

CARNEGIE UK TRUST – DRAFT ONLINE HARM REDUCTION BILL

Explanatory notes

1. This draft Bill (page 11) implements the proposal for a statutory duty of care enforced by a regulator approach to online harm reduction set out by Professor Lorna Woods, William Perrin and Maeve Walsh in the Carnegie UK Trust [publication of April 2019](#). It creates a high-level framework to regulate systems operating online that may give rise to harms. The framework empowers an independent regulator, OFCOM, to act at arms' length from the executive and Parliament.
2. This short draft Bill is a simple but effective route to legislation. Rather than creating everything from scratch in a voluminous Bill of thousands of clauses, the authors dovetail online harms into an existing, proven regulatory regime in only 60 clauses. This draft Bill amends the [Communications Act 2003](#) (CA03), the very large Act that abolished seven regulators and created OFCOM. Over the years, Parliament has added other regulatory functions to the CA03, proving it can be adapted for new purposes, as the authors do here. Adding to the CA03 regime garners the benefit of over 15 years of practice and experience existing in a regulator that is already operating.
3. CA03 has been revised over time to make OFCOM itself work better, ensuring that its board has the right balance of powers to handle large well-funded companies of the sort it will encounter in online harm reduction. The draft Bill adapts existing CA03 powers to add functions for online harms and only creates new processes where strictly necessary. Where OFCOM's functions work well, the draft Bill aims to adopt them.
4. Parliament will want to know how the regulator will work. This draft Online Harm Reduction Bill requires the regulator to make codes of practice, that are essential for the operation of a statutory duty of care regime. An indicative list of such codes is provided. The codes should be written by the independent regulator, not by government. To enable Parliamentary scrutiny of draft codes before the Online Harm Reduction regime is in place, a competent regulator needs to be empowered to start work before a Bill gets to Parliament.
5. A paving Bill could be one route to allow the Secretary of State to appoint OFCOM as Interim Online Harms regulator to prepare for the introduction of a duty of care-based

regime and provide draft codes to support Parliament's deliberation. Or, if OFCOM thinks that they can carry out that task within their existing powers, they could exchange letters with the Secretary of State and proceed by agreement, although such a route would provide for lesser Parliamentary scrutiny.

Principal differences from the [Online Harms White Paper](#)

6. The Carnegie paper by Woods/Perrin/Walsh responding to the government's consultation welcomed the White Paper approach and drew out a number of differences in approach which are largely reflected in this draft Bill.
 - Nature of legislation: there is not yet a government route to legislation. The 2019 [Queens Speech](#) (October) announced a draft Bill for pre-legislative scrutiny but no details were given of the form it would take prior to Parliament being dissolved for the 2019 election. The critical policy step of a response to the Online Harms White Paper is still missing. It is possible that the government would write a draft Bill starting with a clean sheet rather than an amending Bill. The Carnegie draft Bill demonstrates a low risk, amending approach.
 - Regulator: the previous administration had not decided who will be the regulator and the DCMS commitment to a response to the White Paper consultation by the end of this year (2019) looks undeliverable as Parliament has been dissolved and is not likely until Spring 2020 at the earliest. This draft takes a low-risk approach and uses OFCOM, an established regulator.
 - Codes: this Bill does not provide for the Home Secretary to make codes, which might vest too much power in the executive; the Home Secretary is a statutory consultee.
 - Advisory Board: this Bill creates a new Online Harms Advisory Board and a Technical Advisory Committee.
 - Definitions: the draft Bill provides some; the government is considering its response.
 - Duty of care: the draft Bill spells one out.
 - Nature of harms: the draft Bill seeks to set the harms encompassed by the (then) [Internet Safety Strategy Green Paper](#) two years ago in the context of the Human Rights Act. The draft sets out a wider range of harms than the Online Harms White Paper including harms to consumers and businesses (reportedly such online harms are Britain's biggest category of property crime), misogyny as hate speech and harms to society at large.
 - Press and traditional media: the Bill is drafted to seek to exclude traditional media and their below-the-line comments from the online harms regime as there is a national settlement in these areas already, a position the previous administration [appeared to clarify](#) after the White Paper publication.

Sections of the Draft Online Harm Reduction Bill

Duty of Operators – Section 2

7. This section creates a systemic statutory duty of care, drawing upon the experience of the [Health and Safety At Work Act 1974](#) (HSWA74). The duty has regard to users and others – we had in mind victims of, for instance, revenge pornography who are not themselves users of the platforms from which harm flows.
8. The duty is qualified, based on the experience of other statutory duties of care. by ‘so far as is reasonably practicable’. Such a qualification is vital to such a duty functioning in the real world.
9. 2(1)(c) describes a non-exclusive list of harms and requires operators to have regard to the balance of rights in the Human Rights Act. The draft Bill sets out a range of harms that would appear to be within the scope of Article 10(2) of the European Convention on Human Rights that acknowledges restrictions may be placed on speech. This approach encompasses the harms identified in the Online Harms White and (then the Internet Safety Strategy) Green Paper. The broad scope of this approach also includes harms to consumers and discrimination by sex (misogyny) omitted from the White Paper.
10. OFCOM is a statutory body and is thus bound by the Human Rights Act 1998 and the Equality Act 2010. Section 6 Human Rights Act provides:
 - (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
11. OFCOM is accustomed to striking a balance between rights in its role as regulator (see, for instance, the Peace TV Urdu ruling: [Bulletin 383](#) p 17 onwards).
12. [Section 149 of the Equality Act](#) sets out a Public Sector Equality Duty that applies to OFCOM:
 - (1) A public authority must, in the exercise of its functions, have due regard to the need to —
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

See also the explanatory notes below on Section 4 of the draft Bill which explain how a range of other rights-based obligations on OFCOM are also triggered by the route we have taken.

13. Section 2(2) sets out a range of technical measures that are necessary for a systemic approach to harm reduction, based upon Article 56 of the [Data Protection Act 2018](#) (DPA18) and Section 6 of the HSAW74. While section 56 DPA18 deals with law enforcement, the wording implements the more general duty of privacy by design which we have adapted to reflect 'safety by design'.
14. The HSAW74 makes specific provisions (such as testing for safety) within the generality of the duty of care. The previous administration confirmed in an answer to [Lord Stevenson](#) that Section (6) of the HSAW74 applies to software supplied for use at work.

“Section 6 of the Health and safety at Work etc. Act 1974 places duties on any person who designs, manufacturers, imports or supplies any article for use at work to ensure that it will be safe and without risks to health, which applies to artificial intelligence and machine learning software.”

Online platform service operators – Section 3

13. This section defines an online platform service and describes those who operate it as 'online platform service operators'. This approach – describing the service and then those who operate it – is similar to that used in communication legislation.
14. There are a number of overlapping regimes in this area: broadcasting regulation, press regulation (IPSO and Leveson-Compliant), the revised [Audio Visual Media Services Directive \(AVMSD\)](#) (which regulates online video services and that the UK government has said it will implement), the [e-Commerce Directive](#) and others. Any approach to regulation of social media needs to navigate these and take decisions about which it engages. This statutory duty of care enforced by a regulator regime is a potential route to implementing some obligations of the AVMSD.
15. The draft Bill seeks here to exclude the 'traditional' regulated media. Parliamentary draftsmen seeking this effect in the [Malicious Communications \(Social Media\) Bill 2016](#) used 'editorial control' as a differentiator and 'editorial responsibility' is used in [S368A of the CA03](#) as a test. The Audio Visual Media Services directive ([Article 1.1\(c\)](#)) defines editorial responsibility as:

“the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.

Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided”.

16. In our view, *ex post* moderation is not editorial control; that more relates to *ex ante* selection of material for inclusion in a service. Likewise, navigation and discovery tools, although they affect the content that is seen and cannot be said to be content neutral, do not constitute editorial control in this sense. OFCOM should provide guidance in this area.

The regulator – Section 4

17. This amends the CA03, that gave OFCOM the majority of its powers to add in responsibility for online harm regulation. Section 3 of the CA03 contains a list of criteria that OFCOM must follow in its actions, based on existing rights and decisions by Parliament. Online harm reduction is added by 4(1) of the draft Bill as something OFCOM must secure in going about its duties. OFCOM has a wide range of powers, checks and balances and the procedures to put this into effect. Here the Bill seeks, where appropriate to bring these mechanisms to bear on online harms without having to list them again at great length.
18. 4(2)(a): Balancing rights is important to the online harms regime. As a public body OFCOM is already bound in law by the UK [Human Rights Act 1998 and the Equality Act 2010](#). Duties under these Acts give OFCOM a strong foundation to consider all rights when taking decisions such as approving guidance. This section also notes important treaties to which the UK is a signatory.
19. 4(2)(b): This section also amends OFCOM’s general duties to prohibit it requiring general monitoring in respect of online harms as currently required by Article 15 of the e-commerce directive.
20. 4(3): this requires OFCOM to report to Parliament on how it has balanced the application of its duties under human rights legislation and treaties in acting as regulator of online harms.

Codes of practice – Section 5

21. This section requires OFCOM to provide guidance on the application of the duty of care through the creation codes or adoption of codes prepared by others and describes a consultation procedure that OFCOM must follow. The section draws to some extent from the HSAW74 and from OFCOM’s own guidance on making other codes. Codes are for OFCOM to draw up in consultation with industry, civil society and others. OFCOM can also adopt codes written by others (for instance children’s

groups, industry bodies, even the Secretary of State) after consultation. A code adoption process provides a strong incentive for industry co-regulation. Pre-existing codes such as the [Internet Watch Foundation](#) work on removing child sexual abuse imagery would be a strong candidate for OFCOM to adopt.

22. OFCOM must consult the Secretary of State but is not obliged to adopt codes written by them. This air gap between the executive and the independent regulator reflects the norms Parliament established in regulating broadcasting over the decades and is a significant point of divergence with the White Paper, where the Home Secretary has been given the power to set codes in relation to terrorism and child sexual abuse content. The Council of Europe and the EU both expect that regulators be independent. The World Trade Organisation Reference Paper on Telecommunications services also requires independence of regulation.
23. Section 5 (7) requires OFCOM to create codes on a range of generic, high level, systemic issues that will be required to support a systemic duty of care. The generic approach – getting the basics of risk management and transparency right – will be more effective in tackling tactical issues than many codes on specific topics. In the context of the duty in Section 2, OFCOM is required to provide guidance on the following:
 - (a) Assessment of risk – factors informing suitable, sufficient, up-to-date processes of risk assessment. The ‘suitable and sufficient’ language is drawn from Section 3 of the [Management of Health and Safety at Work Regulations 1999](#). OFCOM can give general, non-exclusive indicators to companies of techniques to assess harm and high-level harm types. It should set out, as the ICO does with Data Protection Impact Assessments what a risk assessment should include. But operators themselves are bound by the S2 duty and must themselves make judgements about harm that arises from the operation of their services. Operators are able to use survey and market research methods to scope harm and its causes. OFCOM can use its advisory bodies created by this Bill to ensure that operators, their trade bodies, civil society and victims of harm are able to share knowledge of risks.

OFCOM might have a slightly greater role in helping operators understand societal harms the incidence of which might not be immediately apparent especially to a small company, for example harms to the electoral system. But OFCOM should take into account the operators’ capacity to be aware of societal harms, such as the existence of guidance, or whether a company has staff whose job it is to understand public policy issues; we notice that larger companies have staff that mainly exist to talk to government and parliamentarians about such issues. In a duty of care system, the burden lies with operators to assess risk of harm, its causes and mitigation.

- (b) Transparency of platform – both information about how its processes work to prevent harm and quantitative data about harm. Complaints processes should be

particularly transparent (see also (f)). As in other areas, some information will be transparent to the public at large, a smaller set transparent only to the regulator who keeps it confidential.

(c) Risk factors in service design and nudging techniques – guidance on mitigating risk and what features present elevated risks in specific circumstances. Where risk factors in generic service components are apparent or risk arises in cross-service behaviours (such as a feature on one service used to cause harm on another), the code should set out how operators should co-operate in respect of harm reduction.

(d) Discovery and navigation techniques – guidance on mitigating risk and what features present elevated risks in specific circumstances in content presentation, such as algorithmic sorting or ‘auto-play’ videos which turn a service from pull to push. See note (c) above on co-operation between operators.

(e) How users can protect themselves from harm – guidance on how giving users tools and other techniques can mitigate risk.

(f) Disclosure, complaints and resolution procedures. Where a significant breach of the duty occurs operators should disclose this to the regulator. In this code OFCOM should set out disclosure requirements and process. OFCOM should set standards for complaints and resolution process. The ‘polluter pays’ principle suggests that the burden for managing the ‘failure’ part of the process should remain with the operator, not be brought into some sort of statutory ombuds-process. In line with transparency requirements, the operator should make public information on how the company deals with complaints, reaches decisions, as well as information about how a company understands its own community standards.

(g) Child sexual exploitation and abuse.

(h) National Security.

Codes (g) and (h) are different from codes (a)-(f) in that they focus on particular types of content rather than cross-cutting technical, design and business features. This is justified because of the severity of the harm and/or the need for swift intervention and for the cooperation between operators and law enforcement. National security in this context includes terrorism and the activities of foreign actors.

24. A risk-based approach to harm minimisation across generic factors (a) to (f) would illustrate where specific interventions on persistent harms might be required either under the statutory duty of care or by Parliament in other legislation or regulations. Codes (g) and (h) cover areas where there is near universal agreement for action given

the magnitude of harms involved, reflected in much voluntary action and self/co-regulation such as the Internet Watch Foundation.

25. Section 12(3) notes that OFCOM will take into account compliance with the Section 5 codes when assessing penalties for breach of the duty of care. Subsection 8 onwards provides for OFCOM to create statutory codes which have binding effect.
26. The statutory duty of care regime and OFCOM's powers do not critically depend upon the existence of codes of practice, which can take years to formulate and adopt. The regime is in operation from the time that the Act comes into force, subject to the S(2) duty approach to reasonableness and the good governance factors set out in the CA03 that govern OFCOM's general approach to regulation. Regulatory uncertainty could be reduced through the appointment of an Interim Regulator to carry out preparatory work and the discussion of draft codes during the scrutiny of the Bill.

Gathering information – Section 6, Section 10

27. Voluntary methods to extract information from social media companies for Parliament have not gone well. This section amends OFCOM's effective information-gathering powers to allow it to gather online harms information. The [Digital Economy Act 2016](#) (DEA) increased OFCOM's powers to seek information, based on experience of practice and the draft Bill amends the DEA amendments to the CA03 so that the new more effective powers apply to online harms. Section 10 seeks to prevent the destruction of information to frustrate regulatory action.

OFCOM's route to enforcement action – Sections 7,8, 9, 11, 12

28. The Communications Act did not provide an existing process that could easily be adapted for enforcement of a duty of care. The draft Bill draws upon the Data Protection Act 2018 model of Assessment Notice, Penalty notice, a model with which most online platform service operators will be familiar. The draft Bill presents a simplified version. The Penalty Notice approach in S12 also draws from the Health and Safety at Work Act 1974 approach to enforcing a duty of care.
29. Section 8 outlines a process that could trigger an assessment process by OFCOM on petition from an external body, similar to a 'super complaint' in economic regulation. OFCOM is required to issue guidance on how this process might work, having consulted its advisory panel. We judge that a process is necessary, despite the fast-moving nature of the online world, otherwise complaints would be endlessly appealed.

OFCOM power to direct ISPs to block access – Section 13

30. The draft Bill amends the power created by Parliament in the [Digital Economy Act \(S23\)](#) to enable OFCOM to make a similar order where an operator has failed to deliver its duty of care and there is risk of serious harm or a non-compliance with an enforcement notice. This is a very strong measure and would only be used as described.

Appeals – Section 14

31. Parliament has scrutinised at length the balance between OFCOM being able to deliver regulatory certainty through making decisions and natural justice. After many years of appeals by deep-pocketed companies that frustrated regulatory certainty, the Digital Economy Act limited the ability to appeal against OFCOM's decisions to judicial review grounds. This section amends OFCOM's appeals process to give the same treatment to Online Harms issues.

Entry, Search and Seizure – Section 15

32. OFCOM has powers under the [Wireless Telegraphy Act 2006](#) (WTA) to obtain warrants from courts to enter premises etc. The powers are amended here to include Online Harms. The cap on the level of fine under the WTA is also removed for online harms offences, given the scale of the largest companies in this sector that have a track record of not providing information. However, there is a question as to whether the long title of the WTA is sufficiently broad to encompass this: if not a new section would be required in this draft Bill to give OFCOM powers for collecting information with regard to online harms as it has under the WTA.

Fees for Services – Section 16

33. Enables OFCOM to charge fees in a balanced and proportionate way by amending an existing process. There is not yet an economic model in the public domain for OFCOM's costs in this area. There must be an assumption that OFCOM's resources are topped up from the Consolidated Fund initially and it then moves to a fee-based regime.

Advisory Bodies – Section 17

34. OFCOM has a series of advisory bodies to assist and inform the regulator to carry out its duties. The online harm environment is very fast-moving and it will be important

for OFCOM to draw upon external expertise. The draft Bill adds two advisory boards – one on online harms themselves and another for the underpinning technology. Given the important role of civil society organisations in particular, the draft Bill enables board members to be paid. The draft Bill allows for technology companies to sit on the harms advisory board but only in a minority, not bring the Chair – in the manner of the [Human Fertilisation and Embryology Authority](#). OFCOM has considerable experience of working with advisory panels which should lead to a quicker start than the Technology Advisory Panel for the Investigatory Powers Act.

Research – Section 18

35. OFCOM is a research-driven regulator and this amendment adds online harms to the list of things that OFCOM is required to research.

Cooperation with other regulators – Section 19

36. Online harms affect a substantial swath of society and this section requires OFCOM to co-operate with other regulators. Such co-operation would be a two-way process.

International Monitoring and co-operation – Section 20

37. This section adds online harms to the activities to which OFCOM must carry out international activities. The European Union, France, India, Canada, New Zealand are all reviewing their law in this area. The competition regulators in the G7 have all signed a concordat on joint working on online issues.

Overall length of draft Bill

38. In our early online harms work for Carnegie UK Trust we said that

‘Action to reduce harm on social media is urgently needed. We think that there is a relatively quick route to implementation in law. A short Bill before parliament would create a duty of care, appoint, fund and give instructions to a regulator.’

And

‘We speculate that an overall length of six sections totalling thirty clauses might do it. This would be very small compared to the Communications Act 2003 of 411 Sections, thousands of clauses in the main body of the Act and 19 Schedules of further clauses....’

'We are considering drafting such a Bill to inform debate and test our estimate.'

This succinct draft Bill has 20 Sections totalling some 60 clauses and proves the point that a short Bill can deliver the objective.

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Carnegie United Kingdom Trust

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Online Harm Reduction Bill 2019

An Act to make further provision for reducing harm to people who use online platform services and designate the Office of Communications as regulator of online harm reduction.

1) Preliminary

- 1) This Act makes those who offer services on the internet take steps with the aim of protecting other companies and people from reasonably foreseeable harms arising from the operation of the former's services and gives powers to regulate the activities of the service providers to the Office of Communications (OFCOM) a regulator subject in particular to the Human Rights and Equality Acts.

2) Duty of operators

- 1) It shall be the duty of every online platform service operator described in Section 3 to ensure, so far as is reasonably practicable, that:
 - (a) The users of an online platform service are free from harm arising from the service's operation or use and
 - (b) The service is conducted so that people who may be affected by the service and are not users of that service are not appreciably harmed as a result of its operation or use.
 - (c) Without prejudice to the generality of an online platform service operator's duty under (a) and (b) above, the matters to which that duty extends include, in particular, harms related to
 - (i) national security and terrorism
 - (ii) stirring up of hatred and hate speech including hatred on the basis of sex
 - (iii) harms to consumers and companies such as fraud, scams and intellectual property crime
 - (iv) threats to democracy and the democratic process
 - (v) the health, safety and well-being of people under 18 years old and vulnerable people.

In relation to this sub-section online platform service operators shall always have regard to the limitations on interferences with natural or legal persons' rights established by the Human Rights Act 1998.

2) An online platform service operator shall:

(a) Undertake suitable and sufficient assessments of the risks of harm to users and other people, particularly those under 18 and vulnerable people, caused by the operation of their service or any elements of it. The assessment shall be reviewed by the operator on an ongoing basis or, if there is reason to suspect that it is no longer valid; or there has been a significant change in the matters to which it relates; and where as a result of any such review changes to an assessment are required the operator shall make them. Such assessments shall be recorded for a period of not less than three years or as set out by the regulator in guidance;

(b) Implement appropriate technical and organisational measures to minimise the risks of those harms arising and mitigate the impact of those that have arisen, taking into account the nature, scope, context and purposes of the online platform services and the risks of harm arising from the use of the service;

(c) To carry out or arrange for the carrying out of such testing and examination as may be necessary for the performance of the duty in section (2)1 above;

(d) Regularly review and update when necessary technical and organisational measures implemented under this section. Keep the appropriateness of such measures under review during the period the online platform service is offered;

(e) Be transparent about their operations to the regulator and those who may use or be affected by their services and the risks arising.

3) Online platform service operator

1) For the purposes of this Act, an online platform service is a service provided using an electronic communications network and as a principal purpose of the service, or of a dissociable section thereof or as an essential functionality of that service:

(a) Organises and displays publicly or to a selected audience content provided by users of the service, whether or not created by the user; and

(i) Is not a service for which the provider has editorial responsibility for or editorial control over the content included in the service or is not a one-to-one telephony service;

- (ii) For the purposes of this section:
- (iii) Content includes text, music, sounds and images whether still or moving, irrespective of length;
- (iv) An online platform service operator is a person or company that provides an online platform service to users in the United Kingdom.

4) **The regulator**

- 1) The Communications Act 2003 is amended as follows to give the Office of Communications regulatory functions under the Online Harm Reduction Act.
 - (a) Section 3 'General Duties of OFCOM', new subsection 2(g) 'the reduction of online harms'
- 2) Section 3 of the Communications Act sets out behavioural guidance for OFCOM in carrying out its duties. It is amended as follows:
 - (a) Insert new Section 3(6)(B) 'When carrying out functions under the Online Harm Reduction Act OFCOM must have particular regard to the United Nations Convention on Rights of a Child, the United Nations Convention on the Elimination of Discrimination Against Women, particularly Article 7 and the United Nations Convention and the Convention and the United Nations Convention on the Rights of Persons with Disabilities, particularly Articles 15,16.'
 - (b) Insert new section 3(6)(C) 'In carrying out its duties under the Online Harm Reduction Act, OFCOM shall not require Online Platform Service Operators to carry out general monitoring of their services.'
- 3) OFCOM will report to Parliament each year on how, in its work it has balanced the duties in Section 4 of this Act.

5) **Approval of codes of practice by OFCOM**

- 1) OFCOM will provide practical guidance with respect to the requirements of Section 2, The Duty of Operators, including through the making or approval of codes other than those that it is required to by subsection 5(7) below. OFCOM will:
 - (a) Consult companies, civil society and other interested parties to determine the scope of codes of practice required to reduce online harm;
 - (b) Approve and issue such codes of practice whether prepared by it or not as in its opinion are suitable for that purpose;

(c) From time to time revise the whole or any part of any code of practice prepared by it in pursuance of this section;

(d) Approve any revision or proposed revision of the whole or any part of any code of practice for the time being approved under this section;

(e) Withdraw its approval from a code of practice approved under this section, OFCOM shall issue a notice in writing identifying the code in question and stating the date on which its approval of it is to cease to have effect.

- 2) Before approving a code under this section OFCOM must publish in a manner such as they see fit, a draft of the proposed code for public consultation. OFCOM must specify the period within which representations may be made to OFCOM about their proposal. That period must end no less than one month after the day of the publication of the notification. But where OFCOM are satisfied that there are exceptional circumstances justifying the use of a shorter period, the period specified as the period for making representations may be whatever shorter period OFCOM consider reasonable in those circumstances. OFCOM must consider every representation about the proposal made to them during the period specified in the notification.
- 3) After publishing a draft code and before approving it, OFCOM must consult persons, associations and professional bodies appearing to represent the interests of those who:
 - (a) Provide online platform services;
 - (b) Use such services;
 - (c) Might be affected by the operation of the services.
- 4) OFCOM must provide the Secretary of State with a copy of any draft code.
- 5) Codes issued under sub section (1) above shall have regard to:
 - (a) Assessment of risk of harm
 - (b) Actions contained therein being reasonably practicable
 - (c) The views of victims of harm or people likely to be at risk of harm
 - (d) The views of users of services likely to be affected by the codes
 - (e) The views of civil society bodies representing or advocating on behalf of people likely to be affected by the operation of the codes
 - (f) The views of online platform service operators and people who seek to become such operators

(g) The views of and action by relevant

(h) Regulators in the United Kingdom or abroad.

- 6) Online platform service operators should have regard to codes approved by OFCOM under this Section 5(1) as codes can provide general guidance on how to meet obligations under this Act. However, specific circumstances might call for different measures to comply with the duty in Section 2 or there may be different ways of complying. The extent to which operators have regard to codes will be taken into account by OFCOM in enforcement notices as set out in Section 11.
- 7) OFCOM will approve, using the process in subsections 1-3 above codes on the following:
 - (a) Assessment of risk – factors informing suitable, sufficient, up-to-date processes of risk assessment
 - (b) Transparency of platform, referring to the duty in Section 2 of this Act and other matters
 - (c) Risk factors in service design
 - (d) Discovery and navigation techniques
 - (e) How users can protect themselves from harm
 - (f) Disclosure of breaches, complaints and resolution procedures.

In addition to the preceding systems-focussed codes of practice, OFCOM will also approve codes on the following matters using the process set out in this section:

(g) Child sexual exploitation and abuse

(h) National Security.

- 8) When a code is prepared under Section 5, OFCOM may submit it to the Secretary of State for approval of Parliament. In such circumstances:
 - (a) OFCOM must submit the final version to the Secretary of State, and
 - (b) The Secretary of State must lay the code before Parliament.
- 9) If, within the 40-day period, either House of Parliament resolves not to approve a code prepared under sub-sections (5) and (8) OFCOM must not issue the code.
- 10) If no such resolution is made within that period:
 - (a) OFCOM must issue the code, and

(b) the code comes into force at the end of the period of 21 days beginning with the day on which it is issued.

11) In this section, "the 40-day period" means:

(a) If the code is laid before both Houses of Parliament on the same day, the period of 40 days beginning with that day, or

(b) If the code is laid before the Houses of Parliament on different days, the period of 40 days beginning with the later of those days.

12) In calculating the 40-day period, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses of Parliament are adjourned for more than 4 days.

13) This subsection 9 applies in relation to amendments prepared under section as it applies in relation to codes prepared under those sections.

6) Information required from online platform service operators

1) Sections [135](#)-137(A) of the Communications Act give OFCOM powers to collect information to carry out its purposes. S135 of the Communications Act is amended as follows: in subsection (2) add new subsections:

(a) '(g) Online platform service operators under the Online Harm Reduction Act'

(b) '(h) People who may be online platform service operators under the Online Harm Reduction Act'

(c) Subsection (3) describes areas in which OFCOM can require information for the purposes of certain functions. Insert new subsection (k) 'to determine whether a duty under the Online Harm Reduction Act has been met, whether by following codes or guidance issued by OFCOM or by other means.'

(d) Section 137(A) of the Communications Act was inserted by the Digital Economy Act to increase OFCOM's ability to collect information in certain circumstances. Section 137(A) is amended as follows: to replace all mentions of 'communications provider' with 'communications provider or online platform service operator under the Online Harm Reduction Act'.

7) Assessment notices

1) OFCOM may by written notice (an "assessment notice") require an online platform service operator to permit OFCOM to carry out an assessment of whether the operator has complied or is complying with the Online Harm Reduction legislation.

- 2) An assessment notice may require the online platform service operator to do any of the following:
 - (a) Permit OFCOM to enter specified premises;
 - (b) Direct OFCOM to documents on the premises that are of a specified description;
 - (c) Assist OFCOM to view information of a specified description that is capable of being viewed using equipment on the premises;
 - (d) Comply with a request from OFCOM for a copy (in such form as may be requested) of —
 - (i) the documents to which OFCOM is directed;
 - (ii) the information which OFCOM is assisted to view;
 - (e) Direct OFCOM to equipment or other material on the premises which is of a specified description;
 - (f) Permit OFCOM to inspect or examine the documents, information, equipment or material to which OFCOM is directed or which OFCOM is assisted to view;
 - (g) Provide OFCOM with an explanation of such documents, information, equipment or material;
 - (h) Permit OFCOM to observe the processing of user generated content that takes place on the premises or in systems operated by or for the operator;
 - (i) Make available for interview by OFCOM a specified number of people of a specified description who operate the service, not exceeding the number who are willing to be interviewed.
- 3) In subsection (2), references to OFCOM include references to OFCOM's officers and staff.
- 4) An assessment notice must, in relation to each requirement imposed by the notice, specify the time or times at which, or period or periods within which, the requirement must be complied with (but see the restrictions in subsections (6) to (9)).
- 5) An assessment notice must provide information about:
 - (a) The consequences of failure to comply with it, and
 - (b) The rights to appeal.

- 6) An assessment notice may not require a person to do anything before the end of the period within which an appeal can be brought against the notice.
- 7) If an appeal is brought against an assessment notice, the online platform service operator need not comply with a requirement in the notice pending the determination or withdrawal of the appeal.
- 8) If an assessment notice:
 - (a) States that, in OFCOM's opinion, it is necessary for the online platform service operator to comply with a requirement in the notice urgently,
 - (b) Gives OFCOM's reasons for reaching that opinion, and
 - (c) Does not meet the conditions in subsection (9)(a) to (d)

Subsections (6) and (7) do not apply, but the notice must not require the online platform service operator to comply with the requirement before the end of the period of 7 days beginning when the notice is given.

- 9) If an assessment notice:
 - (a) States that, in OFCOM's opinion, there are reasonable grounds for suspecting that an online platform service operator has failed or is failing in its duty in Section 2 above or that an offence under this Act has been or is being committed,
 - (b) Indicates the nature of the suspected failure or offence,
 - (c) Does not specify domestic premises,
 - (d) States that, in OFCOM's opinion, it is necessary for the online platform service operator to comply with a requirement in the notice in less than 7 days, and
 - (e) Gives OFCOM's reasons for reaching that opinion,

Subsections (6) and (7) do not apply.

- 10) OFCOM may cancel an assessment notice by written notice to the online platform service operator to whom it was given.

8) Super Assessment process

- 1) OFCOM will consider carrying out an assessment process if it is in receipt of a complaint from a designated body that the operation of an online platform or platforms in the UK market causes significant harm within the meaning of this Act.

- 2) OFCOM must, within 90 days after the day on which it receives the complaint, publish a response stating how it proposes to deal with the complaint, and in particular:
 - (a) Whether it has decided to take any action, or to take no action, in response to the complaint, and
 - (b) If it has decided to take action, what action it proposes to take.
 - (c) The response must state the OFCOM's reasons for its proposals.
- 3) OFCOM will designate bodies able to bring complaints under subsection (1) above and publish guidance on an appropriate, expeditious designation and complaint process. In producing guidance, OFCOM will draw upon the experience of other super complaint processes and consult the Online Harm Advisory Board created by S17 of this Act as well as others OFCOM determines to be appropriate.
- 4) Appeals against a decision to refuse a request for a super assessment process will be dealt with using OFCOM's standard appeals process.

9) Assessment notices – restrictions

- 1) An assessment notice does not have effect so far as compliance would result in the disclosure of a communication which is made:
 - (a) Between a professional legal adviser and the adviser's client, and
 - (b) In connection with the giving of legal advice to the client with respect to obligations, liabilities or rights under the online harms legislation.
- 2) An assessment notice does not have effect so far as compliance would result in the disclosure of a communication which is made:
 - (a) Between a professional legal adviser and the adviser's client or between such an adviser or client and another person,
 - (b) In connection with or in contemplation of proceedings under or arising out of online harms legislation, and
 - (c) For the purposes of such proceedings.

10) Destroying or falsifying information and documents etc

- 1) This section applies where a person:

(a) Has been given an information notice requiring the person to provide OFCOM with information, or

(b) Has been given an assessment notice requiring the person to direct OFCOM to a document, equipment or other material or to assist OFCOM to view information.

2) It is an offence for the person

(a) To destroy or otherwise dispose of, conceal, block or (where relevant) falsify all or part of the information, document, equipment or material, or

(b) To cause or permit the destruction, disposal, concealment, blocking or (where relevant) falsification of all or part of the information, document, equipment or material,

with the intention of preventing OFCOM from viewing, or being provided with or directed to, all or part of the information, document, equipment or material.

3) It is a defence for a person charged with an offence under subsection (2) to prove that the destruction, disposal, concealment, blocking or falsification would have occurred in the absence of the person being given the notice.

11) Enforcement notices

1) Where OFCOM is satisfied that a person has failed or is failing in their duty under Section (2) OFCOM may give the person a written notice (an “enforcement notice”) which requires the person:

(a) To take steps specified in the notice, or

(b) To refrain from taking steps specified in the notice, or both

2) An enforcement notice must:

(a) State what the person has failed or is failing to do, and

(b) Give OFCOM’s reasons for reaching that opinion.

3) An enforcement notice may specify the time or times at which, or period or periods within which, a requirement imposed by the notice must be complied with (but see the restrictions in subsections (6) to (7)).

4) An enforcement notice must provide information about

(a) The consequences of failure to comply with it, and

(b) The rights to appeal.

- 5) An enforcement notice must not specify a time for compliance with a requirement in the notice which falls before the end of the period within which an appeal can be brought against the notice.
- 6) If an appeal is brought against an enforcement notice, a requirement in the notice need not be complied with pending the determination or withdrawal of the appeal.
- 7) If an enforcement notice:
 - (a) States that, in OFCOM's opinion, it is necessary for a requirement to be complied with urgently, and

(b) Gives OFCOM's reasons for reaching that opinion,

subsections (5) and (6) do not apply but the notice must not require the requirement to be complied with before the end of the period of 24 hours beginning when the notice is given.

12) Penalty notices

- 1) If OFCOM is satisfied that an online platform service operator:
 - (a) has failed or is failing in their duty in Section 2,
 - (b) has failed to comply with an information notice, an assessment notice or an enforcement notice
- 2) OFCOM may, by written notice (a "penalty notice"), require the online platform service operator to pay to OFCOM an amount in sterling specified in the notice.
- 3) When deciding whether to give a penalty notice to a person and determining the amount of the penalty, OFCOM must have regard to the following, so far as relevant:
 - (a) The harm caused by the failure
 - (b) Nature, gravity and duration of the failure
 - (c) Any action taken by the operator to mitigate the harm suffered by people or bodies corporate
 - (d) The degree of responsibility of the operator
 - (e) The design of the service

- (f) The extent and nature of tools provided to users by the operator
- (g) Any relevant previous failures by the operator or related entities such as companies in a group;
- (h) The degree of co-operation with OFCOM, in order to remedy the failure and mitigate the possible adverse effects of the failure;
- (i) The manner in which the infringement became known to OFCOM, including whether, and if so to what extent, the relevant operator notified OFCOM of the failure;
- (j) The extent to which the relevant operator has complied with previous enforcement notices or penalty notices;
- (k) Adherence to codes approved under Section 5 of this Act;
- (l) Any other aggravating or mitigating factor applicable to the case, including financial benefits gained, or losses avoided, as a result of the failure (whether directly or indirectly);
- (m) Whether the penalty would be effective, proportionate and dissuasive.

- 4) The amount specified in the notice shall not exceed 20 million pounds or 4% of what OFCOM determines to be the undertaking's total annual worldwide turnover in the preceding financial year, whichever is higher, or in any other case 20 million pounds.

13) OFCOM's power to require Internet Service Providers to block access

- 1) Where fines are not a sufficient deterrent or sanction and noting the prevalence of international service providers, Section 23 of the Digital Economy Act is amended to extend to OFCOM powers to require access to material is blocked in the manner of the Age Verification Regulator:
 - (a) S(1) new sub section (1)A at end 'Where OFCOM considers that a person ("the non-complying person") has failed to deliver their duty under S2 of the Online Harm Reduction Act risking serious harm and is failing or unable to comply with an enforcement order in a timely manner OFCOM may give a notice under this subsection to any internet service provider
 - (b) S(2) (a) insert 'or OFCOM' after 'Age-verification regulator'
 - (c) S(2) (b) insert 'or subsection (1)A'

(d) S(2) (e) at end replace semi colon with 'or appeals against OFCOM's decisions under the Online Harm Reduction Act'

(e) S(7) Insert 'or OFCOM' after 'age verification regulator'

(f) S(9) Insert 'or OFCOM' after 'the age verification regulator'

(g) S(10) insert 'or OFCOM' after 'the age verification regulator'

(h) S(11) insert after sub section 11(a) new sub-section 11B 'Where subsection 1(A) applies say why the regulator considers the offending material to have failed to deliver the duty of care under S2 of the Online Harm Reduction Act and why the notice is appropriate.'

(i) S(11) (d) Insert at end 'or information about arrangement for appeal against this decision by OFCOM.'

(j) S(12) subsection (b) after 'Kingdom' delete full stop and insert 'or' and insert new subsection (c) an online platform service operator that has not met its duty of care under S(2) of the Online Harm Reduction Act for the reasons set out by OFCOM.

14) Appeals

- 1) S192 - S196 of the Communications Act set out how appeals against OFCOM's decisions are to be handled. S192 is amended as follows:
- 2) Subsection 1, new para (f) 'appeals brought against decisions made under the Online Harm Reduction Act.'

15) Powers of entry and search under warrant

- 1) OFCOM's powers to seek a warrant to enter premises are set out in the Wireless Telegraphy Act 2006, which is amended as follows:
 - (a) Section 97, subsection 1(a) after 'offence under' insert 'Online Harm Reduction Act or'

16) Fees for services

- 1) A fee regime for OFCOM is described in S 368(NA) of the Communications Act. It is amended to provide a fair and reasonable basis for OFCOM to charge fees for work under this Act as follows:
 - (a) S368(NA) Subsection 2 after 'provider' insert 'or online platform service operator under the Online Harm Reduction Act'

17) Advisory Bodies

- 1) Part 1 of the Communications Act describes OFCOM's advisory bodies. It is amended as follows.

Part 1 of the Communications Act insert after Section 21 new para 21(A):

1. It shall be the duty of OFCOM to establish and maintain a committee to be known as 'The Online Harm Advisory Board'

- a. The committee shall consist of a chair appointed by OFCOM and any such members as OFCOM sees fit
- b. The committee shall provide advice to OFCOM (including other committees established by OFCOM) on the nature, prevalence and future trends in online harms.

2. In appointing people to the committee OFCOM shall ensure that no more than at least one-third of members but fewer than half of the other members of the committee represent online platform operators. People who work for online platform service operators or have done so in the last five years cannot be chair of the committee.

3. OFCOM shall pay to, or in respect of, any member of the Online Harm Advisory Board who is not a member or employee of the regulator, such sums by way of pensions, allowances or gratuities as the OFCOM may determine; and provide for the making of such payments to or in respect of any such member of the Online Harm Advisory Board.

- 2) Amend part 1 of the Communications Act to insert after Section 21 new para 21(B):

- (1) It shall be the duty of OFCOM to establish and maintain an Online Harm Design and Technology Advisory Board

- (i) The committee shall consist of a chair appointed by OFCOM and any such members as OFCOM sees fit
- (ii) The committee shall provide advice to OFCOM (including other committees established by OFCOM) on the impact of changing design practice and technology on the exercise of OFCOM's powers under this Act with particular regard to changes that might increase or decrease harm.
- (iii) OFCOM shall pay to, or in respect of, any member of the Online Harm Design and Technology Advisory Board who is not a member or employee of the regulator, such sums by way of pensions,

allowances or gratuities as the OFCOM may determine; and provide for the making of such payments to or in respect of any such member of the Online Harm Design and Technology Advisory Board.

18) Research

- 1) Section 14 of the Communications Act sets out issues upon which OFCOM must carry out research. It is amended as follows:

New sub section: '14(g) The feelings, experience and perceptions of people towards and overall state of services covered by the Online Harm Reduction legislation'.

19) Co-operation with other regulators

- 1) OFCOM is required to add online harm to the cooperation it undertakes with other regulators as it carries out its duties. In particular OFCOM should cooperate in respect of online harms with:
 - (a) The Information Commissioner
 - (b) British Board of Film Classification
 - (c) Advertising Standards Authority
 - (d) Competition and Markets Authority
 - (e) Children's Commissioner
 - (f) Electoral Commission
 - (g) Crown Prosecution Service
 - (h) National Police Chiefs Council
 - (i) Office of the Surveillance Commissioner
 - (j) Intellectual Property Office
 - (k) Chief Medical Officers
 - (l) Equality and Human Rights Commission
 - (m) the National Security Advisor

(n) Any regulator approved under the Royal Charter on Self-Regulation of the Press.

20) International monitoring and cooperation

1) Section 22 of the Communications Act requires OFCOM to carry out a range of international functions in respect of communications to be amended as follows:

(a) S22 subsection 1(a) after 'communications' insert 'or online harms'.

[ENDS]

