



Law Society
of Scotland

Online Safety Bill

Law Society of Scotland – briefing for Second
Reading

April 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We previously responded to the UK Government's *Online Harms White Paper* in July 2019¹.

We now welcome the opportunity to consider and provide comment on the Online Safety Bill² ahead of the Bill's Second Reading in the House of Commons fixed for 19 April 2022.

General remarks

We welcome the introduction of the Bill, which establishes a new regulatory regime to address illegal and harmful content online and enables OFCOM to act as the online safety regulator, which includes OFCOM overseeing and enforcing new regulations. Furthermore, the Bill imposes legal requirements on providers of internet services which allow users to encounter content generated, uploaded or shared by other users ("user-to-user services"), providers of search engines which enable users to search multiple websites and databases ("search services"), and providers of internet services on which provider pornographic content (pornographic content that is published by a provider and is not user generated) is published or displayed.

We consider that action is needed to address online harms and we recognise that this is a complex task, given the need to balance the interests of various groups, protect freedom of expression and ensure that citizens, particularly children or other vulnerable users, can use the internet safely.

As highlighted in our response to the White Paper, we share concerns around the increasing volume of disinformation and misinformation and the difficulty of identifying real stories from fake news. Online harm is widespread and in the longer-term international cooperation in this area is likely to prove more efficient than any single country's initiative.

¹ [19-07-01-priv-cons-crim_lss-response_online-harms-converted.pdf \(lawscot.org.uk\)](#)

² <https://bills.parliament.uk/bills/3137>

Criminal offences

We note that the Bill creates a number of offences applicable to Scotland, for example, in connection with information notices (clause 92 – 96). We consider that it will be important for a strong awareness raising campaign to be undertaken to make the public and operators aware of these provisions before these come into force. We also consider it is essential that communication around this topic makes it clear that individual criminal responsibility remains on the part of the perpetrators.

Vulnerable adults

We note that while the Bill seeks to provide specific protections for those who may be vulnerable due to their young age (children), it does not extend these protections to other potentially vulnerable groups including those with mental and intellectual disabilities.

We also note the need for the functions and duties of any regulator to be properly and adequately coordinated with those of other bodies and entities having relevant roles.

Comments on the Bill

The Bill is divided into eleven parts and has fourteen schedules. We do not seek to comment in detail on each of these.

Part 1

This Part contains an overview clause and sets out what is included in the Bill. We have no comments.

Part 2 and Schedules 1 and 2

This Part and related Schedules set out the key definitions in the Bill. *We have no comments.*

Part 3 & Schedule 3

This Part imposes duties of care that apply to providers of regulated user-to-user and search services.

Chapters 1 - 3

Clause 5 provides an overview of Part 3 of the Bill. We have no comments.

Chapter 2 imposes duties of care on providers of regulated user-to-user services in relation to content and activity on their services. Clause 7 sets out the scope of duties of user-to-user services and Clause 8 sets

out the illegal content risk of assessment duties, including a duty to carry out a suitable and sufficient illegal content risk assessment (Clause 8 (2)). Clause 9 establishes the safety duties about illegal content. We have no comments.

Clause 10 concerns children’s risk assessment duties. We have no comments.

Clause 11 sets out the duties to protect children’s online safety including a duty to take or use proportionate measures to effectively mitigate and manage the risks of harm and mitigate the impact of harm to children. We have no comments.

Adult risk assessments duties are set out under clause 12 and the duties of protecting adults’ online safety in relation to Category 1 services are set out in clause 13. We have no comments.

The Bill also sets out the user empowerment duties (Clause 14), duties to protect the content of democratic importance (Clause 15), duties to protect journalistic content (Clause 16), duty about content reporting (Clause 17), and duties about complaint procedures (Clause 18).

We note that clause 17(6) includes within the definition of an ‘affected person’ “an adult providing assistance in using the service to another adult who requires such assistance, where that other adult is a user of the service or is the subject of the content.” We suggest that clarity is required as to the role of attorneys, guardians and interveners in this regard. Such appointments made under the Adults with Incapacity (Scotland) Act 2000 are subject to the principles set out in section 1 of that Act, which also represent good practice.

We have no other comments on clauses 14 – 18.

Clause 19 concerns duties about freedom of expression and privacy. Under clause 19(2), user-to-user services are under a duty to have regard to the importance of protecting user’s right to freedom of expression within the law and under clause 19(3), they must also have to have regard to the importance of protecting users from a breach of any statutory provision or rule of law concerning privacy. We consider these considerations to be very important in protecting the rights and freedoms of individuals.

Clause 20 concerns record keeping and review duties which apply to all regulated user-to-user services. We have no comments.

Chapter 3 sets out the providers of search services duty of care, as all providers of regulated search services must comply with a number of duties in relation to each such service they provide.

Clause 23 establishes the duties about illegal content risk assessment, which includes carrying out a suitable and sufficient illegal content risk assessment (Clause 23(2)) and Clause 24 sets out the duties about safety duties about illegal content, namely, to take or use proportionate measures to effectively mitigate and manage the risks of harm to individuals. We have no comments.

Clause 25 deals with children’s risk assessment duties and clause 26 sets out safety duties to protect children’s online safety which apply to regulated services that are likely to be accessed by children. We have no comments.

Clause 27 sets out the duties of content reporting, which requires service providers to operate a service, whereby service providers must have systems and processes in place that allow users and affected persons to easily report search content they consider content that is illegal or harmful to children.

We note that clause 27(5) includes within the definition of an ‘affected person’ “an adult providing assistance in using the service to another adult who requires such assistance, where that other adult is a user of the service or is the subject of the content.” As per our comment in relation to clause 17 above, we suggest that clarity is required as to the role of attorneys, guardians and interveners in this regard. Such appointments made under the Adults with Incapacity (Scotland) Act 2000 are subject to the principles set out in section 1 of that Act, which also represent good practice.

Clause 28 concerns duties about complaints procedure in relation to regulated search services. We have no comments.

Clause 29 deals with the duties about freedom of expression and privacy in relation to all regulated search services. It provides that when deciding on and implementing safety measures and policies, there must be regard to the importance of protecting the rights of users and interested persons to freedom of expression within the law (clause 29(2)), and to the importance of protecting users from a breach of duty of any statutory provision or rule of law concerning privacy that is relevant to the use or operation of a search service (clause 29(3)). We consider these considerations to be very important in protecting the rights and freedoms of individuals.

Clause 30 addresses record-keeping and review duties regarding regulated services, whereby regulated search services must keep written records of every risk assessment under clause 23 or 25 and services have a duty to keep a written record of any measures taken or in use to comply with a relevant duty as set out in clause 30(3). We have no comments.

Chapter 4

Clauses 31 to 33 concern Children’s Access Assessments. We have no comments.

Chapter 5

Clauses 34 - 37 concern Duties about Fraudulent Advertising. We have no comments.

Schedule 3 concerns the timing of providers’ assessments. We have no comments.

Chapter 6 & Schedule 4

This Chapter concerns Codes of Practice and Guidance.

Under clause 37, OFCOM are required to prepare and issue a code of practice for providers of Part 3 services (providers of search services), which describe the recommended measures for complying with duties in relation to the illegal content duties (set out in clauses 9 and 24) so far as relating to terrorist content and child sexual exploitation and abuse content.

Clause 37(6) requires OFCOM to consult with a number of parties in the course of preparing a draft code of practice or amendments. We welcome the requirement for consultation which will ensure scrutiny of the draft code by relevant stakeholders.

This provision lists the groups that OFCOM must consult with in preparing a draft code of practice. This includes at clause 37(6)(f) “persons whom OFCOM consider to have relevant expertise in equality issues and human rights”, but it does not include members of potentially vulnerable groups (including disabled people) or the organisations which represent them. We note that clause 61, which relates to OFCOM guidance about transparency reports, does include “persons who appear to OFCOM to represent the interests of those with protected characteristics (within the meaning of Part 2 of the Equality Act 2010),” in the list of consultees. We note that there is an obligation to consult with disabled people on decision-making processes concerning issues relating to disabled people under Article 4(3) of the UN Convention on the Rights of Persons with Disabilities (CRPD). We consider that all persons within the CRPD definition of disabled (people with physical, sensory, mental or intellectual disabilities), and all people who may benefit from the support requirements of Article 13.3 of CRPD should be within scope of the consultation requirements in the Bill. We therefore suggest that the consultation duties under clauses 37 and 61 are strengthened.

Schedule 4 contains other provisions related to codes of practice. We have no comments.

Clauses 39 – 47 contain further detail about the arrangements for codes of practice and guidance. We have no comments on these provisions.

Chapter 7 & Schedules 5 - 7

Chapter 7 concerns the interpretation of Part 3.

Clause 52(4) defines a “relevant offence” as a terrorism offence specified in Schedule 4, a child sexual exploitation and abuse (CSEA) offence specified in Schedule 5, an offence specified in Schedule 6 (offences related to child sexual exploitation and abuse), an offence specified in Schedule 7 (other priority offences) or an offence, not within paragraph (a), (b) or (c), of which the victim or intended victim is an individual (or individuals). The offences set out in Schedules 5 – 7 are existing offences under other legislation.

We have no further comments on these provisions.

Part 4 & Schedule 8

Part 4 of the Bill sets out the other duties of providers of regulated user-to-user services and regulated services.

Clauses 57 and 58 concern Providers of Category 1 Services – User Identity Verification. Clause 57 sets out a requirement that Category 1 providers must offer all adult users of the service the option to verify their identity. Category 1 service means a regulated user-to-user service for the time being included in the part of the register established under subsection (2)(a) (Clause 81(10)(a)). Details of how the verification process works must be clear to users, and under clause 58, OFCOM must produce guidance for providers of Category 1 services.

Clause 58(2) requires OFCOM to “have particular regard to the desirability of ensuring that providers of Category 1 services offer users a form of identity verification likely to be available to vulnerable adult users.” This clause contains the only reference to ‘vulnerable adults’ in the Bill. We consider that the wording of the provision lacks clarity. It is not clear what is meant by ‘vulnerable’ in this context.

Clause 58(3) requires OFCOM to consult with various parties before producing the guidance (including revised or replacement guidance). We welcome this requirement to consult with stakeholders. However, the reference to a duty to consult “persons who appear to OFCOM to represent the interests of vulnerable adult users of Category 1 services” lacks clarity. As above, it is not clear what is meant by ‘vulnerable’ in this context. It is not clear whether this provision requires consultation with groups or organisations of and for vulnerable adult users of Category 1 services, or with representatives of individual vulnerable adults. If the latter, it is not clear how such representatives will be identified by OFCOM or what safeguards will be employed. Further clarity is required.

Chapter 2 concerns Reporting Child Sexual Exploitation and Abuse Content.

Clause 59 requires:

- a UK provider of a regulated user-to-user service to operate the service using systems and processes which secure (so far as possible) that the provider reports all detected and unreported CSEA content present on the service to the NCA and
- a non-UK provider to operate the service using systems and processes which secure that the provider reports all detected and unreported UK-linked CSEA content present on the service to the NCA, and it places the same requirement on non-UK providers of regulated user-to-user services.

We fully support the reporting of all detected and unreported CSEA content present on the service to the NCA.

It is an offence under clause 62(1)(a) if, in purported compliance with a requirements under clause 59, a person provides information that is false in a material respect and (b) if the person knows it is false in

material respect or is reckless as to whether it is false in a material respect. We note that this provision therefore criminalises reckless, as well as intentional, misrepresentations.

Schedule 8 of the Bill concerns Transparency Reports by providers of Category 1 Services, Category 2A Services and Category 2B Services. We have no comments.

Part 5 & Schedule 9

Part 5 of the Bill imposes duties on providers of internet services (including user-to-user services and search services) that publish certain pornographic content.

Definitions of “Pornographic content”, “provider pornographic content”, “regulated provider pornographic content” are provided in clause 66, which we welcome for the purposes of clarity. Clause 67 determines the scope of duties about regulated pornographic material and clause 68 establishes duties about regulated pornographic content. We welcome clause 68 as means of protecting children from pornographic content.

Clause 69 requires OFCOM to produce guidance for providers of internet services to comply with their obligations under clause 68. This is consistent with clause 58 in that it contains a requirement that when OFCOM is producing guidance, it must consult with other relevant parties. We welcome this requirement for consultation with those who represent providers of internet services, adult users of internet services and the interests of children as well as consulting the Information Commissioner.

Schedule 9 of the Bill sets the providers of internet services which are not subject to the duties on regulated provider pornographic content. We have no comments.

Part 6

Part 6 of the Bill concerns Duties of Providers of Regulated Services: Fees. We have no comments.

Part 7 & Schedules 10 - 12

Part 7 concerns OFCOM'S powers and duties in relation to regulated services.

Clauses 77 – 79 set out general duties. We have no comments.

Clauses 80 – 82 concern the register of categories of regulated user-to-user services and regulated search services. Schedule 10 concerns Categories of regulated user-to-user services and regulated search services: regulations. We have no comments.

Clauses 83 – 84 concern risk assessments of regulated user-to-user services and regulated search services. We have no comments.

Clauses 85 – 88 concern information power and information notices.

Clause 85 gives OFCOM the power to require the provision of information they require in order to discharge their online safety functions. Subsection (7) provides that this “does not include power to require the provision of information in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications, could be maintained in legal proceedings.” While we consider this entirely appropriate and note this formulation appears in other legislation, we consider that it is outdated and potentially confusing.

What was once termed ‘confidentiality of communications’ is increasingly referred to as ‘legal professional privilege’ in practice. The concept of legal professional privilege is well-recognised in Scots law, and the Supreme Court in the case of *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another*³ indicated that the law of privilege in Scotland is substantially the same as in England. On that basis we consider consistency of description to be preferable.

We have no comments on clauses 86 - 88.

Clauses 89 – 90 concern investigations and interviews.

Clause 90 concerns the power of OFCOM to require an individual to attend an interview. Subsection (6) provides that this clause does not require a person “to disclose information in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications, could be maintained in legal proceedings.” While we consider this entirely appropriate, we note our comments above in connection with clause 85 in relation to the formation of language used.

Clause 91 and Schedule 11 to the Bill make provision about OFCOM’s powers of entry, inspection and audit.

Schedule 11, Paragraph 1 provides that OFCOM may authorise persons to exercise their powers of entry and inspection, carry out audits or apply for and execute a warrant.

Paragraph 4 concerns audit notices. We consider it appropriate that an audit notice may “not require a provider to do anything that would result in the disclosure of information or documents in respect of which a claim for legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings” (paragraph 4(5)) but note our comments above in connection with clause 85 in relation to the formation of language used.

³ [2013] UKSC 1

In relation to the issue and execution of warrants (paragraphs 5 – 17 of Schedule 11), we consider that warrants should only be obtained when matters are urgent and a time-period would normally be expected for its expiry. Under paragraph 10, we note the requirement that “Entry and search under a warrant must be within the period of one month starting with the date of its issue.” We consider that a period of one month is reasonable and is in line with other legislation concerning the execution of warrants (e.g. Misuse of Drugs Act 1971, section 23(3)).

Paragraph 17 sets out limitations to the powers set out in the schedule in connection both with entry and inspection of premises without a warrant and powers exercisable under a warrant. We consider it appropriate that the “powers are not exercisable in relation to information or documents in respect of which a claim for legal professional privilege or, in Scotland, confidentiality of communications, could be maintained in legal proceedings” (paragraph 17(3)), however, reiterate our comments above in connection with the reference to ‘confidentiality of communications’.

Clauses 92 - 96 concern information offences and penalties. We have no comments.

Clauses 97 – 102 concern disclosure of information. We have no comments.

Chapter 5 (clauses 103-109) concerns regulated user-to-user services and regulated search services: notices to deal with terrorism and CSEA content, Chapter 6 (clauses 110-129) concerns enforcement powers and Chapter 7 (clauses 130-137) concerns committees, research and reports. Schedule 12 concerns penalties imposed by OFCOM under Chapter 6 of Part 7. We have no comments on these provisions.

Part 8

Part 8 of the Bill concerns Appeals and Super-complaints. We have no comments.

Part 9

Part 9 of the Bill concerns the Secretary of State’s functions in relation to regulated services.

Clause 143 permits the Secretary of State to designate a statement if the requirements of clause 144 (consultation and parliamentary procedure) are met, and the statement sets out the Government priorities on online safety.

Clause 144 requires the Secretary of State to consult OFCOM and other persons the Secretary of State on the draft statement and OFCOM have a minimum of 40 days to respond to any consultation on the draft statement. We welcome the requirement to consult and to lay the draft statement before Parliament for consideration.

Clauses 145 – 146 provide that the Secretary of State may direct OFCOM to establish a committee to provide OFCOM with advice on a specific online safety matter. We have no comments.

Clause 147 enables the Secretary of State to give guidance to OFCOM relating to their exercise of statutory powers and functions under the Bill and other legislation. We have no comments.

Clause 148 amends the Communications Act 2003 to add the functions of this Bill to the list of those which must be included in the Secretary of State's annual report to Parliament. We have no comments.

Clause 149 requires the Secretary of State to review the regulatory framework provided in the Bill and in section 11 of the Communications Act 2003. We have no comments.

Part 10 & Schedule 13

Part 10 of the Bill sets out Communication Offences. Schedule contains amendments consequential on offences in Part 10 of the Bill. The provisions of clauses 150 – 157 do not extend or apply to Scotland and so we make no comment.

Part 11 & Schedule 14

Part 11 concerns supplementary and other general provisions. We have no comments.

Schedule 14 deals with the Liability of Parent Entities as relative to clause 161. We have no comments.

Part 12

Part 12 of the Bill contains the Interpretation and Final Provisions. We have no comments.

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