

INDEPENDENT REVIEWER OF TERRORISM LEGISLATION  
INDEPENDENT REVIEWER OF STATE THREAT LEGISLATION

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CONTEMPT OF COURT AND DISINFORMATION

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**Introduction**

1. This is my response to the Law Commission's consultation on reforming the law of Contempt of Court (Consultation Paper No 262, July 2024).
2. The current law on contempt of court stokes the risk of online disinformation after a terrorist or similar attack.
3. Disinformation can be exploited by terrorists or malign state actors.
4. The Law Commission's Consultation Paper has not addressed disinformation. I suggest that it should be considered because of the link between suppressing true information and encouraging false information. Some suggestions are made about potential reform.

**Background**

5. The background to this response is the disinformation that circulated on social media about the identity and asylum-status of the Southport attacker in July 2024.
6. This disinformation has been plausibly connected to some of the violence that followed<sup>1</sup>.
7. It circulated at a time when the public wanted to know more about the attack and the attacker, but little information was being reported about the attacker in traditional news outlets.
8. It is plausible that a lack of trustworthy information about the attacker led to an information vacuum that (a) fed false speculation (b) fed the narrative that the true facts were being withheld by the authorities, so increasing the saliency of the disinformation.

**Attacks and Contempt of Court**

9. When a terrorist or similar attack happens, members of the public want to understand what has happened, and to understand that the authorities are dealing with it appropriately. This desire to understand is both natural and legitimate. In the absence of information speculation is inevitable.
10. However, if an individual has been arrested, the law imposes a heavy prohibition against prejudicing future criminal proceedings<sup>2</sup>. Breach of this prohibition can lead, and in the past has led, to criminal prosecution brought by the Attorney General.

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<sup>1</sup> BBC News, 'Did social media fan the flames of riot in Southport?' (31.7.24).

<sup>2</sup> The strict liability rule in sections 1 to 2 Contempt of Court Act 1981.

11. The prohibition is likely to be most keenly felt by traditional news outlets with journalists trained in the law of contempt, mindful of professional standards, and advised by lawyers alert to the risk of prosecution: in other words, the organisations that are best placed to counteract disinformation.
12. By contrast, social media users and platforms, especially those based overseas, are less likely to know or care about the law of contempt.
13. Given the consequences of criminal prosecution, as well as squeezed budgets within mainstream media, it is understandable if journalists take a precautionary approach to what the prohibition entails.
14. The law is not helped by being cast in broad and general terms: what must be avoided is any publication which creates “a substantial risk” that the course of justice “will be seriously impeded or prejudiced”<sup>3</sup>. This test is considered vague, leading to a “Sword of Damocles” hanging over journalists’ heads<sup>4</sup>.
15. This has the following practical consequences:
  - At the very time that trustworthy information is needed, traditional news outlets will be wary about contempt of court.
  - This puts inevitably limits the amount of trustworthy information available to the public.
  - In turn, online disinformation can thrive.
  - The position is completely different where the attacker dies. Here the media are free to report details because there will not be any prosecution. The ability to counter disinformation therefore depends on whether the attacker lives or dies.

## Potential Solutions

16. **Firstly**, it could be argued that journalists simply need to be more robust in interpreting the strict liability rule. There may be much information that could be reported about a terrorist attack which would not create a substantial risk of seriously impeding or prejudicing the course of justice.
17. On this argument, journalists should therefore have more confidence that publishing, for example, the attacker’s name, age, nationality, file photo if held, could not possibly amount to contempt of court. There may be other details, for example indisputable facts concerning the attack, which could be published.
18. But it is one thing to argue the point: it is journalists whose necks are on the line and, if they get things wrong, risk prosecution under the strict liability rule.
19. **Secondly**, it could be argued that the police should take the lead in putting out details proactively, for example by press release or news conference. All media outlets can have confidence that if the police are willing to say something on record, they must

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<sup>3</sup> Section 2(2).

<sup>4</sup> CP262, at paras 3.43-4.

have assessed that doing so will not prejudice a live investigation (for example, by tipping off suspects) or future criminal proceedings.

20. There is much sense in the police taking a proactive lead, recognising the importance of a trusted voice, providing sober and unsensational information to counter the risk of disinformation.
21. Whilst it is true that the College of Policing could publish guidance to police, this would not affect the liability of journalists under the Contempt of Court Act 1981 and the strict liability rule. In addition, the police may themselves take an overcautious approach to the requirements of the 1981 Act.
22. **Thirdly**, a more user-friendly public interest defence could be created. The current law (section 5 of the 1981 Act) protects good faith discussion of public affairs or other matters of general public interest, where the risk of prejudice to criminal proceedings is “merely incidental”.
23. As the Law Commission has observed, this is not an easy test to apply<sup>5</sup>. It does not seem to assist where the incident that has led to an arrest is *itself* the matter of general public interest.
24. However:
  - It would be a significant step for the law to accept that some criminal trials could be prejudiced.
  - 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.
  - The prior issue is how to ensure that even non-prejudicial material is reported, so as to avoid an information vacuum.
25. **Fourthly**, without changing the nature of the strict liability rule, 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.
26. 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.

## Conclusion

27. Online disinformation is a relevant consideration to the law of contempt of court because of the current law’s ability to inhibit trustworthy reporting in the wake of a terrorist or similar attack.

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<sup>5</sup> Ibid, at para 5.124.