



Law Society
of Scotland

Online Safety Bill

Law Society of Scotland – briefing for Report Stage

July 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We previously responded to the UK Government's Online Harms White Paper in July 2019¹, and we issued a briefing on the Online Safety Bill (the Bill) ahead of the Bill's Second Reading in the House of Commons in April 2022².

We now welcome the opportunity to consider and provide comment on the Bill ahead of the Report Stage in the House of Lords³ fixed from 6 July 2023.

We have the following comments to put forward for consideration.

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

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

² [220322onlinesafetybillhocsecondreadingbriefing.pdf \(lawscot.org.uk\)](#)

³ [newbook.book \(parliament.uk\)](#)

is widespread and in the longer-term international cooperation in this area is likely to prove more efficient effective than any single country's initiative.

Criminal offences

We note that the Bill creates a number of offences applicable to Scotland, for example, in connection with information notices. 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 they 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 seventeen 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

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

Part 3 and Schedules 1, 2, 3, 4, 5, 6, and 7

This part sets out the provisions regarding the providers of regulated user-to-user services and regulated services.

Chapter 1

Clause 5 is the overview of Part 3. We have no comments.

Chapter 2

Schedule 3, Part 1 concerns the timing of providers assessments.

We note paragraph 1 (1), regarding the publication of the first illegal content risk assessment guidance (CAA) and it would be beneficial if OFCOM can advise when they will produce the illegal content risk assessment guidance. In addition, we also wish to comment on paragraph 1 (2) which provides, ‘the first illegal content risk assessment of the service must be completed within the period of three months beginning with the day on which that guidance is published’. Clarification about how long it will take OFCOM to publish the first children’s access assessment guidance would be welcomed.

Regarding paragraph 1 (3) of Schedule 3, whilst the first CAA of the service must be completed within three months beginning with the day on which the first CAA guidance is published, we are unsure if three months will be sufficient time to prepare the CAA guidance.

We have no comments on paragraph 2 of Schedule 3, Part 1, or on Schedule 3, Parts 2, 3, or 4.

Clause 8

Under clauses 8, 9, 10 and 11, where a party who has a duty under these clauses, they must ensure that all staff, agents and/or contractors working for or on behalf of the party are trained in the policies and practices in relation to online safety.

Clause 8 sets out the provisions on illegal content risk assessments. Clause 8 (4) requires that before making any significant change to any aspect of a service’s design or operation, there is a duty to carry out a further *suitable and sufficient* illegal content risk assessment relating to the impacts of that proposed change. We believe that there should be greater clarity on the criteria for a “suitable and sufficient” illegal content risk assessment.

Clause 9

We support the duties under clause 9 (2).

We consider regarding clause 9 (3) (a), that a definitive length of time should be provided for, as currently parties maybe unsure that the time has been minimised.

In relation clause 9 (3) (b), we consider that “swifty” should be defined or that a time limit is stated.

Regarding clause 9 (4), where providers of a service should take or use measures in a number of areas, including (h) staff policies and practices, we believe that all staff, agents and/or contractors working for or on behalf of the party should be trained in the application of the duty of care and the other contents of the Bill. This will help to ensure that all parties are fulfilling their obligations as set out in the Bill.

Clause 10

Clause 10 (2) places a duty on providers to carry out a suitable and sufficient children’s risk assessment at a time set out in, or as provided by, Schedule 3, and providers must keep a children’s risk assessment up to date, including when OFCOM make any significant change to a risk profile (clause 10 (3)). While we support any measure that protects children from any form of harm, we think it would be beneficial to establish for the party drafting the children’s illegal risk assessment how the design and operation of the service may reduce or increase the risk that is identified?

Clause 11

Under clause 11 (2), providers are under a duty to take or use proportionate measures relating to the design or operation of the service to effectively -

- (a) mitigate and manage the risks of harm to children in different age groups, as identified in the most recent children’s risk assessment of the service
- (b) mitigate the impact of harm to children in different age groups presented by content that is harmful to children present on the service

Again, we support measures that protect children, and we consider that all staff, agents and/or contractors working for or on behalf of the party should be trained in the application of the duty of care and the other contents of the Bill.

Clause 12

We note clause 12 (11), which includes in clause 12 content which is abusive, and targets the following characteristics - (a) race, (b) religion, (c) sex, (d) sexual orientation, (e) disability, or (f) gender reassignment, however we are unsure why the characteristics at clause 12 (11) are not the same protected characteristics as in section 4 of the Equalities Act 2010⁴. The protected characteristics in the Equalities Act are – age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief and sex. The Government should explain the reason for the difference in approach between the two provisions.

⁴ [Equality Act 2010 \(legislation.gov.uk\)](http://legislation.gov.uk)

Clause 13

We note clause 13 (2), taking into account Article 10 of the European Convention on Human Rights and the right to freedom of expression⁵. Clause 13 (2) places a duty on providers to operate a service using proportionate systems and processes that are designed to ensure that the importance of the free expression of content of democratic importance is considered. The right to freedom of expression is not absolute under Article 10, it must be balanced with formalities, conditions, restrictions, or penalties as prescribed by law and are necessary in a democratic society. It is not clear how clause 13 takes into account the need to consider these restraints on an individual's right to freedom of expression.

We note clause 13 (7) deals with “content of democratic importance” regarding the user-to-user service. Clause 13 (7) (b) refers to content that is or appears to be specifically intended to contribute to democratic political debate in the United Kingdom or a part or area of the United Kingdom. What provisions will cover the democratic political debate in the Crown dependences⁶.

Clause 14

We have no comments on clause 14.

Clause 15

We note clause 15 (3) regarding the duty to have a complaints procedure available to a person who considers the content to be journalistic content and who is— (a) the user who generated, uploaded or shared the content on the service, or (b) the creator of the content. We wish to highlight the Independent Press Standards Organisation complaints process⁷, and we feel it is important that there is no duplication in complaints processes against journalistic content to avoid confusion for parties.

Clause 16

We have no comments to make.

Clause 17

We have no comments to make.

⁵ [Human Rights Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁶ [Fact sheet on the UK's relationship with the Crown Dependencies \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁷ [Our complaints process \(ipso.co.uk\)](https://ipso.co.uk)

Clause 18

We support clause 18 (2), where when deciding on, and implementing, safety measures and policies, service providers are under a duty to have particular regard to the importance of protecting users' right to freedom of expression within the law. This is consistent with the provisions of the Article 10 freedom of expression⁸, which protects individuals rights to hold your opinions and to express them freely without government interference, however public authorities may restrict this right if they can show that their action is lawful, necessary, and proportionate.

Chapter 3

Chapter 3 concerns the providers of search services: duties of care.

Clause 19

We note clause 19 (2) concerning a duty to make and keep a written record, in an easily understandable form, of every risk assessment however written record is not defined.

Clause 20

We have no comment to make.

Clause 21

We consider that the phrase, the 'duty of care' is too vague. In the law of tort or delict the phrase refers to the underlying duty of care declared in *Donoghue v Stevenson* 1932 S.C. (H.L.) 31. In the bill the duty of care extends to duties about illegal content risk assessment, illegal content, content reporting, complaints procedures, freedom of expression and privacy and record keeping. Accordingly, "duty of care" appears in many instances and relates to specific duties, such as user to user services, but what does it mean, particularly when there are a number of duties set out in the Bill, and how does the phrase used in the Bill relate to the duty of care in civil liability? For example, in *Donoghue v Stevenson*⁹ Lord Atkinson held:

"The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by

⁸ [Human Rights Act 1998 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1998/42)

⁹ [1932] AC 562

my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”¹⁰.

We believe that the duty of care provisions in the Bill may perhaps being applied in a different way than the duty to take reasonable care, and we consider that the duty of care in the Bill for service providers should be to reasonable care.

Clauses 22 to 25

We have no comments to make.

Clause 26

We note that clause 26 (5) (d) 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.

Clause 27

We note clause 27 (3) which imposes a duty to make the policies and processes that govern the handling and resolution of complaints of a relevant kind publicly available and easily accessible (including to children).

Clause 28

We support the provisions in clause 28 regarding the duties about freedom of expression and privacy in relation to all regulated search services. We welcome clause 28 (2), where when deciding on, and implementing, safety measures and policies, service providers are under a duty to have particular regard to the importance of protecting users’ right to freedom of expression within the law. This is consistent with the provisions of the Article 10 freedom of expression¹¹, which protects individuals rights to hold your opinions and to express them freely without government interference, however public authorities may restrict this right if they can show that their action is lawful, necessary, and proportionate.

¹⁰ [Donoghue \(or McAlister\) v Stevenson \[1932\] All ER Rep 1, \[1932\] All ER Rep 1 \(lexis.com\)](#)

¹¹ [Human Rights Act 1998 \(legislation.gov.uk\)](#)

Clause 29

We have no comments to make.

Chapter 4

Clauses 30 to 32

We have no comments to make.

Chapter 5

Clauses 33 and 34

We have no comments to make.

We note clause 35 (3) regarding offences under the Fraud Act 2006, however most of the Act does not apply in Scotland, as fraud is a common law crime. We believe the Bill requires clarification on this matter to differentiate between the common law crime of fraud in Scots Law and statutory offence under the Fraud Act 2006 in English Law.

Chapter 6

Chapter 6 concerns Codes of Practice and Guidance.

Clauses 36 to 43

We have no comments to make.

Clause 44

We note the relationship between duties and codes of practice. Whilst the scope and extent of the duties under clause 44 vary, provider(s) shall be treated to comply with a relevant duty if:

- they take or use measures that are described in a code of practice which are recommended for the purpose of compliance with the duty in question (subsection 1)
- if the provider takes or uses such of the relevant recommended measures as incorporate safeguards to protect users' right to freedom of expression within the law (subsection (2) (a).
- if the provider takes or uses such of the relevant recommended measures as incorporate safeguards to protect the privacy of users (subsection (2) (b).
- if the provider takes or uses such of the relevant recommended measures as incorporate safeguards to protect the rights of users and interested persons to freedom of expression within the law (subsection (3) (a).
- if the provider takes or uses the measures described in a fraudulent advertising code of practice which are recommended for the purpose of compliance with the duty in question (subsection (4).

We support the duties for providers, but we believe that the duty of care provisions in the Bill for providers should be a duty to take reasonable care, and this should be applied consistently throughout the Bill.

clause 45

We note clause 45 concerning the effects of the code of practice, where ‘a failure by a provider of a Part 3 service to act in accordance with a provision of a code of practice does not of itself make the provider liable to legal proceedings in a court or tribunal’. We are concerned that a failure to act in accordance with a code of practice appears to have no consequence for the provider.

In addition, we note clause 45 (3), where ‘in proceedings, the court or tribunal must take into account a provision of a code of practice in determining a question arising in the proceedings if— (a) the question relates to a time when the provision was in force, and (b) the provision appears to the court or tribunal to be relevant to the question’. We believe this clause should be amended as the court or tribunal is not bound to apply the code of practice. We consider that the court or tribunal should be so bound.

Chapter 7

Chapter 7 is the interpretation part of Part 3.

Clauses 46 to 49

We have no comments on these clauses.

Clause 50

We note clause 50 concerning “recognised news publisher” and while the BBC and Sianel Pedwar Cymru are listed as recognised news publishers, Channel 4 is not listed, however license holders under the Broadcasting Act 1990 or the Broadcasting Act 1996 who publishes news-related material in connection with the broadcasting activities authorised under the license are recognised news publishers. Channel 4 is licensed under section 24 (3) of the Broadcasting Act 1990¹², and for clarity, we believe that Channel 4 should be referenced as a recognised news publisher.

Clause 53

We note clause 53 (6) concerning “Illegal content” etc. Illegal content means content that amounts to a relevant offence (subsection (3), and the offences are “relevant offences”, which are priority offence (subsection (4) (a) or offences under subsection (5). We note that it is not an offence in the Bill if the illegal content is an offence under the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277 (subsection (6) (b)). However, under clause 243 (1) of the Digital Markets, Competition and

¹² [Broadcasting Act 1990 \(legislation.gov.uk\)](https://legislation.gov.uk)

Consumers Bill¹³, the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277) are to be revoked, and the Bill will need to be amended to reflect this.

Furthermore, priority offences under clause 53 are defined in schedules 5, 6 and 7. We offer the following comments on schedule 7.

The Hate Crime and Public Order (Scotland) Act 2021 (HCPOA) does not appear on the list of priority offences in Schedule 7 to the bill, however offences under the Public Order Act 1986, the Criminal Law (Consolidation) (Scotland) Act 1995 and the Crime and Disorder Act 1998 do. The HCPOA repeals, as regards Scotland, the:

- Public Order Act 1986 sections 18-21 and parts of 23, 25 and 29
- Criminal Law (Consolidation) (Scotland) Act 1995, Section 50A (racially aggravated harassment) and
- Crime and Disorder Act 1998 Section 96 (offences racially aggravated).

We would welcome clarification why the UK Government decided not to include the HCPO act in schedule 7. Our suggested amendment is:

Schedule 7, page 203, line 14 – Add at end “An aggravation to an offence or an offence under the Hate Crime and Public Order (Scotland) Act 2021”.

Clause 54

We note clause 54 regarding “content that is harmful to children” etc. Under clause 54 (2), the Secretary of State can make regulations designating primary priority content that is harmful to children. We consider that the Secretary of State should consult with devolved authorities, organisations which are concerned with the welfare of children, the various Children’s Commissioners¹⁴ and with other relevant parties and organisations. Similarly, under clause 54 (3), the Secretary of State can make regulations designating priority content that is harmful to children. Again, we offer the same comments at clause 54 (2) regarding consultation with different parties.

¹³ [Digital Markets, Competition and Consumers Bill \(parliament.uk\)](https://www.parliament.uk/bills/2018-19/digital-markets-competition-and-consumers-bill)

¹⁴ [Home - The Children and Young People's Commissioner Scotland \(cypcs.org.uk\)](https://www.cypcs.org.uk), [Homepage | Children's Commissioner for England \(childrenscommissioner.gov.uk\)](https://www.childrenscommissioner.gov.uk), [Home - Children's Commissioner for Wales \(childcomwales.org.uk\)](https://www.childcomwales.org.uk), [Home - Niccy](https://www.niccy.gov.uk)

Part 4 and Schedule 8

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

Chapter 1

Clauses 57 and 58

We have no comments to make.

Chapter 2

Chapter 2 concerns reporting child sexual exploitation and abuse content.

Clauses 59 and 60

We support the provisions in clause 59 regarding the requirement to report CSEA (CSEA- child sexual exploitation and abuse content) to the NCA. We also support the provisions in clause 60 concerning the regulations about reports to the NCA.

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.

Clauses 61, 62 and 63

We have no comments to make.

Chapter 3

We have no comments to make.

Chapter 4

Chapter 4 sets out the provisions regarding transparency reporting, and clause 68 sets out the requirements on transparency reports about certain Part 3 services, we have no comments.

Part 5 and Schedule 9

Part 5 sets out the Duties of Providers of Regulated Services: Certain Pornographic Content (clauses 70 to 73).

Clauses 70, 71 and 72

We agree with the provisions defining “pornographic content”, “provider pornographic content”, “regulated provider pornographic content” which bring clarity to the bill. We welcome clause 71 as means of protecting children from pornographic content.

Part 6 and Schedule 10

We have no comments to make.

Part 7 and Schedules 11, 12 and 13.

Part 7 concerns OFCOM’s Powers and Duties in relation to Regulated Services.

Chapter 1

Chapter 1 concerns General Duties

Clause 82

We note clause 82 regarding the general duties of OFCOM under section 3 of the Communications Act, while we support the provisions of clause 82 (4), that a higher level of protection is required for children than adults, we believe that vulnerable adult users require a higher level of protection than adults without such a vulnerability, and that clause 82 (4) should be consistent with clause 58 (2) and (3) regarding the reference to vulnerable adult users.

Clauses 83 and 84

We have no comments to make.

Chapter 2

Clauses 85 to 88

We have no comments to make.

Chapter 3

Chapter 3 concerns risk assessments of regulated user-to-user services and regulated searches services.

Clauses 89 and 90

We have no comments to make.

Chapter 4

Clause 91

We note that OFCOM may by notice require a person to provide them with any information that they require for the purpose of exercising, or deciding whether to exercise, any of their online safety functions (clause 91 (1)). Whilst there is a requirement for OFCOM to ensure they exercise this power proportionately; we believe that a person who receives a notice from OFCOM is advised of their right to legal representation.

We further note clause 91 (7), which provides that, “the power conferred by subsection (1) 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*¹⁵ 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.

Clause 92

This sets out that the information notice must set out the information to be provided, the reason why OFCOM require the information, the form and manner in which it must be provided and contain information about the consequences of not complying with the notice (Clause 92 (2)). We consider that the notice should state in writing that the recipient of the notice has the right to legal advice and representation.

Clause 93

We have no comments to make.

¹⁵ [2013] UKSC 1

Clause 96

This concerns the power to require interviews, and OFCOM must indicate the subject matter and purpose of the interview and contain information about the consequences of not complying with the notice (Clause 96 (3)). We note 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 reiterate our comments on clause 91 in relation to the formation of language used.

Clause 99

This clause contains the offences in connection with information notices. A person commits an offence if he or she fails to comply with a requirement of an information notice (clause 99 (1)). The notice should state in writing that the recipient of the notice has the right to legal advice and representation, and that it is an offence to fail to comply with the notice.

Clause 100

We note that under Schedule 12, it is an offence if the person fails without reasonable excuse to comply with a requirement of an audit notice (clause 101 (1)). An offence is committed if the person provides information that is false in a material respect, and at the time the person provides it, the person knows that it is false or is reckless as to whether it is false (Clause 101 (2)). The notice should state in writing that the recipient of the notice has the right to legal advice and representation, and that it is an offence to fail to comply with the notice.

Schedule 12

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 91 in relation to the formation of language used.

In relation to the issue and execution of warrants (paragraphs 5 – 17 of Schedule 12), 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)). We reiterate our comments above in connection with the reference to ‘confidentiality of communications’.

Clauses 102 -104

We have no comments to make.

Clause 106

We consider that clause 106 (1) requires amendment, as OFCOM may not disclose information received (directly or indirectly) from, or that relates to, an intelligence service unless the intelligence service consents to the disclosure. We consider that OFCOM must not disclose information received (directly or indirectly) from an intelligence service unless the intelligence service consents to the disclosure.

Furthermore, we note clause 106 (3), in the event of OFCOM disclosing information to an intelligence service or publish information, OFCOM remove or obscure the information. Whilst OFCOM must not disclose information, the Bill is silent on the position if an employee or an individual acting on behalf of OFCOM discloses or publishes information. We wish to highlight section 43 (4) of the Legal Profession and Legal Aid (Scotland) Act 2007¹⁶, where it is an offence for a person employed or acting on behalf of the Scottish Legal Complaints Commission to disclose information. We consider that the Bill should contain similar provisions, where it is an offence for a person employed or an individual acting on behalf of OFCOM to disclose or publish information.

Chapter 5 Regulated user-to-user services and regulated search services: Notices to deal with terrorism content and child sexual and abuse content.

We have no comments to make.

Chapter 6 sets out the provisions on enforcement powers.

Clause 119

Clause 119 (8) provides that where a provisional notice of contravention is given to a person, it must (a) state that the person may make representations to OFCOM (with any supporting evidence) about the

¹⁶ [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(legislation.gov.uk\)](https://legislation.gov.uk)

matters contained in the notice, and (b) specify the period within which such representations may be made. We consider that the notice should state in writing that the recipient of the notice has the right to legal advice and representation, and that it is an offence to fail to comply with the notice.

Clause 120

We note the provisions regarding fraudulent advertising which are enforceable by OFCOM against providers of regulated services, in particular clauses 33 and 34.

Clause 33 sets out the provisions on the duties about fraudulent advertising: Category 1 services and clause 34 concerns the duties about fraudulent advertising: Category 2A services. We support the duties on service providers to protect service users and consumers from financial and/or other harm because of fraudulent advertising.

Clause 121

We support the provisions in clause 121(2), where after considering any representations and evidence, OFCOM decide not to give the person a notice under this section, they must inform the person of that fact. We consider that subsection (3) should be amended to ensure that OFCOM must consider representations and evidence. In the event OFCOM are satisfied that the person has failed to comply with a notified requirement it may give the person a notice confirming its opinion.

Clause 122

We note clause 122 (7), where the duty to comply with a confirmation decision is enforceable by OFCOM— (a) for an injunction, (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or (c) for any other appropriate remedy or relief.

Clauses 123 to 126

We have no comments to make.

Clause 127

We note clause 127 regarding confirmation decisions: offence, where a person commits an offence without reasonable excuse, the person fails to comply with a requirement imposed by the decision.

Clause 129

We note clause 129(3), which states “the provider may make representations to OFCOM (with any supporting evidence) about the matters contained in the notice”. We believe clause 129(3) requires amendment to ensure that the provider’s legal advisor may also make representations to OFCOM. The clause should be amended to, “the provider and the provider’s legal advisor may make representations to OFCOM (with any supporting evidence) about the matters contained in the notice”.

Clause 130

Clause 130(4), which provides that “the provider may make representations to OFCOM (with any supporting evidence) about the matters contained in the notice”. Similar to clause 129(3), clause 130(4) should be amended to, “the provider and the provider’s legal advisor may make representations to OFCOM (with any supporting evidence) about the matters contained in the notice”.

Clauses 131 to 138

We have no comments to make.

Clause 139

We note clause 139 regarding publication by providers of details of enforcement and subsection (11), where the duty under subsection (10) (publication notice) is enforceable in civil proceedings by OFCOM— (a) for an injunction, (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988, or (c) for any other appropriate remedy or relief.

Chapter 7

Chapter 7 concerns Committees, Research and Reports.

Clause 141 – 149

We have no comments to make.

Part 8**Clauses 150 and 151**

We have no comments to make.

Clauses 152 to 154

Clause 152 provides eligible entities with the power to make super-complaints to OFCOM. Under subsection (3), an entity is an “eligible entity” if it meets criteria specified in regulations made by the Secretary of State’. Subsection (5) requires the Secretary of State to consult with OFCOM and any other person considered appropriate. We consider that in the interests of clarity the eligible entities should be identified in the Bill, following the precedent in other legislation¹⁷ (such as The Enterprise Act 2002 (Super

¹⁷ [The Enterprise Act 2002 \(Super-complaints to Regulators\) Order 2003 \(legislation.gov.uk\)](#)

complaints to Regulators) Order 2003). This approach would ensure that eligible entities can be reviewed and updated on an ongoing basis.

Part 9

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

Clause 155

This clause permits the Secretary of State to designate a statement if the requirements of clause 156 (consultation and parliamentary procedure) are met, and the statement sets out the Government priorities on online safety.

Clause 156

This clause requires the Secretary of State to consult OFCOM and other persons the Secretary of State considers appropriate on the draft statement. OFCOM have at least 40 days to respond to the consultation. We welcome the requirement to consult and to lay the draft statement before Parliament for consideration.

Clauses 157 – 161

We have no comments to make.

Part 10 and Schedule 14

Part 10 of the Bill sets out the Communication Offences.

We note clause 171 (repeals in connection with offences under sections 160 and 162) repeals Section 127(2)(a) and (b) of the Communications Act (false messages) for offences in England and Wales and section 1(1)(a)(ii), section 1(1)(a)(iii), and section 1(2) of the Malicious Communications Act 1988.

Clause 171 will repeal the offences in England and Wales, not Scotland or Northern Ireland, thereby creating inconsistencies in the UK in the law regarding false communications, as this will be different in different jurisdictions within the United Kingdom.

It is worth noting that the criminal law of Scotland is distinct from the criminal law of England in a number of areas including the law relating to the sending of non-consensual sexual communications.

The Scottish Ministers have not promoted a legislative consent motion in the Scottish Parliament to extend the repeal of sections 127(2)(a) and (b) of the 2003 Act to Scotland because it was not appropriate to do so as the new offence under clause 162 would make it more difficult to prosecute those who deliberately

make hoax calls to the emergency services. The current law provides that a person “is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he— (a) sends by means of a public electronic communications network, a message that he knows to be false, (b) causes such a message to be sent; or (c) persistently makes use of a public electronic communications network.

It may be more difficult to prove that such communications are made with the intention of causing ‘non-trivial physical or psychological harm’ to a likely audience as required under clause 162.

Parts 11 and 12 and Schedules 15, 16 and 17

We have no comments to make.

For further information, please contact:

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