



# An introduction to the Draft Online Safety Bill

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# Agenda

1 Introduction

2 Scope

3 Overview of duties

4 Discharging duties, and  
Codes of Practice

5 Enforcement

6 Misc. Ofcom duties

# Introduction

- Draft Online Safety Bill published 12<sup>th</sup> May
- Following the “Online Harms” strategy from white paper April 2019
- Government responses to consultation February and December 2020
  
- As draft legislation it is not directly on the legislative track
- Instead, prepared for pre-legislative scrutiny prior to summer recess
- Actual Bill expected after the summer recess

# Overview

- Core aim is to ensure providers of services accessible over the Internet regulate content on the service so as to minimise harm – or at least, some types of harm
- Ofcom will regulate the service providers: the service providers must regulate the content
  - Ofcom is not directly censoring content. Instead, it is telling providers what kind of content is unacceptable, and requiring them to take (more or less more prescriptive steps) to remove it.
- This will be done by imposing on service providers a “duty of care” that can be discharged by following codes of practice published by Ofcom, as well as making transparency reports, risks assessments and other duties.

## Disclaimer

- The Draft legislation is voluminous, complex and only recently published. It is also likely to change, perhaps very substantially.
- This presentation can only attempt an overview and a flavour of what is intended.
  - The intent here is to demonstrate to you the relevance of this proposed legislation to your business, and to give you an indication of the level of investment and engagement you will need to set about achieving compliance. It is *NOT* intended as a guide to compliance itself.
- This presentation cannot be comprehensive, and will contain errors and material omissions.

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## Scope

## Scope: Services

- Search services
- User-to-user services
- Provided anywhere in the world, so long available to UK users and “risk of harm” to UK users from content on the service
- User-to-user means any service with user-generated content, with few exceptions

## Categories of services

- The Draft Bill creates the concept of designating certain types of services as “Category 1”, “Category 2A” and “Category 2B”.
- The criteria for determining whether a service / service provider is considered Category 1, etc, will be set by Regulations as yet undisclosed



## Categories of services (c't'd)

- We understand that Category 1 will be large social media platforms, according to some definition or another
- For now, as we know is that
  - Category 1 criteria will be size and “functionalities”
  - Category 2A criteria will be size and “any of factors the Secretary of State considers relevant”
  - Category 2B will be functionalities and “any of factors the Secretary of State considers relevant”

## Scope: Exempt service

The following types of service are exempt

- E-mail
- SMS and MMS messaging (but not Internet instant messaging services)
- One-to-one live aural communications (but not video-chat nor conference calls, and certainly not services like Zoom that have both)
- Internal business services
- Services provided by public authorities
- Limited functionality:
  - yes/no voting, like/dislike or an emoji etc
  - Comments and reviews on content published by the provider

## Scope: harm

- Harmful content is
  - Content which is illegal
  - Content which is legal but harmful to children
  - Content which is legal but harmful to adults
- Harm means “physical or psychological harm” (but note potential disconnect between “harm” and “harmful”)
- Exclusions for:
  - Financial impact
  - Safety or quality of good featured in the content
  - The way a service featured in content is performed (including unqualified/unlicensed practice)

## Scope: illegal content

Illegal content in scope is content dissemination of which amounts to an offence of

- Terrorism offences
- Child Sexual Abuse offences
- An offence listed or described by the Secretary of State in regulations (yet to be written); (“**priority illegal content**”)
- Any offence of which the victim or intended victim is an individual

## Scope: harmful to children

- Anything of a description designated as such in Regulations made by the Secretary of State; plus
- Content is also harmful to children if there is a material risk of the content having (directly or indirectly) a “significant adverse physical or psychological impact on a child of ordinary sensitivities”
- But if the content would have such an impact on a child with particular characteristics, assume the child has those characteristics
- So, if the content would be harmful to toddlers, or to children with autism, then the test of a toddler, or an autistic child “of ordinary sensitivities”.

## Scope: harmful to adults

- Anything of a description designated as such in Regulations made by the Secretary of State; plus
- Content is also harmful to adults if there is a material risk of the content having (directly or indirectly) a “significant adverse physical or psychological impact on an adult of ordinary sensitivities”
- But if the content would have such an impact on a adult with particular characteristics, assume the adult has those characteristics
- NB: This scope only applies to “Category 1 providers”

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## Overview of duties

## All providers

- Risk assessments of illegal content
  - Giving separate attention to different categories of illegal content
- Record keeping and review of risk assessments
- A user reporting /complaints and redress scheme
- Publish policies and procedures for complaints and redress
- “Safety duties” for illegal content (see next slide)
- Assessment whether service is likely to be accessed by children

Also,

- “to take into account” freedom of expression and privacy



## Likely to be accessed by children

- All providers must conduct a specific risk assessment to determine whether their service is likely to be accessed by children.
  - Written records must be kept of the assessment
- There are provisions that limit the grounds for assessing that your service is not likely to be accessed by children
- If the assessment is not performed the service will be deemed likely to be accessed by children
- The assessment must be repeated before there is any significant change to any aspect of the design of the service, or change in effectiveness of any measures, or number of children using it.

# Safety duties about illegal content

- A general duty to “mitigate” and “effectively manage risks of harm”
- A duty to operate systems and processes to minimise
  - The *presence* of priority illegal content;
  - The *length of time* priority illegal content is present;
  - The *dissemination* of priority illegal content
- A duty to swiftly remove such content when alerted
- Transparency and level of detail obligations for terms of service
- An obligation to apply terms of service consistently
- When removing content, to take into account
  - The findings of risk assessment
  - The importance of freedom of expression and privacy

## Additional duties for services likely to be accessed by children

Largely mirroring the general duties, but adjusted for particular care or differing impact on children, e.g.:

- “Children’s risks assessments”, giving separate attention to each relevant category of content harmful to children and separate attention to children in different age groups
- A separate duty to take step to “mitigate and effectively manage the risks of harm to children in different age groups” and to mitigate impact of harm; and
- To prevent children encountering primary priority content, and other harmful content

# Additional duties for Category 1 providers

- Duties to protect adults from (legal) content harmful to adults”
- Risk assessment duties for freedom of expression and privacy
- Transparency and level of detail in terms of service in relation to freedom of expression and privacy
- Duties to protect “content of democratic importance”, meaning
  - Content published by a recognised news publisher; and
  - User-generated content intended to contribute to democratic political debate in the UK
- Duties to protect journalistic content from recognised news publishers, including more robust appeals against removal

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# Discharging duties & Codes of Practice

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## Transparency reports

- Ofcom given fairly broad authority to what must be in a transparency report and its format, subject to some constraints set out in the Draft Bill
- Ofcom must publish guidance on what it requires

# Codes of Practice

- Ofcom to publish codes of practice describing recommended steps for complying with the various duties
- Admissible in court
- Draft Bill sets out safety objectives for regulated services (user-to-user and search)
- Codes of Practice are public documents
  - Laid before Parliament, negative resolution procedure
- The Secretary of State can by regulations change the objectives
- **Secretary of State can direct Ofcom to modify a Code of Practice to ensure it reflects government policy**
  - But cannot specify particular recommended technical steps

# Alternatives to Codes of Practice

- Regulated services are required to discharge the duty (e.g. to minimise the availability of certain content), not directly to do the things specified in the Code of Practice
- A regulated service can in theory do things differently, provided Ofcom is satisfied that the alternative steps taken achieve the online safety objectives and also the protection for freedom of expression.
- However, a regulated service will be deemed to have satisfied its duties if it complies fully with the steps set out in the relevant Codes of Practice.



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# Enforcement

## Provisional and confirmation notices

- Can order a regulated service provider to “take steps” to comply
- Broad power to specify what must be done
- Could be highly prescriptive, but cannot require use of a particular technology
- Can include a fine
  
- Must first be issued on a provisional basis, and give provider operator to make representations to Ofcom.
- Ofcom can then provide a “confirmation decision” if it is satisfied provider is still failing to comply with the notified requirement

## Use of technology notice

- If Ofcom believes the service provider is failing to comply with the safety duty for illegal content regarding CSEA content or terrorism content, based on persistent presence and prevalence of the same they can issue
  - A “use of technology warning notice”; and subsequently, (s.63)
  - A “use of technology notice” (s.64)
- Under that notice, the service provider would have to use “accredited technology” to identify and remove content of that nature or, if already using it, change the way in which they are using it as directed by Ofcom.
- The notice last for 36 months.

## Misc. enforcement

- Skilled persons reports
- Information disclosure requirements
- Ofcom investigations
- Ofcom power to require interviews
- Requirement to name a senior manager
  - Personally criminally liable for non-compliance with information requests
- Fine for non-compliance
  - Maximum fine for non-compliance £18m or 10% of global revenue, if greater.
- Service restriction orders: court ordered business interruption
- Access restriction orders: court ordered Internet blocking

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## Misc. Ofcom duties

## Other Ofcom duties

- Maintain a register of categories of services
- Conduct risk assessments
  - To identify and assess risk of harm by regulated services
  - Develop “risk profiles” for categories of services
- Research about users’ experiences
- Advisory committee on misinformation and disinformation
- Appeals and “Super-complaints”
- Publish summary reports on transparency reports received
- Report on researchers’ access to information from providers
- Other reports chosen by Ofcom



Thank you