

INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

Response to OFCOM consultation “Protecting people from illegal harms online”

Executive Summary

1. The necessary special protection for children against exposure to terrorism content is missing from OFCOM’s proposals.
2. The internet is a major source of radicalisation and self-radicalisation of children, resulting in a well-documented increase in children being investigated and arrested for terrorism offences.
3. If OFCOM were to promulgate the Codes in their current form this would very arguably result in a breach of OFCOM’s duty under the Online Safety Act 2023. In summary, the Act requires OFCOM to generate a terrorism content Code that pursues higher standards of protection for children than for adults.
4. OFCOM also appears to have a blind spot in its analysis of risk. It fails to consider that age is a risk factor relating to the harm caused by terrorism content.
5. OFCOM’s proposals on terrorism content are otherwise impressive. Where the Online Safety Act 2023 puts so much responsibility on the regulator to flesh out standards, this was bound to be an immense task.
6. In short:
 - OFCOM should acknowledge youth as a factor in its assessment of the harm resulting from terrorism content.
 - OFCOM should ensure that higher protection from terrorism content is required in the Codes for children than for adults.

Background

7. OFCOM’s consultation opened on 9 November 2023 and is due to conclude on 23 February 2024. It follows the enactment of the Online Safety Act 2023 and concerns a major set of proposals on standards for regulating illegal content.
8. If implemented, these proposals will impose obligations on:
 - User-to-user services (“U2U services”) where people can create and share content, or interact with others, such as Facebook, TikTok, Instagram, X, and other social media apps.
 - Search services, such as Google.

9. Terrorism content is a subset of illegal content¹.

The impact on children of terrorism content

10. In 2017 the UN described children as being of at particular risk of online terrorism recruitment². This observation has proven to be correct in the UK and internationally. Radicalisation is by no means restricted to active recruitment of children by adults but includes radicalisation of children by other children, and self-radicalisation.

11. None of this ought to be a surprise. The internet, which is core to most children's lives, plays an important role in radicalisation and attack preparation for lone individuals and pairs of attackers³.

12. In my 2022 response to the Online Safety Bill, I set out concrete recent examples of UK children who had been arrested and/or prosecuted for terrorism offending⁴.

13. The following additional material tends to establish that radicalisation of children is a growing problem, and that a major cause is exposure to online influences:

- In 2020, the Council of the European drew attention to the spread of transnational digital far-right terrorist subcultures especially on online video gaming platforms and its potential impact on the young⁵.
- In the course of 2021, Counter Terrorism Policing released 54 news items on their website⁶. In 10 of these, the police drew attention to the risk posed to children by online terrorism content and asked for vigilance.
- OFCOM's own 2021 report, 'Online Nation', records that 9% of social video platform users had been exposed to 'radicalisation or terrorism' within the last 3 months⁷. Much of children's social media use is centred on social video⁸.
- In 2022, the National Police Chiefs Council launched an anti-terrorism-grooming website⁹. In doing so it referred to the "perfect storm" during

¹ Section 50.

² United Nations Office on Drugs and Crime, 'Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System' (2017), at page 13.

³ Kenyon, J., Binder, J. F., & Baker-Beall, C. (2024, January 15). An Analysis of Terrorist Attack Perpetrators in England and Wales: Comparing Lone Actors, Lone Dyads, and Group Actors. *Journal of Threat Assessment and Management*.

⁴ Available at <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2022/07/IRTL-OFCOM-Response-1.pdf>.

⁵ EU Counter-Terrorism Coordinator, 'Online gaming in the context of the fights against extremism' (6.7.20). See also Koehler, D., Jugl, I., Fiebig, V., 'Extreme Right Radicalisation of Children via Gaming Platforms' (GNET, 24.10.22).

⁶ www.counterterrorism.police.uk.

⁷ Figure 3.14.

⁸ Ibid, page 61.

⁹ www.actearly.uk.

COVID making more young people vulnerable to online radicalisation and other forms of grooming¹⁰.

- The European Union’s annual terrorism report for 2022 referred to the increasing number of young people, including minors, exposed to online terrorist propaganda¹¹:
- In 2023, UK counter-terrorism police’s head of Prevent spoke of the increasing numbers of young people being radicalised and to the role of the amount of time spent by young people online¹²:
- According to a recent academic study report, in anonymous transnational online extremist ecosystems, which are widely available and have very low barriers to participation, the potential impact of extremist minors is on a par with adults¹³:
- Government guidance in September 2023 on radicalisation in education settings refers to the risk to learners of the rapid proliferation of terrorist content online¹⁴:
- The December 2023 the government issued revised Prevent guidance identifying a “concerning number of children” who commit terrorism offences by downloading and disseminating terrorist materials online¹⁵.
- Commenting on Prevent statistics in England and Wales in 2023, counter-terrorism police observed that children and young people were overly represented, and that the statistics showed a continuation of the “worrying trend” of children becoming more prevalent in counter-terrorism casework, with young children being exposed to harmful ideologies and extremist content¹⁶.
- French security services referred in December 2023 to ISIS propaganda seducing a new generation of teenagers¹⁷.
- In evidence to the Home Affairs Committee in Parliament, in December 2023, Assistant Commissioner Matt Jukes spoke of counter-terrorism police dealing with more people who have accessed terrorist material online and “younger people as well, which is a feature of our work”¹⁸.
- In January 2024, the head of the Met Police’s counter-terrorism unit Commander Dominic Murphy identified an “uncomfortable” increase in child radicalisation driven by an online environment that was enabling young Londoners to consume a mix of toxic ideologies, thereby fuelling the terrorist threat¹⁹.

¹⁰ ‘CTP launch new safeguarding website to combat ‘perfect storm’ of online radicalisation’ (18.11.20).

¹¹ European Union Terrorism Situation and Trend Report (TE-SAT) for 2022 (2023).

¹² Daily Mail, ‘How lockdown “fuelled surge in right-wing extremism among children”: Shocking graph shows how number of under-15s monitored by Prevent for far-Right terrorism DOUBLED during the pandemic’ (26.12.23).

¹³ Rose, H., and Vale, G., ‘Childhood Innocence? Mapping Trends in Teenage Terrorism Offenders’ (ICSR, 2023).

¹⁴ HM Government, ‘Understanding and identifying radicalisation in your education setting’ (Guidance, 7.9.23).

¹⁵ HM Government, ‘Prevent duty guidance: for England and Wales’ (31.12.23).

¹⁶ CT Police, ‘New statistics show increase in Prevent referrals’ (News release, 7.12.23).

¹⁷ ‘ISIS propaganda seducing “new generation of teenagers,” French domestic intel’, Politico, 6.12.23.

¹⁸ Oral evidence, 12.12.23.

¹⁹ Evening Standard, “‘Startling’ rise in child arrests in London over extreme Right-wing terrorism, Met chief warns’ (2.1.24).

- Also in 2024, the government’s Counter Terrorism Internet Referral Unit identified a 12-fold increase in hateful social media content since the Hamas terrorist attacks of October 2023. The profile appeared to be “skewing younger”²⁰.
- Latest counter-terrorism statistics for the year ending September 2023 show the joint highest ever number of child arrests (31) in the preceding 12 months²¹.

OFCOM’s incomplete assessment of risk

14. In Volume 2 of its consultation material, OFCOM has published a document on “The causes and impacts of online harm”. As part of this it has considered the risks of harm connected with terrorism offences²².
15. However, the relevant part of its assessment only refers to the following “user base characteristics” as being relevant to terrorism: race, ethnicity, religion, and gender²³. There is no reference to youth.
16. OFCOM should include youth as a risk factor in relation to terrorism content.

Code and Online Safety Objectives

17. Chapter 6 of Part 3 of the 2023 Act is entitled “Codes of Practice and Guidance”.
18. The first statutory obligation within this Chapter is for OFCOM to prepare and issue a code of practice for relevant services relating to terrorism content or terrorism offences²⁴. The purpose of the code is to describe measures for the purpose of complying with the illegal content safety duties²⁵, which relate to removing illegal content such as terrorism content and minimising users’ exposure to it.
19. In practice, and no doubt to reduce the number of documents, OFCOM has not created a separate code of practice for terrorism content. Rather it has bundled up all measures relating to terrorism content in two compendious Illegal Content Codes of Practice (one relating to U2U services, the other to search services²⁶).
20. There is another relevant duty on OFCOM. The regulator must ensure that measures described in the terrorism content code of practice “...are compatible with pursuit of the online safety objectives”²⁷.
21. What do the online safety objectives say about children?

²⁰ BBC, ‘Young Britons exposed to online radicalisation following Hamas attack’ (6.1.24).

²¹ Home Office, Statistics on the operation of police powers under Terrorism Acts, 14.12.23, Table A.10.

²² Chapter 6B.3.

²³ 6B.33.

²⁴ Section 41(1). Terrorism offences are those listed in Schedule 5.

²⁵ Sections 10 (U2U) and 27 (search).

²⁶ Annex 7 and Annex 8.

²⁷ Schedule 4, para 3.

22. The online safety objectives for regulated U2U services require that they should be designed and operated in such a way that:

- They provide a higher standard of protection for children than for adults²⁸.
- The different needs of children at different ages are taken into account²⁹.
- There are adequate controls over access to and use of the service by children, taking into account use of the service by, and impact on children in different age groups³⁰.

23. Similarly, the online safety objectives for regulated search services require:

- A higher standard of protection for children than for adults³¹.
- That the different needs of children at different ages are taken into account³².
- Search services to be assessed to understand their use by, and impact on, children in different age groups³³.

OFCOM's proposed terrorism content Code

24. Despite OFCOM's obligations in relation to the online safety objectives (explained above), there is nothing in the proposed Codes that provides higher protection for children than adults in relation to terrorism content; that takes account of the different needs of children at different ages with relation to terrorism content; that provides adequate controls on access to terrorism content taking account of impact on children in different age groups (for u-2-u services); or that requires assessment to understand the service's use by and impact on children in different age groups in relation to terrorism content.

25. To reiterate: OFCOM's obligation is to ensure that measures described in the terrorism content Code "...are compatible with pursuit of the online safety objectives"³⁴. What does this mean?

26. It is true that the wording of the statutory obligation is to achieve Codes that "are compatible with pursuit of" the safety objectives, not Codes that "further the pursuit of" the safety objectives.

27. This could imply a negative obligation only. This could mean that the terrorism content Code should not lay down standards that prevent higher standards being imposed in due course (for example, in a future children's Code) or in relation to other content (for example, higher standards relating to access to pornography).

²⁸ Ibid, para 4(a)(vi).

²⁹ Ibid, paragraph 4(a)(vii).

³⁰ Ibid, paragraph 4(a)(ix).

³¹ Ibid, paragraph 5(a)(v).

³² Ibid, paragraph 5(a)(vi).

³³ Ibid, paragraph 5(b).

³⁴ Schedule 4, para 3.

28. But having regard to the other “online safety objectives” whose pursuit the Code must be “compatible with”, this is an unlikely interpretation.
29. For example, the first online safety objective that applies to both U2U and search services requires design and operation so that the systems and processes for regulatory compliance and risk management are effective and proportionate to the kind and size of service.³⁵ This is a baseline objective, and it is difficult to conclude that OFCOM’s duty in formulating the Codes was merely not to interfere with this fundamental safety objective being pursued at some stage in the future, or elsewhere. The same point can be made of the other online safety objectives not relating specifically to children³⁶.
30. The better view is that OFCOM’s duty, in formulating a terrorism content Code that is “compatible with the pursuit” of the online safety objectives (including those relating to children) is a positive one. The Code itself must therefore incorporate special protections for children.
31. So, unless the code is changed to incorporate the child safety objectives, OFCOM will fail to comply with its statutory obligation.

Better protection in practice

32. Assuming the terrorism content Code does require higher protection for children etc, what measures might it include?
33. Reference should be made to the index of recommended measures in the annexes 7 and 8 of the consultation, which identify particular measures which are required by the terrorism content Code. The approach is that stronger responsibilities are placed on large or multi-risk services than on small services.
34. OFCOM’s rationale for this is that if a service is at risk of a single kind of illegal harm, that risk is more likely to be well understood across the organisation³⁷. However, this is at odds with OFCOM’s own assessment, which acknowledges that small platforms, with fewer resources to identify and moderate terrorism content, are particularly at risk of exploitation from terrorist actors³⁸. The case of JustPaste.it is a good example³⁹.
35. I suggest that, as a bare minimum, the following changes should be made to the recommended measures:
 - Under ‘Governance and accountability’, all services (or failing that, large or multi-risk services) should periodically review the risk of children accessing terrorism content on their service.

³⁵ Schedule 4, paras 4(a)(i) and 5(a)(i)

³⁶ Ibid, paras 4(a)(ii), (iv), (v), (viii) and 4(b); paras 5(a)(ii), (iii), (iv), 5(c).

³⁷ Volume 4, paras 11.43-46.

³⁸ Volume 2, paras 6B.74 to 6B.77.

³⁹ ‘How a Polish student’s website became an Isis propaganda tool’ (Guardian, 15.8.14).

- Under ‘Content moderation’, all services (or failing that, large or multi-risk services) should prioritise, and required to demonstrate how they are prioritising, the avoidance of children encountering terrorism content on their service.
- Under ‘Default settings and support for child users’, the requirements that are currently required for Child Sexual Exploitation and Abuse (CSEA) and ‘other duties’ should also extend to terrorism (this obligation affects only a specific category of services).
- Under ‘Enhanced user controls’, the requirements that are currently required for CSEA and ‘other duties’ should also extend to terrorism (this obligation affects only a specific category of services).

Miscellaneous points on the proposed Illegal Contents Judgment Guidance

36. At A2.7, OFCOM invites services to note section 3 of the Terrorism Act 2006. This enables a constable to serve a notice on a service provider that content is unlawfully terrorism-related. Service of such a notice is then relevant if any prosecution is brought against the service provider under section 2 Terrorism Act 2006.
37. However, section 3 Terrorism Act 2006 has never been used⁴⁰. There is not only no purpose in referring to it – worse, services may be induced to believe that they can rely upon constables to do their assessments for them by serving a notice. I suggest that this reference should be removed.
38. Regarding expressing a view that is supportive of a proscribed organisation, A2.15 c) needs to reflect the requirement for recklessness in section 12(1A)(b) Terrorism Act 2000.
39. Regarding A2.27, the final sentence is incorrect; A2.29 is correct (no mental element is required for offence under section 58 Terrorism Act 2000).
40. Page 154 refers to an authority (Attorney General’s Reference (No 4 of 2002) [2003] EWCA Crim 762) in relation to section 12(1A) Terrorism Act 2000. However, the authority only relates to section 12 Terrorism Act 2000. Section 12(1A) was enacted later.

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⁴⁰ Terrorism Acts in 2021 at 12.57. I am confident that this is correct because of the process of fact-checking prior to publication of my reports.