



Simplifying and strengthening the draft Online Safety Bill – Carnegie UK amendments

This note has been produced by Carnegie UK for the Joint Committee on the Draft Online Safety Bill. These amendments address significant issues raised in evidence to the Committee by us and others. We provide an explanatory note for each significant amendment or group of amendments. This note should be read alongside our evidence to the Committee.¹ Carnegie UK is most grateful to Prof. Lorna Woods for her very substantial intellectual input into this demanding work.

The note is in two parts:

1. list of consolidated amendments in respect of reordering/clarifying of the objectives of the Bill, a new definition of harm and a Foundation Duty. These simplify and strengthen the Bill as well as addressing a range of issues brought in evidence to the Committee.
2. table of amendments to bring the Secretary of State’s powers into line with international norms for media regulation.

We have also produced a version of the Bill that incorporates these amendments that might be easier for some to read – this can be found on the Carnegie UK website.²

Caveat

The amendments trigger a cascade of consequential amendments: we have made the most significant consequential. The complexity of the original draft Bill means we have not made every consequential in the time available. The odd error may have crept in particularly to cross referencing and we should be grateful to be informed of any spotted.

1. Simplifying and strengthening the draft Bill - amendments

Long title

Replace long title with

‘A bill to make provisions for and in connection with the regulation by OFCOM to improve the safety of United Kingdom citizens who use the internet, with superior safety for children and having due regard to free speech and democratic debate while preserving the freedoms of the press.’

¹ https://d1ssu070pg2v9i.cloudfront.net/pex/pex_carnegie2021/2021/10/06120715/Evidence-Joint-Committee.pdf

² <https://www.carnegieuktrust.org.uk/programmes/tackling-online-harm/>

Explanatory note

We propose to simplify and strengthen the Bill, in particular through a logically ordered hierarchy of powers and actions that make the Bill easier to understand by people affected by it. This reduces the regulatory burden and makes the Bill more effective in preventing harm. The process begins with a new long title that better reflects the purpose of the Bill.

Clause 1

Amend Clause 1 (1)

ADD “*principally through the imposition of a duty of care on regulated services*”.

Explanatory note

This amendment is one of several below to the very first elements of the Bill that help the reader step through what the Bill more easily by inserting literal descriptions of what it does.

Clause 1A

After Clause 1, INSERT New Clause 1A

Objectives of the online safety bill

(1) *The Online Safety Objectives are-*

(a) *The adequate protection of citizens from harm arising from the operation of regulated services through the imposition of a duty of care on providers of such services to take appropriate and reasonable steps to ensure that those services are safe by design and in the operation of their systems and processes*

(b) *A higher level of protection for children*

(c) *the preservation of public health, safety and the national security of the United Kingdom*

(d) *The safeguarding of freedom of expression and the right to respect for private and family life, home and correspondence.*

Explanatory note

Objectives of the Bill should come first – this greatly aids comprehensibility. The draft Bill has a variety of objectives scattered throughout. Here we propose an overarching set of objectives to give order and coherence to the draft. The text draws upon the proposed General Duties of OFCOM in respect of the Bill (currently Clause 56) and other duties in the Bill. The former Online Safety Objectives in Clause 30 which covered only a narrow subset of issues are re-labelled below as ‘Safer Systems and Processes Principles’.

Adequate protection is a phrase already used in the Communications Act 2003.

The words ‘adequate’, ‘appropriate’ and ‘reasonable’ are important qualifiers contributing to flexibility for the regime. In broad terms, ‘adequate’ contributes to protecting a company from over-regulation while ensuring certain minimum standards are met, ‘appropriate’ contributes to allowing for differing risk tolerances for different types of service as well as the different vectors for harm the different services create and ‘reasonable’ is well known from the application of other statutory duties of care.

The amendment simplifies the bill through avoiding the need to repeat OFCOM’s pre-existing duties in respect of good regulatory practice such as proportionality etc. The ability to reuse these is a feature of using an existing regulator. The Communications Act has overarching criteria in Section 3 (quoted below) which apply to OFCOM’s activities that do not need to be repeated in the Online Safety Objectives:

‘(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice.’

Clause 1B

General duties of OFCOM under section 3 of the Communications Act

Move up clause 56 (1) to (5) to here

(1) Section 3 of the Communications Act (general duties of OFCOM) is amended in accordance with subsections (2) to (8).

(2) In subsection (2), after paragraph (f) insert—

“(g) the exercise of its online safety functions to attain the Online Safety Objectives”

(3) In subsection (4)(c), at the beginning insert “(subject to subsection (5A))”.

(4) After subsection (4) insert—

“(4A) In performing their duties under subsection (1) in relation to matters to which subsection (2)(g) is relevant, OFCOM must have regard to such of the following as appear to them to be relevant in the circumstances—

(a) the risk of harm to citizens arising from the operation of the service including (in the case of user-to-user services) content present on such services or (in the case of search services) content that may be encountered in or via search results;

(b) the need for a higher level of protection for children than for adults;

(Zb) the need to maintain an appropriate balance between

*(i) freedom of expression and the right to respect for private and family life, home and correspondence; and
(ii) the need to protect freedom of the media;*

(c) the need for it to be clear to providers of regulated services how they may comply with their duties under Chapters 1, 2, 3 or 4 of Part 2 of the Online Safety Act 2021 (duties of care) taking account of the Safer Systems and Processes Principles in section [30];

(d) the need to exercise their functions so as to secure that providers of regulated services may comply with such duties by taking steps which are proportionate to

*(i) the kind, size or capacity of the provider in question, and
(ii) the level of risk of harm presented by the service in question, and the severity of the potential harm;*

(e) the desirability of promoting the use by providers of regulated services of technologies designed to reduce the risk of harm arising to citizens from (in the case of user-to-user services) content present on such services or (in the case of search services) content that may be encountered in or via search results;

(f) the extent to which providers of regulated services demonstrate, in a way that is transparent and accountable, that they are complying with their duties under Chapter 1, 2, 3 or 4 of Part 2 of the Online Safety Act 2021 (as the case may be).”

Explanatory Note

Following on from the overarching objectives should be the provisions empowering OFCOM to do the work. Moving OFCOM’s powers up from where they currently are in Cl 56 follows a more logical hierarchy that assists comprehension and effectiveness – long title, objectives, statutory body to implement the objectives. OFCOM’s powers in general flow from the Communications Act 2003. In that Act, each of OFCOM’s major activities (telecoms, broadcasting, postal etc) has a ‘general duty’ that relates to that activity.

The ‘Safer Systems and Processes Principles are a relabelling of the former Online Safety Objectives’ in Clause 30, that label now being used instead for new broader objectives in 1A.

INSERT in Part 1, Chapter 2 the following new clauses:

New 3A definition of harm

“harm” means any of-

- (a) physical, psychological, or economic harm experienced by an individual;*
- (b) harm to public safety, public health and national security;*

(c) harm to relations between those who share a protected characteristic within the meaning of the Equality Act 2010 (or a subset of that characteristic) and those who do not; and

(d) harm to democratic debate or to the integrity and probity of the electoral process.

Explanatory note

This defines the types of harm, not the level of harm which is specified elsewhere in the bill. In this we follow the distinction that can already be found in the draft bill.

Pre-legislative Scrutiny has drawn attention to harms that go beyond harm to the individual. This amendment brings a concept of societal harm into scope but seeks to do so such that it is constrained to issues that are germane to the Bill. Language is drawn from OFCOM reports as well as from the draft OSB itself. This amendment encompasses most issues set out in the Online Harms White Paper Table 1, p31. We have some concerns as to whether the criminal content provisions (cl 41) cover all relevant offences (e.g. glorification offences which do not have a direct victim related to gang life, suicide etc).

It is necessary to bring democratic issues into the definition of harm to provide a foundation for the provisions on content of democratic importance (Cl 13), as well as the protection of journalism content (cl 14). The government defines harm to ‘democratic content’ but harm should relate more specifically to ‘debate’ (as the government almost suggests in Cl 13(6)(b)). The wording in (d) also draws from Crown Prosecution Service guidance on election offences. It is also necessary to address in the definition the types of harm raised in OSB Clause 112 addressing health and safety and national security.

The amendment introduces the concept of economic harm to the individual which has been the subject of strong representations but does not include economic harm to companies.

Foundation duty

The new duty simplifies the bill by providing a broad base upon which Parliament and the Secretary of State can focus the effort of the regulator and companies into areas of specific concern such as illegal issues and child protection.

The Foundation Duty also harmonises a number of confusing structures in the bill to remove what seem to be gaps, ensuring that the regime is future proof and reducing the regulatory burden through reducing complexity. The Foundation Duty uses the risk assessment to flush out risk, rather than the draft Bill’s model of needing to understand the risks before knowing which risk assessment to apply.

New Clause 4A

(1) It shall be the duty of any provider of any regulated service to take appropriate steps as are reasonable to prevent and to mitigate reasonably foreseeable harms arising through the operation of its service based on the findings of the risk assessment taking particular account of priority harms in Schedule [3A].

Explanatory note

This amendment introduces a general duty of care for user to user AND search services.

The range of factors to be taken into account is listed in proposed new clause 4(B) (5) below, aggregating the multiple duties in the draft Bill and avoiding duplication in drafting.

Targeted duties in respect of children and illegal content remain and are reinforced by this more comprehensive duty.

The duty with its use of '*arise through the operation*' is a simpler but more effective version of the complex interplay between content and systems or process duties scattered throughout the existing draft. '*[A]rise through the operation*' would include advertising targeting etc systems and processes run by the company even if the content of advertising remains excluded by Cl 39(20(f). As a further amendment to Clause 4A, which is part of the foundation duty amendments, it introduces the phrase 'reasonably foreseeable' into the text – linking back more strongly to other statutory duties of care.

Differentiation between service types (such as those that intend to be more risky and people partake in them as such) are accommodated by '*appropriate*' and '*reasonable*'. This wording also allows the specific nature of search to be taken into account. Note that OFCOM is under general obligations to act proportionally given the terms of the Communications Act (see above).

The objective '*prevent and mitigate*' is clearer (in the current OSB draft the objective is split between OFCOM's overarching duties, the online safety objectives and the individual duties). This formulation follows the internationally recognised human rights risk management hierarchy of prevent first and if that does not work then mitigate and can be seen described in the United Nations Guiding Principles on Business and Human Rights.

This amendment now makes a clear link between risk assessment (see below) and the duty to prevent or mitigate; this is hard to follow in the current draft. It now reads 'based on', which implies a slightly stronger connection between the risk assessment and the risk mitigation than 'taking account'.

A speech and privacy risk assessment (see below) provides balance between regulation and rights such as freedom of expression, the importance of speech of democratic actors as well as ensuring that services do not overlook the use of the assertion of one right by a person to deny other rights of a different person such as silencing people by intimidation. The outcome of this impact assessment also informs the foundational duty.

Parliament and the Secretary of State set the initial areas of focus for the regulator by agreeing a list in Schedule [3A]. We describe below the process of how priority harms are changed in a new system that requires the Secretary of State to act on evidence from OFCOM using the positive procedure, limiting their ability to act alone.

Inclusion of search should not axiomatically increase the regulatory burden. In other regimes such as health and safety lower risk activities act under a general duty and have a lower burden. If search is, as leading companies claim, lower risk than user to user services then they should have little concern. As search evolves into providing a richer set of materials than a simple set of links through new systems and processes it is prudent to ensure risks are assessed and mitigated.

(2) It shall be the duty of the provider of every regulated service to carry out an assessment about access by children as set out in s 26.

Explanatory note

The child access assessment is now at the heart of the foundation duty – in this amendment it now precedes the risk assessment duty (as it should logically do) rather than being after it as in the draft OSB.

Cls 26 and 27, which describe the child access assessment, remain as in the draft OSB.

3) It shall be the duty of the provider of every regulated service to carry out a risk assessment in accordance with section [4C] paying proper regard to guidance prepared by OFCOM under section 62 and the risk profiles developed under section 61 to systematically and comprehensively understand the harms likely to arise from the operation of the regulated service, including from its characteristics, the harms' severity and likelihood, and as often as may be appropriate revise that risk assessment including when required to do so by OFCOM.

Explanatory note

This amendment is the risk assessment which forms part of the foundation duty. This assessment simplifies the regime.

The amendment consolidates assessment of risks from both the operation of the service (for instance children who click healthy eating advice then being targeted by software with extreme dieting material) and the content in the service: these are dispersed throughout the draft Bill potentially leading to gaps. Note the obligation to revise the risk assessment is different from the obligation to review (found in current cl 16(4) and 25(4)).

OFCOM's guidance is now tied into how companies assess risk.

'*systematically and comprehensively*' aims to prevent wilfully blind risk assessments where companies choose not to see risks by applying their corporate value set – perhaps that the good done by the company is so overwhelming/lucrative that they regard the level of risk of harm as acceptable/good for shareholders. The obligation envisages that OFCOM may view a risk assessment as deficient and may require the risk assessment to be re-done. Further amendments below to the enforcement powers reflect this.

The assessment covers harmful outcomes, whether contravening the criminal law or not and applies to all services not just Category 1.

Below the definition of ‘*characteristics*’ has been linked to the meaning of ‘*functionality*’ in the draft bill, and applies across the entire bill, which then draws through into more areas proper consideration of the systems and processes and general safety by design. This is a substantial reinforcement of the systems and processes approach to harm reduction.

Below the specific risk assessments required in the draft Bill have been amended to reflect the presence of this foundation risk assessment. The specific assessments can now become factors that are required to be taken into account in the general risk assessment.

(4) It shall be the duty of the provider of every regulated service to carry out an impact assessment of the regulated service on the right to freedom of expression and the right to respect for private and family life, home and correspondence, taking into account any guidance from OFCOM, and to publish that assessment.

Explanatory Note

This amendment both requires service providers to check that the operation of their services does not adversely affect people’s human rights. It is also a check on whether the company have over-applied risk mitigation and adversely affected rights.

Human rights impact assessments are well understood in the United Nations Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance on Business and Human Rights. Such HRIAs are significantly more than a statement of compliance. Here, we have focussed the obligation on freedom of expression and the right to respect for private life.

This is a stronger measure to illustrate impact on freedom of expression, privacy, and democratic speech than in Cl 12 of the draft Bill, which can be deleted.

(5) It shall be the duty of the provider of every regulated service to comply with the duties about reporting and redress set out in section [4E].

Explanatory Note

This consolidates reporting and redress duties (which are still being worked through subsequent to these amendments). When complete this should increase simplicity.

(6) It shall be the duty of the provider of every regulated service to comply with each of the record-keeping and review duties

Explanatory Note

This consolidates record keeping and review duties. When complete this should increase simplicity.

INSERT in Part 1, Chapter 2 the following new clause:

New Clause 4B

- (1) The duty to carry out a risk assessment under [section 4A(3)] includes the obligations to*
- (a) carry out a risk assessment at a time set out in section [4C],*
 - (b) to keep a risk assessment up to date, including when OFCOM make any significant change to a risk profile that relates to services of the kind in question, and*
 - (c) to carry out a further risk assessment before making any significant change to any aspect of the design or operation of a service.*

Explanatory Note

Provides for the foundation risk assessment to be kept up to date and is based on the provisions originally in the draft OSB. By consolidating the duty, repetition is avoided. This increases simplicity.

- (2) Where a risk assessment in relation to a service that is likely to be accessed by children identifies the presence of non-designated content that is harmful to children, the provider of that service is under a duty to notify OFCOM of*
- (a) the kinds of such content identified, and*
 - (b) the incidence of those kinds of content on the service.*

Explanatory Note

Moves a useful condition from the draft OSB to make it bear upon the new foundation duty; the notification of non-designated content operates as a form of early warning system. It affects search now as well as user to user services.

- (4) Where a risk assessment is carried out and identifies the presence of content that is harmful to adults, other than priority content that is harmful to adults, a duty to notify OFCOM of -*
- (a) the kinds of such content identified, and*
 - (b) the incidence of those kinds of content on the service.*

Explanatory note

Moves a useful condition from the unamended draft OSB to make it bear upon the new foundation duty. Broadens the scope of the duty to a wider range of services and improves OFCOMs risk intelligence allowing it to see early harms that emerge on smaller platforms.

- (5) When undertaking a risk assessment the following are relevant factors to consider and where appropriate to identify, assess and understand taking into account the risk profile that relates to the services of that kind -*
- (a) the user base, including, where the service is likely to be accessed by children, the number of users who are children in different age groups;*
 - (b) the level of risk of individuals who are users of the service encountering the following by means of the service -*
 - (i) terrorism content,*
 - (ii) CSEA content,*

- (iii) priority illegal content,
- (iv) other illegal content, and
- (v) content that is harmful to adults
- (vi) other harms,

taking into account (in particular) software, systems and processes used by the service, and how easily, quickly and widely content may be disseminated by means of the service;

(c) the level of risk of harm to individuals presented by illegal or harmful content of different descriptions, and where relevant giving separate consideration to children in different age groups;

(d) where the service is likely to be accessed by children, the level of risk of children who are users of the service encountering any of the following by means of the service

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- (i) each kind of priority content that is harmful to children (with each kind separately assessed),

- (ii) each kind of priority content that is harmful to children (with each kind separately assessed), and

- (iii) non-designated content that is harmful to children;

giving separate consideration to children in different age groups, and taking into account (in particular) algorithms used by the service and how easily, quickly and widely content may be disseminated by means of the service;

(e) harm to children presented by different descriptions of content that is harmful to children, giving separate consideration to children in different age groups;

(f) the level of risk of functionalities of the service facilitating the presence or dissemination of illegal content, identifying and assessing those functionalities that present higher levels of risk;

(g) where the service is likely to be accessed by children, the level of risk of functionalities of the service facilitating the presence or dissemination of content that is harmful to children, identifying those functionalities that present higher levels of risk, including functionalities -

- (i) enabling adults to search for other users of the service (including children), and

- (ii) enabling adults to contact other users (including children) by means of the service;

(h) the different ways in which the service functions or is used, and the impact that has on the level of risk of harm, whether caused by illegal content or not, that might be suffered by individuals;

(i) the nature, and severity, of the harm that might be suffered by individuals from the matters identified in accordance with paragraphs (b) to (h), and where the service is likely to be accessed by children, the harm that might be suffered by children giving separate consideration to children in different age groups;

(j) how the design and operation of the service (including the business model, governance and other systems and processes) may reduce or increase the risks

identified, with the risks to children, where relevant, in different age groups considered separately;

(k) the extent to which and the means by which the service may be used in conjunction with other services so as to give rise to the risk of harm, especially harm to children;

(l) the differential impact on users of different kinds of any of the functionalities; and

(m) other such matters that OFCOM might include in its guidance and risk profiles.

Explanatory note

This clause consolidates the harm factors from the three principal risk assessments in the draft Bill to ensure that the new foundation risk assessment covers them. They provide a foundation for the risk assessment but do not limit it.

Cl 7(8), 7(9) and 7(10) which define separate risk assessments can be deleted

Criminal content issues are now explicitly addressed to children too, closing a potential gap in the draft OSB.

As discussed above factors concerning the operation of software and processes of services (including algorithms) are now explicitly brought together with content issues providing greater protection and simplification.

Sub-clause (b)(6) refers to the societal harms described in the definition of 'harm'; it is not an open category.

A provisional attempt has been made to address cross platform harms in (k).

A new sub-clause (l) has been introduced. The list of factors set out in the draft bill required differentiation between different ages of children, but not any other differentiation. It may be that groups of users with certain characteristics are likely to have a heightened risk of harm (and note the definitions of harm to adults and to children defined in Clauses 45 and 46), but also that there might be other users who will be differentially impacted by features (e.g. turn into bullies).

(6) A risk assessment must at the least include a clear statement as to how the risk assessment was carried out, including the assumptions on which it proceeded, a risk mitigation strategy and the process for understanding the extent to which the risk mitigation strategy has been successful.

Explanatory Note

This amendment increases the effectiveness of risk assessment and mitigation by making the service provider reflect upon how they performed it and whether it worked. If things go wrong, this then provides the regulator with an easy point of entry for enforcement. Note also the changes to the enforcement powers in cl 80 and 82.

The draft OSB envisaged that the risk assessment be kept up to date, but that related more to changes in services/features rather than measuring the effect of the risk assessment and mitigation strategy.

Timing in the draft OSB focusses upon the initial assessment (reproduced in new Clause 4C below). This amendment does not put detailed obligations in about that (e.g. there is no specified time for measuring or reporting on measuring) but requires the provider to think about this.

(7) The duty to carry out a risk assessment includes the obligation to send OFCOM a copy of the risk assessment and the risk mitigation strategy as soon as possible after the risk assessment's completion.

New Clause 4C

Timing of risk assessment

[move amended Cl (8) to here]

New Clause 4D

(1) It shall be the duty of every service provider to specify clearly in a publicly available statement details of the provider's terms of service or, as the case may be, policies and procedures that are designed to protect users from any of the priority harms relevant to the service and any other harms identified in the risk assessment.

(2) It shall be the duty of the service provider to enforce any such terms of service or policies and procedures effectively and consistently.

Explanatory Note

Each of the individual safety duties contained similar obligations so this amendment aims at consolidation. While the specific obligations with regard to harmful but legal content in cl 11 and the provisions in relation to search are now covered by the new foundation duty and have been deleted, the provisions with regard to criminal content and content harmful to children contained more specific requirements and so remain.

Note that 'terms of service' is a defined term in relation to user-to-user platforms; policies and procedures with regard to search is not. It may be that a definition is needed in respect of those policies and procedures, but we have not proposed any such definition.

New Clause 4E

[reproduce Reporting obligations in Cl (15)]

Explanatory Note

Moving this clause forwards in the Bill and making it apply to both user-to-user services and search simplifies the Bill with only a small increase in burden.

Search is evolving rapidly to produce more contextual information around each 'simple' search result, and it is important to future proof against future harm.

New Clause 4F

[move amended record keeping and review to here]

Explanatory Note

Moving this clause forwards in the Bill and making it apply to both user-to-user services and search simplifies the Bill with only a small increase in burden.

Amendments to existing clauses

Clause 5

DELETE clause 5(1)

AMEND the remainder of the clause

(1) Without prejudice to the generality of the foregoing all providers of regulated user-to-user services must comply with the following duties in relation to each such service each of the illegal content duties (see section 9),

(2) Additional duties apply to providers of particular kinds of regulated user-to-user services, as follows.

(3) All providers of regulated user-to-user services that are likely to be accessed by children must comply with each of the duties to protect children's online safety (see section 10).

(4) All providers of services the risk profile of which identifies that the service presents risks to democratic debate must comply with each of the duties to protect content of democratic importance (see section 13) in relation to each such service.

(5) All providers of services the risk profile of which identifies that the service presents risks to news plurality and distribution must comply with each of the duties to protect journalistic content (see section 14) in relation to each such service.

Explanatory Note

This amendment is a simplification enabled by the Foundation Duty

Clause 5 listed each of the duties. As most of them now form part of the foundational duty much of clause 5 becomes unnecessary. Additionally, the clause has been consolidated to remove the distinction between Cat 1 services and other services, the proportionality of obligations being reflected through the risk assessment picked up in later amendments.

This section applies to user-to-user services only. The existing duties on the most important harms— illegal material and protecting children - can be retained and are compatible with and strengthened by the foundation duty.

Higher level duties are retained (with the exception the provisions in relation to harmful but legal and certain aspects of cl12). They will be strengthened by the new Freedom of Expression and Privacy Impact Assessment above. The provisions on democratic content and journalistic content are targeted to those platforms which pose a risk to the interests protected by clauses 13 and 14.

Specific duties on material harmful to adults are overtaken by the foundation duty.

Clause 7

DELETE

Explanatory Note

The detailed individual risk assessments have been picked up in the new risk assessment under the Foundation Duty in new 4(B).

Clause 8

AMEND cl 8(1), 8(2) and 8(3) by SUBSTITUTING ‘regulated service’ for ‘regulated user-to-user service’ and ‘relevant service’ for ‘user-to-user service’ in cl 8(3).

AMEND cl 8(5) so that ‘section 7(1)(a), 3(a) or 6(a)’ is REPLACED with ‘section [4B]’.

Clauses 11 and 12 can be DELETED

Explanatory Note

The new Foundation Duty combined with the requirement to assess the impact on human rights using broader definitions of expression and privacy provides a more effective protection of harms to adults, protection of speech and privacy than the somewhat cursory duties in the draft OSB which can now be deleted. This simplifies and strengthens the regime.

Clause 13

DELETE ‘: Category 1 services’ from heading to clause 13

AMEND clause 13(2) by inserting

‘Appropriate and proportionate’ after ‘service using’

‘, taking into account the protection of democracy risk profile produced by OFCOM under section [61A],’ after ‘systems and processes designed’

INSERT into cl 13(3) ‘take reasonable steps to’ after ‘A duty to’

INSERT in cl 13(5)(a) ‘, expressed in age-appropriate language,’ after ‘clear’ and ‘easily’ after ‘and’,

Explanatory note

The amendment strengthens protection of democratic debate and simplifies its application. The change to the heading reflects the fact that this duty will now apply to all user-to-user services that present a threat to democratic processes, not just Cat 1 services. Subsequent changes to the text of the duty make clear that the obligations will be graduated taking into account the extent to which services pose a significant threat to content of democratic importance or are a particular platform of importance for such content. This is tied back to a specific risk assessment that OFCOM must do on services that might present a risk to democratic processes. OFCOM of course has substantial expertise in ensuring that a wide range of content is available and detailed understanding of democratic debate in other media forms. It is therefore more targeted to the issue, rather than just using the Cat 1 designation relieving the burden for Cat 1 services that might not in fact present a threat to democratic processes.

Clause 14

DELETE ‘: Category 1 services’ from heading to clause 14

AMEND clause 14(2) by inserting

‘Appropriate and proportionate’ after ‘service using’
‘, taking into account the news plurality risk profile produced by OFCOM under section [61B],’ after ‘systems and processes designed’

INSERT into cl 14(5) after ‘A duty to’, ‘take reasonable steps bearing in mind the news plurality risk profile relevant to the service to’

INSERT in cl 14(7)(a) ‘, expressed in age-appropriate language,’ after ‘clear’ and ‘easily’ after ‘and’,

Explanatory note

The amendment strengthens protection of journalistic content and simplifies its application. The change to the heading reflects the fact that this duty will now apply to all user-to-user services that present a threat to plurality, not just Cat 1 services. Subsequent changes to the text of the duty make clear that the obligations will be graduated taking into account the extent to which services pose a significant threat to plurality or are a particular platform of importance for such content. This is tied back to a specific risk assessment that OFCOM must do on services that might present such a risk. OFCOM of course has substantial expertise in ensuring that a wide range of content is available and detailed understanding of plurality issues. *This allows more precise targeting of the platforms that pose risks to the existence of a diversity of journalism outlets (whatever their size and whatever their role with regards harmful and/or criminal content) and a range of views.*

Clause 15

AMEND as follows

(1) The duties about reporting and redress are the duties set out in this section

DELETE clause 15 (8)

MOVE to clause 4E

Explanatory Note

see above, provisions rolled into general duty

Clause 16

DELETE 'in relation to user-to-user services' from cl 16(1)
The cross reference in clause 16(2) should be CHANGED to [4A (3)]
DELETE 'user-to-user' in cl 16(5) and REPLACE with 'regulated'
ADD to clause 16(7):
(aa) Chapter 1 duties
DELETE '(the duties set out in section 15 (reporting and redress)).

Explanatory Note

see above, provisions rolled into general duty

Clause 17

AMEND to read as follows -
(1) Without prejudice to the foregoing all providers of regulated search services must comply with each of the illegal content duties (see section 21),

(2) In addition, all providers of regulated search services that are likely to be accessed by children must comply with each of the duties to protect children's online safety (see section 22)

Explanatory Note

This strengthens the regime and matches the approach in user-to-user services for search.

Clause 19

DELETE

Clause 20

DELETE

Clause 22

DELETE sub-clause 21(5)

Explanatory note

These provisions are now found in the Foundation Duty allowing simplification of the bill.

Clause 23

DELETE.

Explanatory Note

This provision has been super ceded by the stronger, freedom of expression and privacy impact assessment obligation, strengthening the bill.

Clause 24

DELETE

Explanatory Note

This is now rolled up in the general reporting duties in chapter 1.

Clause 25

DELETE

Explanatory Note

This is now rolled up in the general duties in chapter 1.

Clause 30

AMEND heading to read ‘Safer Systems and Processes Principles’

Explanatory Note

This is a more appropriate label for the things described in this useful set of principles, relabelling them to fit the new hierarchy of objectives above.

Clause 36

AMEND clause 36(1) to read

“A provider of a regulated user-to-user service is to be treated as complying with a duty set out in section 4A (foundation duty), section 4E (reporting duties), section 10 (safety duties for services likely to be accessed by children), section 13 (content of democratic importance), section 14 (journalistic content) and if the provider takes the steps described in a code of practice which are recommended for the purposes of compliance with the duty in question (so far as the steps are relevant to the provider and the service in question).”

AMEND clause 36 (3) to read

“A provider of a regulated search service is to be treated as complying with a duty set out in section 4A (foundation duty), section 4E (reporting duties), 22 (safety duties for services likely to be accessed by children) if the provider takes the steps described in a code of practice which are recommended for the purposes of compliance with the duty in question

(so far as the steps are relevant to the provider and the service in question).”

INSERT new cl 36(8)

(8) A provider of a regulated service may seek to comply with a relevant duty by action other than that specified in a code of practice provided that the actions taken are at least as effective, in the view of OFCOM, as those specified in the code.

INSERT in current Cl 36(8)(a) after ‘objectives’, ‘in section [1A]’ and DELETE ‘(so far as they are relevant to the service and the duty in question)’

INSERT new sub-clauses 38(6)(b) and (c) (and renumber current (b) as (d))-

(b) the Safer Systems and Processes Principles (so far as they are relevant to the service and the duty in question),

(c) the risk profile relevant to the service, and

RENUMBER clause 36(8) as 36(9)

INSERT new clause 36(10),

(10) A provider of a regulated service who seeks to comply with a relevant duty by acting otherwise than by taking a step described in a code of practice which is recommended for the purposes of compliance with the duty must explain how the steps taken or proposed are as (or more) effective in achieving the Online Safety Objectives and the relevant duty than the steps recommended.

AMEND (current) cl 36(9) as follows-

RENUMBER as cl 36(11)

INSERT in (a) after ‘objectives’, ‘in section [1A]’ and DELETE ‘(so far as they are relevant to the service and the duty in question)’

INSERT new sub-clauses (b) and (c)(and renumber current (b) as (d))-

(b) the Safer Systems and Processes Principles (so far as they are relevant to the service and the duty in question),

(c) the risk profile relevant to the service, and

AMEND the reference in current 36(9)(b) as (d).

INSERT new clause 36(12)

(12) Where a provider has provided a sufficient explanation under section [36(10)] it will be deemed to comply with the relevant duty unless OFCOM, taking into account the matters in section [36(11)] determines that the explanation under section [36(9)] or the alternative actions under section [36(8)] are inadequate.

RENUMBER current clauses 36(10) and (11) as 36(13) and (14).

INSERT in new clause (14):

(aa) the Chapter 1 Foundation duties

Clause 39 – interpretation of Part 2

DELETE cl 39(2)(f) and cl 39(7)

Explanatory Note

These provisions take advertising out of the regime. There is a risk that in taking out advertising the systems and processes used to deliver that content would also fall out of the regime (at the moment the scope of the regime is tied into content, albeit broadly defined). Advertising systems and processes might themselves be harmful.

The definition of paid-for advertising is unclear in any event, and there are some concerns about the impact of certain types of advertising (e.g. scams).

Clause 46 – Meaning of content that is harmful to adults

INSERT in Clause 46 new

2(b) (iv) content that is otherwise harmful within the meaning of cl 3(a) and not trivial nor mere offence'

Explanatory note

This places a limit on the new definition of harm.

Clause 48 –

INSERT

(1a) In this Part "Chapter 1 Foundation duty" means any of the duties set out in clauses 4A-F

Clause 49 Transparency reports

INSERT in cl 49(4)

(n) any other matters OFCOM determines is appropriate in the light of the Online Safety Objectives.

Explanatory Note

This avoids there being any gaps in the regime, but it is not an open-ended power as it must be linked to the objectives of the regime.

In clause 49(3) DELETE 'means' and REPLACE with '*is a service of a kind in respect of which OFCOM in the risk profiles produced under section 61 has determined it appropriate for transparency reports to be produced*'.

DELETE 49(3)(a)-(c).

Explanatory Note

Amendment provides flexibility for OFCOM to require the production of a transparency report – for instance from a platform that would not previously have got into Category One but is a high-risk service or is a repeat rule-infringer. This links back to the risk profiles Ofcom will produce and will not apply to all services – some risk profiles will require a transparency report.

Clause 56

INSERT

Section 3 of the Communications Act (general duties of OFCOM) is further amended in accordance with subsections (1) to (4)'

MOVE clause 56(2) - (4) to cl 1B

Explanatory Note

Section was truncated – new introduction.

Clause 59 & 60

DELETE Cl 59 and 60

INSERT

*OFCOM shall maintain a register of the services determined by OFCOM to be either -
(a) a service presenting a risk to democratic debate, or
(b) services presenting risk to news plurality and distribution.*

Explanatory Note

These provisions related to the various categories of service (established under Schedule 4). This superstructure has been removed and as a result they were unnecessary. Instead, the register is linked to the specific sector risk assessments carried out by OFCOM.

Clause 61

AMEND clause 61(1) delete 'individuals'

INSERT new clause 61(2) (and renumber remainder of cl 61)-

In carrying out S (61) risk assessments OFCOM should have regard to the Online Safety Objectives in S(1A).

Explanatory Note

The aim of this amendment is to ensure that the sector risk assessment carried out by OFCOM is orientated towards achieving the objectives set out at the start of the amended draft Bill. (Note: these are not the online safety objectives in current cl 30 but the overarching objectives of the regime.)

INSERT new clause 61(3)(a)(iv):

(iv) the risk of harm presented by the characteristics of the service.

Explanatory Note

In the original draft OSB this would form an amendment to clause 61(2).

This amendment strengthens the system by closing what appear to be gaps in the C161 risk assessment provisions: gaps in respect of societal harms and harms arising from the operation of the platform itself (for instance children report that cyber-bullying by anonymous accounts is particularly worrying, separate from the content itself).

Note this amendment defines the scope of the assessment that OFCOM should make – it is not necessarily requiring action on those issues.

Note cl 61(2)(b) requires OFCOM to identify ‘characteristics’ but this is not covering the same ground as the proposed amendment: the existing text in (b) concerns the route to harm not the question of whether a service feature itself might be harmful. Without the amendment, the obligation would only arise in relation to harms occurring to individuals on the basis of types of content.

AMEND *original* cl 61(2)(b) (now 61(3)) by INSERTING “including the risk posed by anonymity” after “relevant to such risks of harm” [line 39].

Explanatory Note

Evidence to the Joint Committee emphasised the role of anonymity as a risk factor and as an issue in victim-led responses to harms. This amendment makes sure that anonymity (which could be considered as an absence of a functionality though account creation – including anonymous account creation - included in the list of functionalities at cl 135(2)(a)) is taken into account here. There may be a case for more extensive provisions around anonymity when it is better understood as a risk factor, in particular how it interacts or not with the disinhibition effect. This amendment requires such issues to be taken into account in risk assessment and potentially in risk mitigation.

INSERT new Cl 61(4) and *renumber* following sub-clauses

(4) When carrying out the risk assessment and developing the risk profiles OFCOM must take into account the likely impact of the characteristics on freedom of expression and on the right to respect for private and family life home and correspondence and identify this impact in the risk profiles it develops.

Explanatory Note

This amendment strengthens the defence of freedom of speech and privacy. While the draft OSB envisaged that risk assessments around fundamental human rights should take place (see cl 12 and 23 of draft OSB, and C14A (4) of Carnegie amendments), the draft bill did not expressly require OFCOM to provide specific risk profiles or guidance on this, running the risk that the rights impact assessment might get blurred in with other risk assessments. This amendment fills that gap.

INSERT new Clause 61(5)

In the risk profile for each kind of service, OFCOM must indicate whether it is appropriate or not for the obligations in clause 49 (transparency reports) to apply to services of that kind.

Explanatory Note

This strengthens transparency reporting by giving OFCOM the role of deciding which companies should provide transparency reports. Such a power would have to be exercised within OFCOM's over-arching General Duty to be proportionate in its actions referred to in the Explanatory Note to new clause 1A above.

INSERT new Cl 61(6)

(6) As soon as reasonably practicable after the finalisation of a risk profile, OFCOM must publish it.

AMEND Cl 61(5) (*renumbered* as cl 61(8)) by INSERTING “and individual risk profiles are” after “the risk assessment” [line 5] and DELETE “is”.

Explanatory Note

The risk profiles are a significant fulcrum in the exercise of OFCOM's powers, but the draft OSB does not require OFCOM to publish them. Whilst OFCOM's normal practice would be to publish, given the centrality of the risk profiles to the regime this should be guaranteed. The risk profiles will also inform the operation of the Super Complaint mechanism. Such transparency simplifies the regime.

It remains unclear to us whether OFCOM allocates companies to risk profiles, or whether the companies choose what they think the relevant profile is. While allocating the big companies may not be problematic (and indeed the largest might have a unique profile each) there is a question of proportionality as to how much OFCOM should be involved as it proceeds down through the stack. OFCOM should have final say as to how to manage this based on operational experience and on the principle of regulatory independence. OFCOM manages a similar exercise with the long tail of small radio stations and regulated VOD services etc.

DELETE cl 61(6) – on original draft OSB numbering

Explanatory Note

This clause defined ‘characteristics’ and has been moved so that it will apply to the entire act and not just cl 61; it is now in cl 135. This strengthens and simplifies the Bill.

Clause 61A Services presenting risks to democratic debate

INSERT

61A *(1) OFCOM must carry out a protection of democracy risk assessment to identify, assess and in particular to understand the significance of user-to-users services of different kinds on democratic debate in the United Kingdom and determine whether, in relation to a particular type of regulated service, it would be appropriate that the duties under section 13 should apply.*

(2) The risk assessment must assess the levels of risk of any harm and identify characteristics of different kinds of user-to-user services to which OFCOM has

determined that the duties in section 13 should apply that are relevant to such risks of harm and assess the impact of those kinds of characteristics on such risks.

(3) OFCOM must develop risk profiles for different kinds of user-to-user services, based on the democratic process risk assessment, categorising the services as OFCOM consider appropriate, taking into account –

- (a) the characteristics of the services, and*
- (b) the risk levels and other matters identified in the risk assessment.*

(4) As soon as reasonably practicable after completing a risk assessment, OFCOM must publish a report on the findings.

(5) As soon as reasonably practicable after the finalisation of a risk profile under section [61A (3)], OFCOM must publish it.

Explanatory Note

The obligation for OFCOM to carry out work here in relation to the protection of democracy links back to the duties in cl 13 (aimed at protecting democratic debate through a focus on content of democratic importance). It would be inappropriate for the obligations to apply equally across the board to all platforms, but instead should depend on the profile of the service and its impact on these sorts of content. This may not just be about size, so this risk assessment-based approach targets the obligation more appropriately. Note the definition of harm has been amended to include some societal harms (to reflect the scope in practice of the harms recognised in cl 13, 14, 98 and 112 – as well as cl 33(1)(b), although we propose deleting cl 33 in total) and now also includes the concerns around the electoral process being undermined.

Clause 61B Services presenting risks to news plurality and distribution

INSERT -

61B *(1) OFCOM must carry out a news plurality and distribution risk assessment to identify, assess and understand the impact of user-to-user services of different kinds on the distribution journalistic content and to the availability of a wide range of journalistic content and determine whether, in relation to a particular type of user-to-user service, it would be appropriate that the duties under section 14 should apply.*

(2) When carrying out the news plurality risk assessment under section [61B], OFCOM should consult in a timely manner the Competition and Markets Authority.

(3) The risk assessment must assess the levels of risk of such harm and identify characteristics of different kinds of user-to-user services to which OFCOM has determined that the duties in section 14 should apply that are relevant to such risks of harm and assess the impact of those kinds of characteristics on such risks.

(4) OFCOM must develop risk profiles for different kinds of user-to-user services, based on the news plurality risk assessment, categorising the services as OFCOM consider appropriate, taking into account -

- (a) the characteristics of the services, and*

(b) the risk levels and other matters identified in the risk assessment.

(5) As soon as reasonably practicable after completing a risk assessment, OFCOM must publish a report on the findings.

(6) As soon as reasonably practicable after the finalisation of a risk profile under section [61B (3)], OFCOM must publish it.

Explanatory Note

The duties in relation to journalistic content have been amended to apply in principle to all user-to-user services, though the obligations on the service providers should not be the same in all cases but depend on the profile of the service and its impact on these sorts of content. This separate risk assessment notes the different nature of the harm – harm to the information ecosystem and diversity of opinion through gatekeeper control – rather than harm to an individual person (and is also different from the harms relating to democratic content). This is more proportionate and targeted than relying on old Cat 1, which assigns all risky/large platforms that same extra duties even if they do not have the same impact on speech. The development of specific risk profiles allows this difference to be recognised. While the duties provide for some specific steps platforms should take, there is still some flexibility in those provisions making the provision of further detail about risk desirable. This assessment also applies to search, where the Joint Committee has heard strong evidence about the impact of dominant players on news distribution.

CI 62

Amend cl 62(1) by replacing “under section 7 or 19” with “under section [4A (3)] and a freedom expression and privacy impact assessment under section [4A(4)].”

Amend cl 62(2) by adding “and section [61A] (see subsection (3) of that section) at the end of the sub-clause [line 19].

Explanatory note

This ensures that OFCOM produces guidance on the new risk assessments etc above.

Clause 70

DELETE cl 70(4)g and h

Clause 80 Provisional Notice of Enforcement

INSERT new clause 80(11)

In this section ‘failure’ includes situations when the provider has omitted to carry out an enforceable requirement referred to in section 82 that applies in relation to the service, has only partially complied with any such enforceable requirement or has, in the opinion of OFCOM, carried out steps to comply with any such obligation without adequate care.

Explanatory Note

This amendment aims to make clear that the obligations in the draft bill are not merely quantitative but that there is a qualitative element to satisfying those obligations. This amendment aims to prevent providers from negligently carrying out risk assessments, or even wilfully choosing to ignore risks.

This should also cover the situation where a company chose to refer to a risk profile that was not appropriate to the service it provides.

This change does not need to be carried through to cl 83 or 84 because those provisions are based on the provisional notice of enforcement. It would seem that a requirement to re-do a risk assessment would be covered by cl80(5), cl 83(5). Amendment to clause 4B(3) envisages the possibility of a risk assessment being required to be re-done.

This amendment will also relate to the children's assessment and transparency reporting among other obligations.

Note that cl 82 will need to be amended to pick up the proposed changes to the risk assessment and safety duties proposed earlier to ensure all are included.

Clause 82

INSERT new clause 82(q)-

(q) the requirements in section [36(8) and (10)] (comply or explain requirements)

RENUMBER remainder of list as (r)-(z)

Explanatory Note

Comply or explain has a long history in UK company regulation - it is a pragmatic approach that relies on good faith and a common understanding of the facts. We note February 2021 proposals for reform to comply or explain by the Financial Reporting Council 'Improving the quality of 'comply or explain'' which suggest some companies are not explaining enough when they do not comply with reporting standards.

The evidence heard by the Joint Committee draws attention to the current information asymmetry between service providers and the regulator, inevitable at the start up of a new regulatory regime. We are concerned that comply or explain is open to gaming by companies seeking to defer regulation. When information asymmetry and regulatory gaming combine it leads to uncertainty and poor risk management.

This group of amendments strengthens the regime by retaining the principles of comply or explain but guiding companies as to principles they should follow in explaining; gives

OFOM the ability through risk profiles to influence the discretion to comply or explain; and allows OFCOM more easily to dispute and require improvement of unsatisfactory explanations. By providing more guidance to companies as to how they can comply the regime may also be simplified.

Clause 104

DELETE

Explanatory note

CL 104 is linked to cl 59 and the categorisation of services which has been deleted. It is therefore redundant.

Clause 118

AMEND clause 118(2) by adding “Chapter 1 of Part 2,” after “such a provider under”.

Clauses 130, 131 – repeal of video sharing platforms provisions, Digital Economy Act etc

DELETE

Explanatory Note

The government has not brought forward proposals to replace these measures to protect children previously approved by Parliament. Both the Digital Economy Act and the VSP provisions provide greater protection for children than the measures in the draft Bill. Repealing these laws suggests that the Online Safety Bill will make things less safe for children in this respect so they should not be repealed.

Clause 132(5)(d) and (f) are no longer necessary

Clause 135

(5) In this act the “characteristics” of a service include the functionalities of the service, its user base, business model, governance and other systems and processes.

Explanatory note

The concept of ‘characteristics’ conveys much about service design, brand values and actual user behaviour of the services, an extremely important component of safety. This amendment increases the number of areas where this concept can be considered strengthening the regime and also simplifying it through consistency.

Clause 137

ADD the following to cl 137(1):

“priority harm” means any of the harms listed in Schedule 3 or designated in regulations made by the Secretary of State under sections 44 or 47.

Explanatory note

This allows reference to priority harms as a group rather than sticking with content-specific categories; relevant for the introduction of the foundational duty.

“online safety objectives” means the objectives found in section [1A]

Schedule 4

DELETE in entirety

Explanatory note

A very substantial simplification of the regime. Detailed descriptions of categories of company no longer need to be set through a series of regulations. The amendments above place the responsibility correctly on OFCOM to manage through use of risk profiles that allow more accurate, proportionate and effective targeting of regulation.

2. Secretary of State’s powers

Carnegie UK discussed with the Joint Committee the unnecessary and potentially harmful breadth of the Secretary of State’s Powers. Our [blog post](#) of 14 September refers. We present here a list of proposed amendments to the draft OSB that address Secretary of State powers that Carnegie UK views as particularly problematic. It does not deal with all issues relating to the Secretary of State’s powers. Our wider work on simplifying and strengthening the draft OSB (Part 1 above) also requires a reduced role for the Secretary of State in a simpler Bill.

Provision	Amendment	Explanatory Notes
Secretary of State’s power to exempt services from the regime		
Cl 3(8) Cl 3(12)	Delete sub-clause and renumber clauses 3(9)-(12) Delete “(11),” Amend cross referencing	This provision allows the Secretary of State to exempt services; while it might be that this relates to categories the clause uses the term ‘description’; does this permit individual services to be exempted? Note: the Secretary of State also has the power to remove the exemption from certain categories of services already exempted. This seems less problematic. NB also (12) potentially affects the meaning of “regulated content”. At the moment the amendment reflects the deletion of cl 3(8) and the consequent re-numbering of subsequent clauses.
Secretary of State’s power to direct Ofcom in re codes		
Cl 33	<i>Delete</i> clause in its entirety (cl 33(1)-31(7))	The current draft bill envisages that this power may be used in 2 circumstances (1) govt policy; (2) national security/public safety. Requirement for conformity with government policy may give rise to free speech concerns. There are no checks or balances on the application of national security or public safety in this clause.
Secretary of State’s power to determine “priority illegal content”		
Cl 41	<i>Insert</i> – Cl 41(4)(c) a priority offence (see section 43A) <i>Renumber</i> current 41(4)(c) and (d) as 41(4)(d) a(c) (e) respectively. <i>Amend section in</i> current 41(4)(d) to replace “not within paragraph (a), (b) or (c)” with “not within paragraph (a), (b) (c) or (d)” <i>Insert</i> in cl 41(5)(c) after “if the relevant offence is”, “a priority offence or if”.	This amendment assumes that just priority categories of content will be identified and that non-priority offences will just be caught through what is currently 41(4)(d). N.B. at the moment it seems that the power to make regs, allows the SoS to specify offences to be considered relevant for the purposes of the regime and to identify priority content. It does not seem that all regs made under current 41(4)(c) need be priority. The aim of the amendment is to put all the ‘priority harms’ in one schedule (without distinguishing between content type),

Provision	Amendment	Explanatory Notes
	<i>Amend</i> the reference in cl 41(6) to “subsection (4)(d)” to read “subsection (4)(e)”.	
	<i>Insert</i> after Cl 43 - 43A Priority Offences (1) In this Part “priority offence” means an offence specified in Schedule 3A. <i>[Sch 3A to be drafted]</i>	
Cl 44	DELETE Cl 44(1) Move cl 44(2)-(6) and INSERT after 47(3) <i>DELETE</i> “for the purposes of subsection (1)” in (current) 44(2). <i>DELETE</i> “In subsection (1)” in (current) 44(4).	Our work on simplifying the Bill removes the need for the separate process here for the determination of priority illegal content. This is now dealt with as part of the common procedure for all categories of harm – see cl 47, a process which re-emphasises Parliamentary oversight.
Cl 132	<i>Insert</i> in cl 132(4) - (d) regulations under section 41 and <i>renumber</i> current (d)-(h) accordingly <i>Delete</i> from cl 132(5) - “(a) regulations under section 41,” and <i>renumber</i> accordingly <i>Delete</i> 132(6)	This amendment requires priority illegal content regs always to be made as positive resolution and removes regulations under cl 41 from the list of regulations to be made by negative procedure. This amendment is repeated for the other regs for priority content. Cl 132(6) is now redundant.
Secretary of State’s Power to specify content harmful to children		
Cl 47		See below – provisions have been consolidated
Cl 132	<i>Insert</i> in cl 132(4) - (f) regulations under section 45 and <i>renumber</i> accordingly <i>Delete</i> from cl 132(5) “(b) regulations under section 45” and <i>renumber</i> accordingly	This is making all regs specifying priority content in re children to be made by positive resolution.
Secretary of State’s Power to Specify Priority Content that is Harmful to Adults		
Cl 46	<i>Amend</i> cl46(2)(b) to read- (b) any of (i) of a kind listed in Schedule 3A	This is borrowing the model from illegal content of listing types of content you want caught.

Provision	Amendment	Explanatory Notes
	<p>(ii) of a description designated as harmful in regulations made by the Secretary of State, or (iii) within subsection (3) or (5)</p> <p>[NB Schedule 3A to be drafted]</p>	<p>The definition of harm now includes societal harm in a limited manner and therefore the definition of harmful to adults could not be restricted to just harms felt by individuals. The removal allows societal harms that are specified in the definition of harm to fall within the definition and will have that meaning through this Part – so allowing regs to identify priority societal harms to be identified.</p>
Cl 47	<p>Amend cl 47(1) to reads as follows:</p> <p>(1) In this section “regulations” means regulations under section 41, 45 or 46.</p> <p>Amend clause 47(3) to read as follows (3) OFCOM must regularly carry out reviews of -</p> <ul style="list-style-type: none"> (a) the prevalence on regulated services of illegal content or harmful content or behaviour with each kind of harm separately assessed (b) the level of risk of harm to individuals in the United Kingdom resulting from those kinds of content, and (c) the severity of that harm in each category of harm. <p>INSERT subclauses (2)-(3) from cl 44 as (3A) -(3B)</p> <p>Amend cl47(4) by inserting after ‘review’ the following “, including a recommendation as to content or behaviour to be specified under section 41, 45 or 46”.</p> <p>Delete clause 47(5)</p> <p>REPLACE cl 47(9) with 44(4)</p> <p>INSERT cl 44(5) and (6) as (9A) and (9B)</p>	<p>This consolidates the process for making regulations so that it is the same for illegal, harmful to children and legal but harmful. Not sure that it is possible to compel the Secretary of State to make regulations?</p>
Cl 132	<p><i>Insert</i> in cl 132(4) - (g) regulations under section 46 and <i>renumber</i> accordingly</p> <p><i>Delete</i> from cl 132(5) “(c) regulations under section 46” and <i>renumber</i> accordingly</p>	<p>This is the same as for the other provisions.</p>
Statement of Strategic Priorities		
Cl 109	<p><i>Amend</i> (3) to add -</p>	<p>This is borrowed from the restrictions on directions in re codes of practice and amended.</p>

Provision	Amendment	Explanatory Notes
	“It may not require OFCOM to include particular steps to be taken by providers or regulated services or action in relation to particular items of content”	
Power to Direct OFCOM in the Exercise of its Powers		
CI 113	<p><i>Delete</i> this clause in its entirety. Replace with:</p> <p>(1) OFCOM has complete discretion in the carrying out of its functions under this act, including in—(a) preparing its enforcement policy, (b) exercising its enforcement functions, and(c) preparing and publishing its budget.</p> <p>(2) At the start of each period of multi-annual funding and no later than 1 April 2023, the Secretary of State must lay before Parliament, and publish, a statement setting out the multi-annual budget which they intend to provide to OFCOM.</p> <p>(3) In making or terminating appointments under section 1(3) and 1(4) Office of Communications Act 2002 the Secretary of State must obtain the consent of the DCMS select committee</p>	<p>This interferes with OFCOM’s day to day activities potentially and risks undermining its independence. It is questionable the extent to which it is in any event necessary given the statement of strategic priorities.</p> <p>The proposed amendment is based on an amendment proposed to the Environment Bill. Have sought to limit impact of (1) to provisions under this act and not all Comms Act (or other acts). Consideration of interplay with Communications Act and OFCOM Act general provisions needed in re (2) and (3). It may be that sub-cl (2) and (3) would fit better in clause 56.</p> <p>NB the Lords Comms and Digital Cttee report suggests a dedicated Joint Committee in this area – perhaps that would be the appropriate committee to scrutinise appointments</p>
Interpretation		
CI 137(1)	<p><i>Add</i> the following “priority harm” means any of the harms listed in Schedule 3 or designated in regulations made by the Secretary of State under sections 44 or 47.</p> <p><i>Delete</i> “harm” means physical or psychological harm;</p>	<p>This allows reference to priority harms as a group rather than sticking with content-specific categories; relevant for the introduction of the foundational duty.</p>

[ENDS]
Carnegie UK
November 2021