

MISSING PIECES: A NOTE ON TERRORISM LEGISLATION  
IN THE ONLINE SAFETY BILL

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**Introduction**

1. This Note concerns offences under terrorism legislation which are incorporated within the Online Safety Bill. The Bill was introduced into the House of Commons on 17 March 2022.
2. In short, the Bill requires tech companies, and OFCOM, to determine what is “terrorism content” by reference to 22 terrorism offences but without reference to intention and defences. Intention<sup>1</sup>, and the absence of any defence, lie at the heart of terrorism offending.
3. In consequence, the duties in the Bill – aimed at minimising “the risks of [terrorist] harm to individuals arising from illegal content and activity” – are unclear. It risks creating legislation that is muzzled and confused.

**Background**

4. Schedule 5 (‘Terrorism Offences’) lists 16 offences against the Terrorism Act 2000, one against the Anti-Terrorism, Crime and Security Act 2001, and 5 against the Terrorism Act 2006<sup>2</sup>. Also included are attempts encouragements and conspiracies to commit, and secondary participation in, these offences.
5. The purpose of listing terrorism offences is to identify what the Bill refers to as “terrorism content”<sup>3</sup>.
6. Terrorism content is “illegal content” and classified as “priority illegal content” alongside Child Sex Exploitation and Abuse content and content that relates to other criminal behaviour listed in Schedule 7<sup>4</sup>.
7. Services within the scope of the Bill, and their regulator OFCOM, will be required form a view about compliance with illegal content risk assessment duties (Clause 8), safety duties about illegal content (Clause 9), and the duty about content reporting (Clause 17). The performance of each of these duties is affected by access to or the presence of illegal content and priority illegal content online.
8. OFCOM will also be empowered to issue notices to regulated user-to-user or search services to deal with the presence of terrorism content<sup>5</sup>.

**Terrorism legislation and the definition of “terrorism content”**

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<sup>1</sup> And occasionally subjective recklessness.

<sup>2</sup> It is not clear what principle was used to select offences for inclusion in Schedule 5. The offence contrary to section 57 (possession for terrorist purposes), which could apply to use of the internet to create a 3-D printed gun, is not included.

<sup>3</sup> Clause 52(5).

<sup>4</sup> Clause 52(7).

<sup>5</sup> Clause 103.

9. Under clause 52, “terrorism content” is defined as “content that amounts to an offence specified in Schedule 5”<sup>6</sup>.
10. Clause 52(3) further provides that content “amounts to” an offence (including a terrorist offence) in the following 4 circumstances. Content either amounts to an offence, or it does not.<sup>7</sup>
11. Firstly, where the “*use* of the words, images, speech or sounds” amounts to a relevant offence.
12. Secondly, in the case of a user-to-user service<sup>8</sup>, where “the *use* of the words, images, speech or sounds, *when taken together* with other regulated user-generated content<sup>9</sup> present on the service” amounts to a relevant offence.
13. Thirdly, where “the *possession, viewing or accessing* of the content” “constitutes” an offence.
14. Fourthly, where “the *publication or dissemination* of the content” constitutes an offence.
15. There does not appear to be any difference between “amounting to” an offence and “constituting” an offence.

### **Analysis**

16. The definition of “terrorism content” in clause 52(5) is novel because under terrorism legislation content itself can never “amount to” an offence. The commission of offences requires conduct by a person or people.
17. Clause 52(3) attempts to address this by requiring the reader of the Bill to consider content in conjunction with certain specified conduct: use, possession, viewing, accessing, publication or dissemination<sup>10</sup>.
18. However, as Table 1 shows, conduct is rarely sufficient on its own to “amount to” or “constitute” a terrorism offence. It must ordinarily be accompanied by a mental element<sup>11</sup> and/or take place in the absence of a defence.
19. For the purposes of this Note, I have left out of consideration other difficult aspects of determining whether conduct amounts to a terrorist offence: for example, whether the circumstances and manner of a statement mean that a reasonable person would understand it as

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<sup>6</sup> Clause 52(5). It is to be noted that under clause 52(9) no account is to be taken of where the conduct takes place. Although many terrorism offences have extraterritorial limits, some relevant offences have special jurisdictional limits based on the nationality or residency of the offender: sections 12(1) and (1A) and section 13 Terrorism Act 2000, as applied by section 17 Terrorism Act 2006.

<sup>7</sup> An earlier version of the Online Safety Bill published in May 2021 provided (at Clause 41) that content amounted to an offence if the provider *had reasonable grounds to believe* that the use of the words etc amounts to an offence.

<sup>8</sup> Defined in clause 2.

<sup>9</sup> Defined in clause 49.

<sup>10</sup> Although not stated, it is implicit that this refers to conduct by a person (rather than a bot, which could not commit an offence).

<sup>11</sup> I refer here only to fault elements that are explicit in the offence-making provision. It is strongly arguable that some fault elements are implicit – for example, in the offence of professing to belong to a terrorist organisation, that the user appreciated the meaning of the words used (see Walker, C., Blackstone’s Guide to The Anti-Terrorism Legislation (3<sup>rd</sup> Ed.) at para 2.32.

a direct or indirect encouragement of terrorist, as opposed to, for example, a joke<sup>12</sup>; or whether the statement was made to “members of the public” (not obvious in the context, for example, of private Telegram channels).

**Table 1: Offences listed in Schedule 5**

| <b><i>Terrorism Act 2000</i></b>   | <b>Mental Element</b>  | <b>Defence</b>  |
|--|--|---|
| S.11 (membership of a proscribed organisation)                                     | -  | Profession of membership took place before organisation proscribed <sup>13</sup>  |
| S.12(1) (inviting support for a proscribed organisation)                           | -  | -   |
| S.12(1A) (expressing an opinion or belief supportive of a proscribed organisation) | Reckless as to whether a person to whom expression is directed will be encouraged to support proscribed organisation | -   |
| S.12(2) (arranging a meeting supportive of a proscribed organisation)              | Knowledge  | (Where meeting addressed by a member of a proscribed organisation in private) no reasonable cause to believe that address would be supportive |
| S.13(1A) (publishing image of uniform of proscribed organisation)                  | -  | -   |
| S.15 (terrorist fund-raising)  | Intention or reasonable cause to suspect that funds to be used for purposes of terrorism                             | -   |
| S.16(1) (use of money or property for terrorist purposes)                          | Intention <sup>14</sup>  | -   |
| S.16(2) (possession of money or property for terrorist purposes)                   | Intention or reasonable cause to suspect that money or property to be used for purposes of terrorism                 | -   |
| S.17 (involvement in terrorist funding arrangements)                               | Intention or reasonable cause to suspect that funds to be used for purposes of terrorism                             | -   |
| S.18 (laundering of terrorist property)  | -  | Did not know or have reasonable cause to suspect that arrangement related to terrorist property   |

<sup>12</sup> In Series 8 Episode 3 of the popular cartoon *South Park*, one of the characters chants “Wir müssen die Juden ausrotten” (We must exterminate the Jews).

<sup>13</sup> Although this defence only applies to one aspect of the s.11 offence, namely “professing to belong” to a proscribed organisation, this is the only aspect of the s.11 offence that can be applicable in this context.

<sup>14</sup> Necessarily, as the use must be “for the purposes of terrorism”.

|  |  |   |
|--|--|---|
| S.54(1) (providing weapons <sup>15</sup> training)                   | -  | Involvement wholly for a purpose other than for terrorism                               |
| S.54(3) (inviting another to receive weapons training)               | -  | Involvement wholly for a purpose other than for terrorism                               |
| S.56 (directing a terrorist organisation)                            | Intention <sup>16</sup>  | -   |
| S.58 (collection of information likely to be of use to a terrorist)  | -  | Reasonable excuse (including journalism and academic research) <sup>17</sup>            |
| S.58A (publishing information about members of the armed forces etc) | -  | Reasonable excuse   |
| Ss.59-61 (inciting terrorism outside the United Kingdom)             | Incitement requires intention or belief that the person incited will commit the offence <sup>18</sup>  |   |
| <b><i>Anti-Terrorism, Crime and Security Act 2001</i></b>            |  |   |
| S.113 (use of noxious substances or things)                          | Is designed to influence government or intimidate the public   | -   |
| <b><i>Terrorism Act 2006</i></b>                                     |  |   |
| s.1 (encouragement of terrorism)                                     | Intending to encourage terrorism or subjectively reckless as to encouragement                          | (Where committed recklessly) clear that statement did not have encourager's endorsement |
| S.2 (dissemination of terrorist publications)                        | Intending to encourage or assist terrorist, or subjectively reckless as to encouragement or assistance | (Where committed recklessly) clear that statement did not have encourager's endorsement |
| S.5 (preparation of terrorist acts)                                  | Intention  | -   |
| S.6 (training for terrorism)   | Intention to use training for terrorism  | -   |
| S.11 (terrorist threats relating to radioactive devices etc)         | -  | -   |

20. All forms of inchoate commission of the above (involving attempts and conspiracies to commit), or secondary participation, involve some mental element, ordinarily intention, and may also involve additional defences<sup>19</sup>.

21. As can be seen from Table 1, only 3 of the above offences do not require either proof of some mental element, or are subject to a defence, or both. These are:

<sup>15</sup> "Weapons" refers to firearms, radioactive weapons, explosives, or chemical biological or nuclear weapons.

<sup>16</sup> Direction can only be done intentionally.

<sup>17</sup> Section 58(3A) expressly protects journalism and academic research.

<sup>18</sup> R v Claydon [2006] 1 Cr.App.R. 20.

<sup>19</sup> For example, under section 50 Serious Crime Act 2007, there is a defence of reasonableness.

- two offences under the Terrorism Act connected with proscribed organisations: sections 12(1) (inviting support for a proscribed organisation), and 13(1A) (publishing image of uniform of proscribed organisation);
- the offence of making terrorist threats relating to radioactive devices etc contrary to section 11 Terrorism Act 2006.

**Should assumptions be made?**

22. None of the other 19 offences (and none of the inchoate offences) are committed merely by using, possessing, viewing, accessing, publishing or disseminating content. These offences are not committed *unless*:
- (a) Where some mental element is required, the mental element is present; and  
 (b) Where a defence is available, a defence is not made out.
23. The Bill is silent on these further aspects. It cannot be the case that where content is published etc. which might result in a terrorist offence being committed, it should be *assumed* that the mental element is present, and that no defence is available.
24. Otherwise, much lawful content online would “amount to” a terrorist offence.

***Example 1:***

If I give online instruction on using a rifle to someone at a shooting club - the conduct element of the weapons training offence contrary to section 54 Terrorism Act 2000 – it cannot be assumed that the defence (that this training is unrelated to terrorism) does not apply and that I am committing a terrorism offence.

***Example 2:***

If I download parts of a guide to military incendiary systems –available from Amazon, and which I have just done for the purposes of researching this Note – it cannot be assumed that I lack a reasonable excuse for having a document likely to be useful to a terrorist (contrary to section 58 Terrorism Act 2000).

***Example 3:***

If I take and upload a photo of Buckingham Palace it cannot be assumed that this was done to assist an act of hostile reconnaissance with the intention of committing acts of terrorism, contrary to section 5 Terrorism Act 2006.

***Example 4:***

If I share a nasheed (popular form of music in the Islamic world) which glorifies the Taleban victory over US, UK and other coalition forces in Afghanistan<sup>20</sup>, because I like the imagery and the beat, it cannot be assumed that I am doing so intending to encourage terrorism, or being subjectively reckless as to whether terrorism will be encouraged (contrary to section 1 Terrorism Act 2006).

***Example 5:***

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<sup>20</sup> Such nasheeds are readily available online. When broadcast, they have been the subject of regulatory action by OFCOM in the past: see Ofcom Broadcast and On Demand Bulletin (no.432, 2021).

If I solicit funds on the internet – the conduct element of the terrorist fund-raising offence contrary to section 15 Terrorism Act 2000 – it cannot be assumed that I do so intending or having reasonable cause to suspect that the funds will be used for the purposes of terrorism.

25. If assumptions are *not* to be made, then, possibly, the intention of the Bill is that terrorism content amounts to/ constitutes an offence if it is realistic to infer the presence of the requisite mental element and the absence of a defence in relation to the use etc. of the content. However:
- This is not what the Bill says. It is possible that the Bill might be interpreted by a Court, or by OFCOM, to allow for intention and defences, but it is undesirable to build such uncertainty into the Bill.
  - In particular, the Bill ought to identify a threshold for inferences. Setting the bar at “realistic to infer” does not allow sufficiently for freedom of speech. It may be “realistic” but wholly inaccurate to infer terrorist intent in the following words: “I encourage my people to shoot the invaders”.

### **Implications**

26. Although tech companies, the regulator, the government and the public may have (or think they have) a broad sense of how the Bill is intended to reduce the risk of terrorism online, there needs to be common understanding and certainty about the new statutory duties. These depends on the definition of “terrorism content”.
27. Firstly, there is both a risk of too little and too much content moderation.
- On one view, there are only 3 types of content which may themselves “amount to” a terrorist offence under Schedule 5: two relating to proscribed groups, and one relating to radioactive threats. For other terrorism offences, tech companies will be able to argue that intention is uncertain, or a defence may be available.
  - On another view, conceivably any content can amount to a “terrorism content” once a terrorist intention is assumed.
28. Secondly, it will be hard for OFCOM to hold tech companies to account for their action or inaction. Regulators are chary of using powers to enforce uncertain duties.
29. Thirdly, public expectations of a pioneering Bill, identified as world leading, may not be met.

### **Conclusion**

30. Part of the problem appears to be that the definition of terrorism content is tied to conduct alone amounting to the commission of a terrorism offence. It would be unsupportable to require assumptions about mental element and lack of defence. But this leaves the question of intention and defence unaddressed.
31. There is room for greater clarity about the policy of the Bill when it comes to terrorism legislation.
32. If the intention of the Bill is to address *content* – for example to allow for automated searches – then greater clarity could be achieved by referring to two definitions in the Terrorism Act 2006: “terrorist publication” (section 2), and statements or articles that are “unlawfully terrorism-related” (section 3). Crudely put, these encompass:

- Content that is objectively likely to be understood as a direct or indirect encouragement or inducement to the commission, preparation or instigation of acts of terrorism;
  - Content that is likely to be useful in the commission or preparation of acts of terrorism and is objectively likely to be understood as useful wholly or mainly for that purpose.
33. However, the Bill does not allow for the feeding in of specialist assessments by the government or counter-terrorism police as to what content objectively falls within these categories. As to existing provisions: section 3 Terrorism Act 2006 is a clunky take-down power that has never been used; and section 3 Terrorism Act 2000 allows the proscription of groups (who may produce branded content) but not, for example, of manifestos. Manifestos, such as Anders Breivik's or Brenton Tarrant's, are highly influential.<sup>21</sup>
34. If the intention of the Bill is to address conduct, then the duties need reframing. For example, section 8 concerns the assessment of the risk of users encountering illegal content (including terrorism content) rather than an assessment of the risk of users committing specified terrorism offences.

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<sup>21</sup> Ware, J., 'Testament to Murder: The Violent Far-Right's Increasing Use of Terrorist Manifestos', ICCT Policy Brief (March 2020).