

*The authors are grateful to the East Midlands Police Legal Service for drawing this change, which was made after the deadline for the current edition of McNae's, to our attention.*