

## **ONLINE SAFETY BILL**

### **Memorandum from the Department for Digital, Culture, Media and Sport and the Home Office to the Delegated Powers and Regulatory Reform Committee**

#### **A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Online Safety Bill (“the Bill”). The Bill was published in draft on 12 May.
2. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

#### **B. PURPOSE AND EFFECT OF THE BILL**

3. The internet has, in many ways, transformed our lives for the better and recent shifts in behaviour mean that we use the internet now more than ever. Internet use in the United Kingdom across all adult age groups increased from 80.9% in 2012 to 90.8% in 2019.<sup>1</sup>
4. However, as the role of the internet has changed, the case for robust regulatory action has continued to grow. Over three quarters of United Kingdom adults express a concern about going online, and fewer parents feel the benefits outweigh the risks of their children being online (falling from 65% in 2015 to 55% in 2019)<sup>2</sup>. Whilst providers of services are regulated in various ways, there is nothing in place to regulate how they treat user-generated content online.
5. This landmark legislation will end the era of self-regulation. This Bill will impose statutory duties on providers of regulated services to help keep their users safe online, and appoint OFCOM as the independent regulator to oversee the regulatory framework. The Bill will apply to providers of internet services which allow users to upload or share user-generated content or otherwise to interact online (‘user-to-user services’) and on providers of services which allow users to search all or some parts of the internet (‘search services’).
6. These obligations apply to providers of regulated services, including those based outside the United Kingdom. To be in scope of regulation, the services must: have a significant number of users in the United Kingdom; be targeted towards United Kingdom users; or be capable of being used by individuals in the United Kingdom and give rise to a risk of significant harm to individuals in the United Kingdom.
7. Certain types of services associated with a low risk of harm are exempted, including internal business services (such as intranets) and some services provided by public

---

<sup>1</sup> [Internet users](#)’ Office for National Statistics, May 2019) “Internet use” here refers to respondents who have used the internet in the last three months”

<sup>2</sup> [Children and parents: Media use and attitudes report 2019](#)’ OFCOM, February 2020

bodies. Certain types of content are also exempt from regulation on regulated services: emails; SMS/MMS messages; one-to one live aural communications; paid-for advertisements; services where the functionalities available to users are limited to posting comments and reviews on content produced by the provider of the service (such as user reviews of products); and content from recognised news publishers. Services where the only user-generated content is an exempt type of content are fully exempt from regulation.

8. This Bill includes 7 Parts and 5 Schedules. It includes measures to:
  - Create a regulatory framework that will impose duties of care on providers of regulated services to improve the safety of their users and others who may be adversely affected by content online. In particular, this includes:
    - Duties on all providers of regulated services to address illegal content online, and ensure protections for children are in place where required.
    - Duties on providers of high-risk, high-reach regulated services (Category 1 services) to tackle content that is legal but gives rise to a risk of harm.
  - Designate OFCOM as the independent regulator to oversee the regime, and give them the enforcement powers required to tackle non-compliance. This includes a deferred power for the Secretary of State to introduce criminal offences for named senior managers of in scope service providers who fail to comply with information requests from OFCOM.
  - Ensure safeguards are in place to protect freedom of expression.
9. As new services, functions and harms emerge and evolve and platforms and users develop new ways to interact online, the regime must be able to adapt to these changes. The harms enabled and facilitated by technologies also continue to change at pace and the framework will not be able to function effectively if it proves unable to adapt to new forms of harm.
10. A number of the delegated powers included within this legislation will allow the government to make regulations in areas where there is likely to be change, such as giving the government the ability to set new priority harms. Others will allow the regulator to produce codes of practice setting out how companies can comply with their duties of care. While previous government consultations focused on the overall shape of the regulatory framework, OFCOM will consult on the codes of practice, which will allow it to consider more detailed aspects of how the regime will operate.
11. This is a complex and technical area in which OFCOM's extensive experience as a communications regulator makes it best placed to develop many of the practical features and processes needed to regulate effectively and independently. The use of delegated powers will ensure that Parliament has a continuing statutory role in determining OFCOM's priorities and aims.
12. The new regulatory framework will be a central part of the United Kingdom's digital landscape and will help ensure that the business environment is pro-competition, pro-innovation, and underpinned by agile and proportionate regulation. A thriving digital economy and society relies on getting the rules right. The powers outlined in this

document will guarantee that the regime will be able to continue to evolve to be able to protect users from harm, whilst adapting to the changing digital landscape.

### **C. DELEGATED POWERS**

13. The measures referred to in paragraph 8 include new regulation-making powers, a power to issue directions, powers to issue a framework document and powers to issue statutory guidance and codes of practice. In addition, the Bill includes standard regulation-making powers to make consequential amendments, transitional or saving provisions, and provisions relating to commencement. This document provides analysis of powers relating to 34 clauses and one Schedule.
14. Ten of the delegated powers are able to amend primary legislation (so-called “Henry VIII powers”). Each such power is limited to amending only specific provisions of the Bill. For example, the delegated power under clause 3(8) allows the description of services exempted from regulation, which are set out in Schedule 1, to be amended as new technologies and patterns of user behaviour develop. Without these powers, the regulatory framework could quickly become inflexible and ineffective. As the regulatory landscape changes, these measures will allow clearly identified parts of the regulatory framework to be updated in response to these new developments.
15. Where the Department has assessed that Henry VIII powers are necessary, it has ensured that the power is set out clearly on the face of the Bill and chosen procedures which retain parliamentary oversight of any exercising of that power. As such, all regulations made under Henry VIII powers in the Bill must be laid before Parliament before they come into effect. This will ensure that Parliament will be able to scrutinise any decision to amend primary legislation.
16. In deciding whether matters should be specified on the face of the Bill or dealt with in delegated legislation, the Department has carefully considered the need:
  - To avoid too much technical and administrative detail on the face of the Bill;
  - To provide flexibility for responding to changing circumstances, so that requirements can be adjusted without the need for further primary legislation; and
  - To allow detailed administrative arrangements to be set up and kept up to date within basic structures and principles that are set out in primary legislation, subject to Parliament’s right to challenge inappropriate use of powers.
17. In deciding what procedure is appropriate for the exercise of the powers in the Bill, the Department has carefully considered in particular:
  - Whether the provisions amend primary legislation; and
  - The importance of the matter to be addressed.

## **PART 1: OVERVIEW AND KEY DEFINITIONS**

### **Clause 3(8): Meaning of “regulated service”**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

#### Context and purpose

18. This clause defines the services in scope of this legislation. It provides that “regulated service” means a regulated user-to-user service, or a regulated search service. To be in scope of the regulatory framework, the service must have links with the United Kingdom by having a significant number of users in the United Kingdom; being targeted towards United Kingdom users; or being capable of being used by individuals in the United Kingdom and give rise to a risk of significant harm to individuals in the United Kingdom.
  
19. Certain user-to-user services or search services are exempted if they pose a low risk of harm to users, or are otherwise regulated. These are set out in Schedule 1 to the Bill (see subsection (7) of clause 3) and are:
  - Email-only services (paragraph 1 of Schedule 1);
  - SMS/MMS-only services (paragraph 2 of Schedule 1);
  - Services which offer only one-to-one live aural communications (such as a voice-only call over IP (internet protocol)) (paragraph 3 of Schedule 1);
  - Internal business services (such as an organisation’s intranet) (paragraph 4 of Schedule 1);
  - Services which only have limited user-to-user functionalities, specifically those which only allow users to communicate via posting of comments and reviews relating to content produced and published by the provider of the service (or by a person acting on behalf of the service provider), such as user reviews of products (paragraph 5 of Schedule 1); and
  - Some services provided by certain public bodies (paragraph 6 of Schedule 1).
  
20. Subsection (8) allows the Secretary of State to make regulations which amend Schedule 1 to provide for further descriptions of user-to-user service or search service to be exempt. This power may be used only if the Secretary of State considers that the risk of harm to individuals in the United Kingdom presented by a service of that description to be low.
  
21. Subsection (12) further allows regulations under subsection (8) to amend clause 39, which provides for the meaning of “regulated content”, where these changes are connected to the addition of a new exempt service to Schedule 1.
  
22. The power in subsection (8) is a Henry VIII power in that it allows other provisions of the Bill to be amended by secondary legislation.

#### Justification for the power

23. For the Online Safety framework to function effectively, it must remain responsive to

technological changes, and be proportionate in its application. Where there is a low risk of harm, companies should not face a disproportionate regulatory burden.

24. The power conferred by subsection (8) allows the description of services exempted from regulation, set out in Schedule 1, to be amended as new technologies and patterns of user behaviour develop. The current list of exempt services is provided in Schedule 1 to give OFCOM and companies certainty about which services will initially fall outside of scope. This power allows the initial list of exempt services to be expanded where there is evidence that other types of user-to-user or search services present a low risk of harm.
25. The associated provision in subsection (12) allowing regulations made under subsection (8) to amend clause 39 is intended to ensure consistency of approach across the legislation following any amendment of Schedule 1. For example, it would permit the Secretary of State to amend the definition of “regulated content” in clause 39(2) to exempt another category of content at the same time as amending Schedule 1 to exempt services which only carry that type of content.

#### Justification for the procedure

26. By virtue of clause 132(4)(a), regulations made under clause 3(8) are subject to the affirmative procedure.
27. The affirmative resolution procedure is the appropriate vehicle for this power, as functionality based exemptions will directly affect the scope of the regulatory framework. It is important that Parliament has the opportunity to debate such changes to the scope of the regulatory framework.

## **Clause 3(9) and (11): Meaning of “regulated service”**

**Powers conferred on:** Secretary of State

**Powers exercised by:** Regulations

**Parliamentary procedure:** Affirmative

### Context and purpose

28. As set out above (see “Clause 3 (8): Meaning of “regulated service”), subsection (7) of clause 3 exempts specific types of user-to-user and search services from regulation.
29. Clause 3(9) allows certain specific exemptions to be repealed by means of regulations made by the Secretary of State, which would then bring such services into scope of regulation. The exemptions which can be repealed are:
  - Services which offer only one-to-one live aural communications (such as a voice-only call over IP (internet protocol)) (paragraph 3 of Schedule 1);
  - Services which only have limited user-to-user functionalities, specifically those which only allow users to communicate via posting of comments and reviews relating to content produced and published by the provider of the service (or by a person acting on behalf of the service provider), such as user reviews of products (paragraph 5 of Schedule 1);
  - Any exemption created through regulations made under subsection (8) of clause 3.
30. The power to repeal an exemption can only be used if the Secretary of State considers that it is appropriate to do so because of the risk of harm to individuals in the United Kingdom presented by the type of exempt service. For example, there may be evidence of an increased risk of harm from such types of service. This is set out in subsection (10).
31. Subsection (12) allows regulations under subsection (9) to amend clause 39. So, for example, amendments can be made to the meanings of “regulated content”, “comments and reviews on provider content” and “one-to-one live aural communications”, where these changes are connected to the repeal of one of the specific exempt services from Schedule 1.
32. Subsection (11) contains a separate power to amend (as opposed to repeal) those provisions in Schedule 1 which are referred to in subsection (9) (i.e. the exemptions for services offering only live one-to-one aural communications and for limited functionality services, and any new exemptions added by regulations made under the subsection (8) power).
33. The powers in subsection (9) and (11) are Henry VIII powers in that they allow provisions in the Bill to be amended by secondary legislation.

### Justification for the powers

34. For the Online Safety framework to function effectively, it has to remain responsive to technological changes. Services which are currently low-risk, and which therefore merit a complete exemption from the framework today, may pose a higher risk of

harm in the future. This is particularly important as harm can migrate quickly across different types of services. It is important that, should the level of risk from exempt services rise to the point where an exemption is no longer merited, those services can be brought into scope of the regulatory framework or amended.

35. Importantly, the power to repeal exemptions can only be exercised if the Secretary of State considers that that is appropriate because of the risk of harm to individuals in the United Kingdom presented by a service of the description in question (see subsection (10)).
36. Under subsection (8) of clause 3, the Secretary of State can also exempt other types of services from the scope of regulation, if the Secretary of State considers such services to pose a low risk of harm to individuals in the United Kingdom. The level of risk on such types of services may also increase over time. Such exemptions should therefore be repealable or amendable to reflect changing levels of risk of harm to individuals in the United Kingdom.
37. The government has worked to identify areas where future changes in user behaviour could necessitate the repeal or amendment of exemptions in Schedule 1. It is creating this limited and targeted power to repeal only certain exemptions on this basis; specifically, this power will allow the Secretary of State to make regulations repealing or amending exemptions which apply to one-to-one live aural communications, to limited functionality services, and to any new exemptions created by regulations made under subsection (8) of clause 3.
38. The associated provision in subsection (12) allowing regulations made under subsections (9) and (11) to amend relevant provisions of Schedule 1 and clause 39 enables consequential changes to be made to ensure consistency of approach across the Bill.

#### Justification for the procedure

39. By virtue of clause 132(4)(a), regulations made under clause 3(9) and (11) are subject to the affirmative procedure.
40. The affirmative resolution procedure is the appropriate vehicle for these powers, as functionality based exemptions will directly affect the scope of the regulatory framework. Removing or amending any exemptions could increase regulatory burdens on businesses, in particular businesses providing services who had previously benefited from the exemption. It is important that Parliament has the opportunity to debate such changes to the scope of the regulatory framework.

## **PART 2: PROVIDERS OF REGULATED SERVICES: DUTIES OF CARE**

### **CHAPTER 2: PROVIDERS OF USER-TO-USER SERVICES: DUTIES OF CARE**

#### **Clause 16(5): Record-keeping and review duties**

**Power conferred on:** OFCOM

**Power exercised by:** Decision

**Parliamentary procedure:** None

#### Context and purpose

41. Clause 16 requires providers of user-to-user services to keep records of and review compliance with their safety duties, duties to protect users rights, user reporting and redress duties and, in the case of Category 1 Services, duties to protect journalistic content and content of democratic importance. Those record-keeping and review duties are:
- To make and keep a written record of every risk assessment carried out under clause 7 (subsection (2));
  - To make and keep a written record of any steps taken to comply with a relevant duty other than recommended steps set out in a code of practice (subsection (3)); and
  - To review compliance with the duties listed above regularly, and as soon as reasonably practicable after making any significant change to any aspect of the design or operation of the service (subsection (4)).
42. The record-keeping and review duties set out above are intended to ensure effective scrutiny of regulated services and are central to ensuring that regulated services operate transparently and in compliance with the regulatory framework.
43. However, the range of regulated user-to-user service providers is extensive and such comprehensive duties may be excessive in specific cases, for example for smaller, lower-risk services. Under subsection (5), where OFCOM consider it to be appropriate, OFCOM may, in relation to a particular user-to-user service, exempt the provider of that service from the duty set out in subsection (2), the duty set out in subsection (3), or both the duties set out in subsections (2) and (3). Under subsection (6) OFCOM must publish details of any such exemption.

#### Justification for the power

44. This power enabling OFCOM to exempt a particular service from the record-keeping and review duties will allow OFCOM to remain responsive and adapt to changes in the regulatory landscape. It will help to ensure that the regime remains effective and proportionate.
45. Delegating this power to OFCOM will allow exemptions to be provided when the framework is operational and OFCOM can use its full resources and expertise to assess what expectations are proportionate for particular services to comply with.
46. This power is limited and its scope is clearly set out in primary legislation. This power will not allow services to be removed from scope entirely, nor will it reduce the steps



companies must take to comply with the wider requirements of the regulatory framework. It only allows the record-taking steps companies must undertake to be reduced where it is considered appropriate by OFCOM.

Justification for the procedure

47. OFCOM must publish the details of any exemption granted under subsection (5). This will ensure that its exercise of this power can be scrutinised.
  
48. Since these provisions are concerned with operational and administrative matters in the context of how the regulator intends to use its powers, the provision to be made is administrative rather than legislative in character. Therefore, no Parliamentary procedure is considered necessary.

## CHAPTER 3: PROVIDERS OF SEARCH SERVICES: DUTIES OF CARE

### Clause 25(5): Record-keeping and review duties

**Power conferred on:** OFCOM

**Power exercised by:** Decision

**Parliamentary procedure:** None

#### Context and purpose

49. The framework requires that regulated services undertake recording keeping and review duties. Those duties for search services are set out in clause 25. Those duties are:
- A duty to make and keep a written record of every risk assessment carried out under clause 19 (subsection (2));
  - A duty to make and keep a written record of any steps taken to comply with a relevant duty. This duty does not include keeping a record of steps which are described in a code of practice and recommended for the purposes of compliance with the duty in question, and apply in relation to the provider and the service in question (subsection (3)); and
  - A duty to review compliance with the Chapter 3 safety duties in relation to a service regularly, and as soon as reasonably practicable after making any significant change to any aspect of the design or operation of the service (subsection (4)).
50. The record-keeping and review duties set out above allow effective scrutiny of regulated services and are central to ensuring that regulated services operate transparently and in compliance with the regulatory framework.
51. However, these duties are extensive and may prove to be excessive in specific cases. Under subsection (5), where OFCOM consider it to be appropriate, OFCOM may, in relation to a particular search service, exempt the provider of that service from the duty set out in subsection (2), the duty set out in subsection (3), or the duties set out in subsections (2) and (3). Under subsection (6) OFCOM must publish details of any such exemption.

#### Justification for the power

52. This power enabling OFCOM to exempt a particular service from the record-keeping and review duties will allow OFCOM to remain responsive and adapt to changes in the regulatory landscape. This will help to ensure that the regime remains effective and proportionate.
53. Delegating this power will allow exemptions to be provided when the framework is operational, and OFCOM can use its full resources and expertise to assess what expectations are proportionate for particular services to comply with.
54. This power is limited and its scope is clearly set out in primary legislation. This power will not allow services to be removed from scope entirely, nor will it reduce the steps companies must take to comply with the wider requirements of the regulatory

framework. It only allows the record-taking steps companies must undertake to be reduced where it is considered appropriate by OFCOM.

Justification for the procedure

55. OFCOM must publish the details of any exemption granted under subsection (5). This will ensure that OFCOM's exercise of this power can be scrutinised.
56. Since these provisions are concerned with operational and administrative matters in the context of how the regulator intends to use its powers, the provision to be made is administrative rather than legislative in character. Therefore, no Parliamentary procedure is considered necessary.

## CHAPTER 4: ASSESSMENT ABOUT ACCESS BY CHILDREN

### Clause 28(1): OFCOM's guidance about assessments under section 26

**Power conferred on:** OFCOM

**Power exercised by:** Guidance

**Parliamentary procedure:** None

#### Context and purpose

57. Clause 26 imposes a statutory duty on a provider of a regulated service to carry out an assessment as to whether it is possible for children to access a service, or any part of its service. A provider can only conclude that it is not possible for a child to access its service if it has robust systems or processes in place which result in children not normally being able to access the service. These could be effective age-verification measures or an equivalent technology which identifies and prevents children accessing the service.
58. If it is possible for children to access the service, then the provider will have to go on to assess whether there are children who use the service, or if the service is of a kind likely to attract users who are children. This would apply both to services designed to be accessed by children, and services intended for an adult-only audience but which evidence shows children are accessing (for example, pornography sites). If the answer to that question is yes, then the provider's services will be treated as likely to be accessed by children and have to comply with the safety duties protecting children. Failure to carry out an assessment would also result in the provider's service being treated as likely to be accessed by children until an assessment is carried out.
59. Clause 28 imposes a duty on OFCOM to prepare and publish guidance for providers of regulated services to assist them in complying with their duties to carry out assessments on children's access. The clause also gives OFCOM power to revise the guidance.

#### Justification for the power

60. OFCOM's power to publish guidance will allow it to set out in detail how companies can assess the extent to which their services are likely to be accessed by children. It would be inappropriate to set out such detailed content on the face of the legislation. The power to revise this document provides the flexibility to modify the details quickly if changes are required.

#### Justification for the procedure

61. Since these provisions are concerned with operational and administrative matters in the context of the duty imposed on regulated providers under clause 26, the provision to be made is administrative rather than legislative in character, and no Parliamentary procedure is considered necessary.

## CHAPTER 5: CODES OF PRACTICE

62. This memorandum first considers the general duties to prepare codes of practice under clause 29(3) and (4) and then sets out in the sections below the powers relating to specific codes of practice on terrorism (clause 29(1)) and child sexual exploitation and abuse (clause 29(2)).

### **Clause 29(3) and (4): Codes of practice about duties**

**Power conferred on:** OFCOM and Secretary of State

**Power exercised by:** Code of practice

**Parliamentary procedure:** Negative

#### Context and purpose

63. This clause places a duty on OFCOM to prepare one or more codes of practice describing recommended steps for providers of regulated services in complying with their safety duties under Part 2, Chapters 2 and 3 of the Bill (except as those duties relate to terrorism content or child sexual exploitation and abuse content):
- All in-scope providers will have duties to protect users from illegal content, to put in place user reporting and redress systems and to review compliance and keep records of any compliance steps taken;
  - Providers whose services are likely to be accessed by children will have additional duties to protect children's online safety; and
  - Providers of Category 1 user-to-user services will have additional duties to protect adults' online safety for content that is legal but gives rise to a risk of harm and in relation to content of democratic importance and journalistic content.
64. Clause 36(3) provides that a provider of regulated services will be treated as complying with its safety duties under the Bill if it acts in accordance with every provision of the code of practice which applies to the duty in question. A provider of a regulated service can comply with a safety duty by taking alternative measures that are capable of effectively delivering as good an outcome, or a better one, than would be achieved by taking the steps set out in the codes of practice. The provider must have regard to the online safety objectives in clause 30 (see clause 36(8)) and OFCOM must also have regard to these objectives when assessing compliance (clause 30(1)).
65. Where a code is in force, OFCOM may prepare amendments to the code or a replacement code (see subsection (4)). Before preparing a code or amendment, OFCOM must consult the persons listed in subsections (5) and (6)).
66. The Bill will set out a number of requirements for the codes of practice. OFCOM must ensure that the steps set out in the codes of practice are compatible with the online safety objectives set out in clause 30. Further, clause 31 will require the codes of practice to address protecting freedom of expression and the right to privacy. That clause also requires OFCOM, in drawing up codes of practice, to cater for the variety of service providers to be regulated and to have regard to the principles that the

contents must be clear, understandable, proportionate, including to OFCOM's risk assessment.

#### Justification for the powers

67. The codes of practice will focus on the systems and processes that in-scope providers need to put in place to uphold their regulatory responsibilities. In many cases the regulator will be defining these systems and processes for the first time in the codes of practice, rather than drawing on established definitions and precedents from other regulatory regimes.
68. The codes of practice will require extensive consultation, including significant evidence and technical input to ensure that they are effective and proportionate. It is considered appropriate that the power to draft each code is delegated to OFCOM as this will ensure that the measures set out are based on the up-to-date evidence and expertise the regulator will have about the sector, the risk of harms occurring and the most effective way to mitigate them. This power will also give OFCOM time to consult on and develop the codes of practice with key stakeholders and experts and provide the flexibility and future-proofing that is essential to regulation of the safety of this sector.
69. OFCOM will consult with relevant parties during the drafting of the codes of practice before sending the final draft to the Secretary of State (clause 32). Ministers will have the power to reject a draft code and to direct the regulator to make modifications for reasons relating to government policy (or national security and public safety in relation to the child sexual exploitation and abuse and terrorism codes) (clause 33).
70. The completed codes will be laid in Parliament under the negative procedure, which means that the codes of practice will come into force on the day they are signed, and will remain in force unless a motion to reject them is agreed by either house within 40 sitting days.
71. This power does not specify what codes can be published, either by subject-matter or number. This allows OFCOM to decide how best to structure its codes of practice to help companies to fulfil their duties of care without imposing unnecessary burdens. It will also enable OFCOM to revise codes of practice or produce new ones when needed to respond to changes in the regulated sector.

#### Justification for the procedure

72. By virtue of clause 32, the codes of practice made under clause 29 are subject to the negative procedure.
73. It is considered that the negative procedure provides an appropriate level of parliamentary scrutiny for the codes of practice. This is because of the clear parameters established in primary legislation and the operational and technical nature of the content, alongside the extensive consultation process.
74. The negative procedure also enables the codes of practice to be published and brought into force quickly. This will keep the regime up to date and ensure that

OFCOM has sufficient powers to tackle illegal harms as they develop.<sup>3</sup>

---

<sup>3</sup> There is recent precedent for utilising the negative procedure: section 125 of the Data Protection Act 2018 stipulates that codes of practice related to data sharing, direct marketing, data protection and journalism as well as the Age-Appropriate Design Code are subject to the negative procedure.

## **Clause 29(1): Codes of practice about duties (terrorism content)**

**Power conferred on:** OFCOM

**Power exercised by:** Code of practice

**Parliamentary procedure:** Negative

### Context and purpose

75. Preventing the spread of terrorism content online is central to the Online Safety framework. Alongside the full government response to the Online Harms White Paper, the government published the Interim Code of Practice on Terrorist Content and Activity Online, setting out the government's expectations of what companies should be doing to address use of the internet for terrorism. This aimed to provide clarity to companies prior to the establishment of the regulatory framework and demonstrated the government's commitment to tackling terrorism content online.
76. As set out above, one of OFCOM's main functions will be to publish codes of practice setting out the steps companies can take to comply with the duty of care. Platforms must comply with the codes, or put in place and record an alternative approach capable of effectively delivering the same (or higher) standards to those set out in the codes.
77. As set out throughout this document, the online environment can change quickly – with changing patterns of user behaviour, platform use, functionality of platforms and evolving threats. In this context, the ways in which terrorism content is accessed, used and distributed online can change rapidly, making it essential that the framework is agile and responsive. As set out above, using codes of practice (as opposed to primary legislation) will enable the framework and guidance to companies to adapt more quickly to new harms and technologies and to support innovation.
78. Under clause 29(1), OFCOM must prepare a code of practice containing guidance to assist providers of regulated services in complying with their duties under clauses 9 or 21 as relating to terrorism content. Under clause 33(1) ministers will have the power to make directions to the regulator regarding the codes of practice on child sexual exploitation and abuse and terrorism in relation to reasons of national security or public safety as well as to ensure that the code reflects government policy.

### Justification for the power

79. The codes of practice will focus on systems, processes and governance that in-scope companies need to put in place to uphold their regulatory responsibilities. They will require extensive consultation to draft, a process which will need significant technical input to ensure that they are effective and proportionate. It is considered that the power to draft each code must be delegated so that OFCOM has time to consult on and develop its codes of practice.
80. Delegating this power also enables the drafting of future codes, ensuring that the framework can adapt to the emergence of new technologies, changing online behaviour and evolving harms.



81. The Bill will set out a number of requirements for the codes of practice. OFCOM must ensure that the steps set out in the codes of practice are compatible with the online safety objectives set out in clause 30. OFCOM will consult with relevant parties during the drafting of the codes before sending the final draft to the Secretary of State (clause 32). Ministers will have the power to reject a draft code and to require the regulator to make modifications for reasons relating to government policy, national security or public safety (clause 33).
82. Under clause 34(6), the Secretary of State will be able to require the regulator to review the codes of practice on terrorism content. This mechanism is intended to ensure that the codes can respond to changing circumstances, evolving threats and technology.
83. Parliament will also have the opportunity to debate and vote on the online safety objectives during passage of primary legislation and the completed codes will be laid in Parliament.

#### Justification for the procedure

84. By virtue of clause 32, the codes of practice made under clause 29 are subject to the negative procedure. The negative procedure provides an appropriate level of parliamentary scrutiny for regulations made under this power because there is an extensive consultation process prior to the issuing and enforcement of the codes.
85. The negative procedure also enables codes of practice to be published and brought into force quickly following the consultation procedure. This will keep the regime up to date and ensure that OFCOM has sufficient powers to tackle these illegal harms as they develop.

## **Clause 29(2): Codes of practice about duties (child sexual exploitation and abuse content)**

**Power conferred on:** OFCOM

**Power exercised by:** Code of practice

**Parliamentary procedure:** Negative

### Context and purpose

86. Preventing online child sexual exploitation and abuse is central to the Online Safety framework. That is why, alongside the full government response to the Online Harms White Paper, the government published the Interim Code of Practice on Online Child Sexual Exploitation and Abuse, setting out the government's expectations of what companies should be doing to address this illegal content and activity online. This provided clarity to companies prior to the establishment of the regulatory framework and demonstrated the government's commitment to tackling child sexual exploitation and abuse content online.
87. When the framework is in force, one of OFCOM's main functions will be to publish codes of practice setting out the steps companies can take to comply with the duties of care. Platforms must comply with the codes, or put in place an alternative approach capable of effectively delivering the same (or higher) standards to those set out in the codes.
88. This power is similar to that provided by clause 29(1). Under clause 30(1), OFCOM must ensure that the steps set out in the codes of practice are compatible with a series of online safety objectives set out in that clause, so far as relating to child sexual exploitation and abuse content.

### Justification for the power

89. Protecting children is central to online safety framework. Many forms of child sexual exploitation and abuse involve online technology and the framework aims to ensure that illegal child sexual exploitation and abuse content is identified, minimised and removed.
90. Whilst we anticipate that the regulator issued codes of practice will be infrequently updated, new technologies, trends and offender behaviours may necessitate changes to the child sexual exploitation and abuse code of practice. Similarly, child sexual exploitation and abuse content often migrates across services, making agility essential in adapting to changing patterns of criminal behaviour. Amendments to the codes of practice will ensure that the framework is futureproofed and can remain up to date.
91. The safeguards and extent of this power are the same as that for clause 29(1). The child sexual exploitation and abuse code of practice will focus on systems, processes and governance that in-scope companies need to put in place to uphold their regulatory responsibilities. It will require extensive consultation to draft, a process which will need significant technical input to ensure that they are effective and proportionate.

92. OFCOM must ensure that the steps set out in the codes of practice are compatible with the online safety objectives set out in clause 30. OFCOM will consult with relevant parties during the drafting of the codes before sending the final draft to the Secretary of State (clause 32). Ministers will have the power to reject a draft code and require the regulator to make modifications for reasons relating to government policy, national security or public safety (clause 33).
93. Under clause 34(6) the Secretary of State will be able to require the regulator to review the codes of practice on child sexual exploitation and abuse. This mechanism is intended to ensure that the codes can respond to changing circumstances, evolving threats and technology.
94. The completed codes will be laid in Parliament.

Justification for the procedure

95. The justification for the procedure chosen is the same as that for clause 29(1). As noted in relation to clause 29(1), this choice of procedure is assessed to be appropriate due to the extensive consultation process.

## **Clause 30(5): Online safety objectives**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

### Context and purpose

96. Under clause 30(1) OFCOM must ensure that steps described in the codes of practice prepared under clause 29 are compatible with pursuit of the online safety objectives. Subsection (2) prescribes the online safety objectives for user-to-user services and subsection (3) prescribes the online safety objectives for search services.
97. The online safety objectives include designing and operating a service in such a way that its systems for regulatory compliance and risk management are proportionate and effective to the size and nature of the service, and appropriate to deal with the number of its users, that users are made aware and understand the terms of service, that there are adequate systems to support users, and that there is a higher standard of protection for children. Clause 30(5) provides that the Secretary of State can by regulations amend the online safety objectives for both user-to-user and search services, and this is therefore a Henry VIII power.

### Justification for the power

98. This section provides continued executive oversight of the online safety objectives, and means that the regime can respond to future technological changes, and can provide flexibility as new policy priorities emerge.
99. If regulations are made amending the online safety objectives, OFCOM must, as soon as reasonably practicable afterwards, consider whether a review of the codes of practice is required and, if OFCOM consider that it is required, carry out a review to assess whether any amendments are needed to reflect the revised objectives subsection (6)).

### Justification for the procedure

100. By virtue of clause 132(4)(b) regulations made under this provision are subject to the affirmative procedure.
101. The affirmative procedure is considered appropriate as changes to the online safety objectives will affect the regulatory framework, principally through the possible need to review the codes of practice. It is therefore important that Parliament has the opportunity to debate any changes.

## **Clause 33(1): Secretary of State's power of direction**

**Power conferred on:** Secretary of State

**Power exercised by:** Secretary of State direction power

**Parliamentary procedure:** None

### Context and purpose

102. Clause 33(1) allows the Secretary of State to direct OFCOM to make specified modifications to a code of practice that has been submitted to the Secretary of State for approval under clause 32(1). The Secretary of State can exercise this power where they believe that the modifications are required to ensure that the code reflects government policy, or in the case of a code relating to terrorism or child sexual exploitation and abuse, for reasons of national security and public safety.
103. Where the Secretary of State gives a direction to OFCOM, OFCOM must comply with the direction, and submit to the Secretary of State the code modified in accordance with the direction. The Secretary of State may give OFCOM one or more further directions requiring OFCOM to make specified modifications to the code.
104. When the Secretary of State is satisfied that no further modifications to the code are required, under subsection (5) the Secretary of State must lay the modified code before Parliament, together with a document containing details about directions given under this section and how the code has been revised in response to them. As referenced in subsection (2)(b), there are exemptions to the requirement to publish in relation to national security or where it would be against the interests of relations with the government of a country outside the United Kingdom.

### Justification for the power

105. This power ensures that codes of practice are in line with government policy and that the Secretary of State can take steps to ensure that there are sufficient provisions to prevent child sexual exploitation and abuse and terrorism content online. Delegating this power is essential because it allows the Secretary of State to respond to changes to the codes of practice under clause 29(1) and ensure that the codes reflect government policy and national security or public safety concerns.
106. A direction given under this section must set out the Secretary of State's reasons for requiring the modifications. As noted above, when the Secretary of State is satisfied that no further modifications are necessary, they must lay the modified code before Parliament, together with a document containing details about directions given under this section and how the code has been revised in response to them. This provides Parliament with full oversight of the revision process.

### Justification for the procedure

107. This is a power of direction for the Secretary of State. All draft codes of practice which are altered as a result of a direction being made under this power will be laid before Parliament and as such be subject to parliamentary scrutiny. Imposing further procedural constraints at the direction-making stage would therefore serve little

purpose while delaying the taking of swift and effective action in response to national security or public safety concerns.

## CHAPTER 6: INTERPRETATION OF PART 2

### Clause 39(12) and (13): Meaning of “regulated content”, “user-generated content” and “news publisher content”

**Powers conferred on:** Secretary of State

**Powers exercised by:** Regulations

**Parliamentary procedure:** Affirmative

#### Context and purpose

108. This clause defines various terms which determine what type of content is in scope of regulation. It defines “user-generated content” (subsections (3) and (4)) and establishes “regulated content” as a subset of “user-generated content”. Subsection (2) provides that “regulated content” is all “user-generated content” except for the following:

- Emails;
- SMS/MMS messages;
- Comments and reviews on provider content;
- One-to-one live aural communications;
- Paid-for advertisements; and
- News publisher content.

This means that the duties imposed on providers of regulated user-to-user services will not apply in respect of these types of content.

109. Clause 39(12) and (13) enable the Secretary of State to make regulations to repeal the exemptions for some types of user-generated content (comments and reviews on provider content, and one-to-one live aural communications). Repealing these exemptions would bring that content into scope of regulation. The powers can only be exercised if the Secretary of State considers it appropriate because of the risk of harm to individuals in the United Kingdom. For example, the Secretary of State may repeal the exemption if evidence emerges of an increased risk of harm from such types of content.

110. The Department has worked to identify areas where future changes in user behaviour could necessitate the repeal of exemptions of specific types of content. It is creating this limited and targeted power to repeal those exemptions. Specifically, the Department considers it appropriate for the power to repeal exemptions to apply only to comments and reviews on provider content, and to one-to-one live aural communications, as it has determined these types of user-generated content to be the most likely to lead to an increased risk of future harm due to the dynamic nature of these functionalities.

111. These are Henry VIII powers in that they allow the Secretary of State to repeal specified provisions of the Bill using secondary legislation.

#### Justification for the powers

112. Comments and reviews on provider content and one-to-one live aural communications will be exempt from regulation due to the low risk of harm which they pose to individuals in the United Kingdom. Exempting them from scope ensures that

businesses will not be subject to disproportionate regulatory burdens.

113. However, for the regulatory framework to function effectively, it must remain responsive to technological changes. Types of content which are currently low-risk, and which therefore merit a complete exemption from the framework today, may pose a higher risk of harm in the future. This is particularly important as harm can migrate quickly across different types of content. It is important that, should the level of risk from exempt types of content rise to the point where an exemption is no longer merited, those types of content can be quickly brought into scope of the regulatory framework.
114. Importantly, the power can only be exercised if the Secretary of State considers that it is appropriate to do so because of the risk of harm to individuals in the United Kingdom presented by the type of content in question.

Justification for the procedure

115. By virtue of clause 132(4)(c), regulations made under clause 39(12) and (13) are subject to the affirmative procedure.
116. The affirmative procedure is considered appropriate as any exemptions would place new regulatory burdens on businesses providing regulated services which include the previously exempt types of content, so it is important that Parliament has the opportunity to debate any such change.



## **Clause 41(4): Meaning of “illegal content” etc.**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** First time - affirmative procedure. Negative procedure thereafter.

### Context and purpose

117. The regulatory framework places duties on all regulated providers to take steps in relation to illegal content on their services (see clauses 9 and 21).
118. Clause 41 defines “illegal content” by reference to content which the provider of the service has reasonable grounds to believe amounts to a relevant offence or whose dissemination amounts to a relevant offence (see subsections (2) and (3) of clause 41).
119. Subsection (4) provides that a “relevant offence” includes a terrorism offence (see clause 42 and Schedule 2) or a child sexual exploitation and abuse offence (see clause 43 and Schedule 3), an offence specified by the Secretary of State in regulations, and other offences where the victim or intended victim is an individual (subject to certain exceptions set out in subsection (6)). Any content relating to an offence specified by the Secretary of State in such regulations is “priority illegal content” (see subsection (5)(c)). The safety duties about illegal content set out in clause 9 impose duties on providers of user-to-user services in relation to the minimisation of the presence and dissemination of priority illegal content (see subsection (3) of that clause) in addition to those imposed in relation to other legal content.
120. The Secretary of State is thus given a power by clause 41 to specify in regulations what offences (which are not otherwise specified terrorism or child sexual exploitation and abuse offences) amount to a relevant offence and so whether content relating to such an offence is to be “priority illegal content” or not. Clause 44(1) provides that when specifying offences in exercise of this power the Secretary of State must take into account the prevalence of relevant content on regulated services, the level of risk of harm being caused to individuals in the United Kingdom and how severely they might be harmed.

### Justification for the power

121. This delegated power is considered necessary to allow the legislation to be updated to address changes in the criminal law and emerging types of illegal content online, to protect individuals in the United Kingdom from the significant adverse physical and psychological impacts that such content can cause.

### Justification for the procedure

122. By virtue of clause 132(6)(a), on the first occasion of its use regulations made under clause 41 must be approved by Parliament through the affirmative procedure. The first use of this power will determine which offences providers of regulated services must prioritise, which will be a central element of the new regulatory framework. It is

therefore considered appropriate that Parliament should be able to debate and approve the original regulations made under this power.

123. By virtue of clause 132(5)(a), in all subsequent cases the power will be exercised through the negative procedure. The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power which will simply specify new offences or remove others from the list. It will also allow the government to respond quickly to the emergence of significant new types of illegal content.

## **Clause 42(2): Offences relating to terrorism**

**Power conferred on:** Secretary of State.

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

### Context and purpose

124. Under the safety duties about illegal content in clauses 9 and 21, providers of regulated services are subject to obligations in relation to priority illegal content and illegal content. The reporting and redress duties in clauses 15 and 24 also impose obligations on providers in relation to making users aware of how to flag and report such content and their policies for dealing with it.
125. Schedule 2 lists existing offences under United Kingdom terrorism legislation that are capable of being committed online, wholly or in part. Under clause 42(2), the Secretary of State will be able to amend Schedule 2 and therefore this is a Henry VIII power.

### Justification for the power

126. The Online Safety framework needs to be able to adapt to new terrorist offences. The United Kingdom terrorism legislation landscape is likely to change in future as new offences are introduced to deal with the evolving terrorist threat.
127. In addition, changes in terrorist behaviour, or to the ways in which online services are used to facilitate terrorist behaviour, could cause existing offences that government does not currently consider as online terrorist offences to move into this space.
128. Delegating this power to make regulations is essential in ensuring that the framework can respond and adapt to changes in terrorist behaviour and keep users safe.

### Justification for the procedure

129. By virtue of clause 132(4)(d), regulations made under clause 42(2) are subject to the affirmative procedure. The affirmative procedure ensures that any amendments to the list of terrorism offences in Schedule 2 are fully debated and scrutinised in Parliament. The affirmative procedure is therefore considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power.

## **Clause 43(2): Offences relating to child sexual exploitation and abuse**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

### Context and purpose

130. Under the safety duties about illegal content in clauses 9 and 21, providers of regulated services are subject to obligations in relation to priority illegal content and illegal content. The reporting and redress duties in clauses 15 and 24 also impose obligations on providers in relation to making users aware of how to flag and report such content and their policies for dealing with it.
131. To ensure that the framework is proportionate and to provide companies and the regulator with legal certainty, Schedule 3 defines which offences are CSEA content for the purposes of the legislation. Schedule 3 is split into Parts to reflect that the criminal law in this area is devolved. Part 1 covers CSEA legislation in England and Wales, Part 2 does the same for Scotland and Part 3 for Northern Ireland.
132. Under clause 43(2) the Secretary of State will be able to amend Part 1 and Part 3 of Schedule 3. This is a Henry VIII power in that it allows the Secretary of State to amend provisions of the Bill.
133. This power will ensure that the framework, and the duties it imposes on companies to keep children safe, remain up to date with technological change and legislative developments.

### Justification for the power

134. The Online Safety framework needs to be able to adapt to new CSEA offences. Part 1 of Schedule 3 lists existing CSEA offences in England and Wales that are capable of being committed online, wholly or in part. Part 3 of Schedule 3 similarly lists existing CSEA offences in Northern Ireland that are capable of being committed online, wholly or in part. Additional CSEA offences within England and Wales and within Northern Ireland are likely to be created to respond to new and evolving threats and in response to new technologies.
135. Delegating this power will enable the list of CSEA offences to be updated to include relevant new offences, and so help to keep children safe by ensuring that the framework can respond and adapt to changes in CSEA offences.
136. The Secretary of State is the appropriate person to exercise the power to amend Part 1 because that part relates to criminal law in England and Wales. With regards to the power to amend Part 3, while the devolution settlement provides that the Northern Ireland Assembly can make regulations dealing with internet services, such regulations require the consent of the Secretary of State. Therefore, the Secretary of State is assessed to be the appropriate person to exercise this power.
137. There are clear limitations on the power. The inclusion of the Schedule in primary legislation ensures that its contents will be subject to scrutiny and debate in

Parliament. While this power allows the use of secondary legislation to amend the list of offences in the Schedule, it only allows Parts 1 and 3 of Schedule 3 to be updated to include new criminal offences or to remove existing ones related to child abuse and exploitation.

Justification for the procedure

138. By virtue of clause 132(4)(e), regulations made under clause 43(2) are subject to the affirmative procedure. The affirmative procedure ensures that any amendments to the Schedule are fully debated and scrutinised in Parliament.
  
139. This procedure is therefore considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power.

## **Clause 43(3): Offences relating to child sexual exploitation and abuse**

**Power conferred on:** Scottish Ministers

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

### Context and purpose

140. Protecting children is central to the online safety regulatory framework. To ensure that the framework is proportionate and to provide companies and the regulator with legal certainty, Schedule 3 defines what offences are defined as CSEA content for the purposes of the legislation. Criminal law is devolved under the Scotland Act 1998 so Part 2 of Schedule 3 specifies which offences under Scottish law are defined as CSEA content for the purposes of the legislation.
141. Under clause 43(3), Scottish Ministers will be able to amend Part 2 of Schedule 3.
142. This power will ensure that the regulatory framework, and the duties it imposes on companies to keep children safe, remains up to date with technological change and legislative developments. This is a Henry VIII power in that it allows secondary legislation to be used to amend provisions in the Bill.

### Justification for the power

143. The Online Safety framework needs to be able to adapt to new CSEA offences. Part 2 of Schedule 3 lists existing CSEA offences in Scotland that are capable of being committed online, wholly or in part. Additional CSEA offences within Scotland are likely to be created to respond to new and evolving threats and in response to new technologies.
144. Delegating this power will enable the Act to include relevant new CSEA offences in Scotland and keep children safe by ensuring that the framework can respond and adapt to changes in CSEA-related activity online.
145. The Scottish Ministers are the appropriate persons to exercise this power because it relates to Scottish criminal law.
146. There are clear limitations on the power. The inclusion of the Schedule in primary legislation ensures that it will be subject to scrutiny and debate in Parliament. While this power allows the use of secondary legislation to amend Part 2 of Schedule 3, it will only allow the framework to be updated to include new CSEA offences or to remove existing ones related to child abuse and exploitation in Scotland.

### Justification for the procedure

147. By virtue of clause 132(7), regulations made under section are subject to the affirmative procedure. The affirmative procedure ensures that any amendments are fully debated and scrutinised in the Scottish Parliament.
148. This procedure is therefore considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power.

## **Clause 45(2): Meaning of “content that is harmful to children” etc**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** First time - affirmative procedure. Negative procedure thereafter.

### Context and purpose

149. Providers of regulated services which are assessed as likely to be accessed by children, in accordance with clause 26, will have to carry out a children’s risk assessment under clause 7(2) to identify content which is legal but harmful to children, and to take steps under clause 10 to ensure adequate systems and processes are in place to protect children from them and mitigate the risk of harm.
150. Clause 45 defines the meaning of 'content that is harmful to children' and confers on the Secretary of State a power, under subsection (2)(b), to specify in regulations both “primary priority” and “priority” content which is harmful to children. Service providers will have to consider each of these priority categories of content in their risk assessment.

### Justification for the power

151. This power is delegated to reflect the need to ensure that the regime is future-proofed, but also to provide legal certainty. There will be parliamentary oversight of the definition of harm in the primary legislation, and then parliamentary oversight of the specific categories of “primary priority” and “priority” content that is harmful to children as part of the scrutiny of secondary legislation made under this power.
152. This will allow high level parliamentary oversight of the definition of content which is harmful to children, allowing new types of content to be added in response to changes in risk or technologies so as to ensure that they are effectively dealt with under the regulatory framework.
153. This delegated power will further ensure that the regulatory framework benefits fully from OFCOM's expertise and research capacity. Under clause 47, the Secretary of State must consult OFCOM before making regulations under this power. Within three years of the date of the first use of either the clause 45 or clause 46 power, OFCOM must prepare a report focusing on the incidence on regulated services of content that is harmful to children and content that is harmful to adults, and the severity of harm that individuals suffer, or may suffer, as a result of those kinds of content. The report must contain OFCOM's conclusions and any recommendations for changes to the regulations. This power allows the Secretary of State to make new regulations in response to OFCOM's report and other changes in the online environment.

### Justification for the procedure

154. By virtue of clause 132(6)(b), on the first occasion of their use regulations made under clause 45 must be approved by Parliament through the affirmative procedure. The first use of this power will determine which descriptions of content that is harmful to children providers of regulated services must prioritise, which will be a central element of the new regulatory framework. It is therefore considered appropriate that

Parliament should be able to debate and approve the original regulations made under this power.

155. By virtue of clause 132(5)(b), in all subsequent cases the power will be exercised through the negative procedure. The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power, which will simply specify new descriptions of priority content or remove others from the list. It will also allow the government to respond quickly to the emergence of significant new types of harmful content.



## **Clause 46(2): Meaning of “content that is harmful to adults” etc**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** First time - affirmative procedure. Negative procedure thereafter.

### Context and purpose

156. Providers of Category 1 user-to-user services will have duties to protect adults from legal but harmful content. They will have to carry out an adults’ risk assessment under clause 7(5) and, under clause 11, to set out how they will deal with content that is harmful to adults in their terms of service and apply those terms of service consistently and transparently.
157. Clause 46 defines the meaning of “content that is harmful to adults” and confers a power on the Secretary of State, under clause 46(2)(b)(i), to specify in regulations priority categories of content harmful to adults. Service providers will have to consider each of these priority categories of content in their risk assessments.

### Justification for the power

158. This power is delegated to reflect the need to ensure that the regime is future-proofed and will ensure new categories of priority content can be added, or existing categories of priority content removed, in response to changes in risk or technologies.
159. This power is delegated to reflect the need to ensure that the regime is future-proofed, but also to provide legal certainty. There will be parliamentary oversight of the definition of content that is harmful to adults in the primary legislation, and then parliamentary oversight of the specific categories of priority content that is harmful to adults as part of the scrutiny of secondary legislation.
160. This delegated power will further ensure that the regulatory framework benefits fully from OFCOM’s expertise and research capacity. Under clause 47, the Secretary of State must consult OFCOM before making these regulations. As with the clause 45(2) power, within three years of the date of the first use of either the clause 45 or clause 46 power, OFCOM must prepare a report focusing on the incidence on regulated services of content that is harmful to children and content that is harmful to adults, and the severity of harm that individuals suffer, or may suffer, as a result of those kinds of content. The report must contain OFCOM’s conclusions and any recommendations for changes to the regulations. This power allows the Secretary of State to make new regulations in response to OFCOM’s report or other changes in the online environment.

### Justification for the procedure

161. By virtue of clause 132(6)(c), on the first occasion of their use regulations made under clause 46 must be approved by Parliament through the affirmative procedure. The first use of this power will determine which descriptions of content that is harmful to adults providers of regulated services must prioritise, which will be a central element of the new regulatory framework. It is therefore considered appropriate that

Parliament should be able to debate and approve the original regulations made under this power.

162. By virtue of clause 132(5)(c), in all subsequent cases the power will be exercised through the negative procedure. The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power which will simply specify new descriptions of priority content or remove others from the list. It will also allow the government to respond quickly to the emergence of significant new types of harmful content.

## **PART 3: OTHER DUTIES OF SERVICE PROVIDERS**

### **CHAPTER 1: TRANSPARENCY REPORTS**

#### **Clause 49(6): Transparency reports by service providers**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Negative

#### Context and purpose

163. OFCOM will be able to require certain categories of service providers to submit transparency reports on an annual basis (clause 49). These reports will be required from all service providers which meet threshold conditions set out in regulations made under paragraph 1 of Schedule 4.
164. The reports will be required following a notice from OFCOM which will set out requirements regarding the type of information, the format in which it must be presented and when it must be submitted. OFCOM may only request information of a type set out in subsection (4). This includes, for example, incidences of illegal or harmful content on the service, how many users are assumed to have encountered it and how such content is disseminated by the service.
165. In deciding what information to require, OFCOM must also take account of the service provider's capacity to produce information, what type of service it is, its functionalities, its number of users and the proportion of users who are children (subsection (5)). It is conceivable that as providers develop their transparency reporting capability, more frequent reporting may be both proportionate and useful. As such, it is essential that the amount of time between reports can be amended. Clause 49(6) therefore enables the Secretary of State to change the frequency with which transparency reports must be produced.
166. The initial requirements on providers to produce annual reports will be placed in primary legislation. The power to amend the frequency of transparency reports will ensure that this provision does not become outdated. This will provide future flexibility and ensure that the transparency framework can keep pace with changes in the technological and regulatory landscape. Where information is needed on a more - or less - frequent basis than is currently foreseeable, this power will allow the Secretary of State to respond to those changes.

#### Justification for the power

167. A power to amend the required frequency of transparency reports through secondary legislation will deliver increased flexibility, in particular if more frequent reports are necessary.
168. This will ensure the transparency reporting process is responsive to technological change, changes in people's use of regulated services, and trends related to online harms.

Justification for the procedure

169. The negative procedure is considered appropriate, as the power does not change the substance of the requirement set out in primary legislation, just the frequency. As such, this provides a suitable degree of Parliamentary oversight while ensuring that the frequency of the reports can readily be kept up to date.

## **Clause 49(7): Transparency reports by service providers**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Negative

### Context and purpose

170. As noted above, certain categories of service providers must produce an annual report (a ‘transparency report’) containing information of a kind and in a format specified in a notice by OFCOM. OFCOM will only be able to require an annual transparency report in respect of the information listed under clause 49(4). In determining the specific information particular providers will need to report on, OFCOM will also need to consider a range of factors, set out under clause 49(5).

171. Clause 49(7) allows the Secretary of State to add, vary or remove the kinds of information listed under clause 49(4) by regulations. It also allows the Secretary of State to update the factors OFCOM must consider in deciding what a particular service will be required to report on in connection with any amendment to clause 49(4), by also amending the list under clause 49(5). This will ensure that the transparency framework can respond to technological developments and changes in usage patterns. Such reporting by regulated bodies is a common feature of similar frameworks. This is a Henry VIII power.

### Justification for the power

172. The power to amend clause 49(4) to add, vary or remove the list of types of information which OFCOM can require regulated providers to report on and to amend the factors OFCOM must take into account in deciding which kinds of information to require (in connection with any such amendment), will futureproof the transparency reporting framework. It will ensure that OFCOM can require companies to report on the information which is most useful which may develop and change over time.

173. There may be certain kinds of information which companies should be required to report on in the longer term, which would be difficult to foresee prior to the framework coming into force. This power will allow the Secretary to State to update the framework accordingly. The power will also ensure that the regime can respond to the emergence of new technologies and changing patterns in user behaviour.

### Justification for the procedure

174. The negative procedure is considered appropriate, as the purpose of this provision is the limited one of updating and refining the lists of kinds of information OFCOM can describe in notices relating to transparency reports set out in the primary legislation, which Parliament will have had the opportunity to scrutinise and debate during the passage of the Bill. As such, this provides a suitable degree of Parliamentary oversight while ensuring that the specific content which OFCOM can require to be included in the reports can readily be kept up to date.

## **Clause 50(1): Transparency reports: guidance**

**Power conferred on:** OFCOM

**Power exercised by:** Guidance

**Parliamentary procedure:** None

### Context and purpose

175. Relevant services must provide annual transparency reports under clause 49. The information to be included within those reports will be set out in notices provided by OFCOM.
176. OFCOM must prepare and publish guidance on any matter they consider to be relevant to providers producing and publishing a transparency report. The guidance must detail how OFCOM will determine the descriptions of information in clause 49 that they will require a transparency report to contain. It must also detail how OFCOM will take into account the provider's capacity to produce information, its kind of service, its functionalities, and its number of users before deciding what information to require as well as the steps that OFCOM will take to engage with relevant providers, before requiring the information in a notice under clause 49.
177. OFCOM will also have the power to revise and replace any such guidance. Before preparing any guidance under this clause, OFCOM must consult any person they consider appropriate including persons listed in clause 50(2) such as regulated providers, trade associations and other regulators etc.

### Justification for the power

178. This provision is concerned with administrative and operational matters. As the requirements will need to be tailored to different types of service providers, it is not appropriate to place this level of detailed content on the face of this legislation.
179. Delegating this power gives OFCOM the flexibility needed to consult with relevant persons and will enable them to determine what information to require providers to prepare a transparency report on.

### Justification for the procedure

180. Since these provisions are concerned with operational and administrative matters, no Parliamentary procedure is considered necessary.

## CHAPTER 2: FEES

### Clause 51(5): Duty to notify OFCOM

**Power conferred on:** OFCOM

**Power exercised by:** Decision subject to Secretary of State's approval

**Parliamentary procedure:** None

#### Context and purpose

181. OFCOM will have a power to charge an annual fee to the providers of regulated services who are not exempt (see clause 52), where the providers meet the relevant financial threshold (which is to be set by OFCOM and approved by the Secretary of State, see clause 53).
182. Under clause 51(1), a provider of a regulated service must notify OFCOM in relation to a charging year which is:
- The first fee-paying year in relation to that provider, or
  - Any charging year after the first fee-paying year where—
    - The previous charging year was not a fee-paying year in relation to the provider, and the charging year in question is a fee-paying year in relation to the provider, or
    - The previous charging year was a fee-paying year in relation to the provider, and the charging year in question is not a fee-paying year in relation to the provider.
183. A “fee-paying year”, in relation to a provider, means a charging year where the provider is not exempt (see subsection (5)) and the provider's qualifying worldwide revenue, for the qualifying period, is equal to or greater than the threshold figure. The threshold figure in question is that which is published in accordance with clause 53.
184. A notification under subsection (1) must include details of all regulated services provided by the provider. Where it is a notification under subsection (1)(a) or (b)(i), it must also include details of the provider's qualifying worldwide revenue for the qualifying period that relates to that charging year, and any supporting evidence, documents or other information specified by OFCOM in a Statement of Charging Principles (see clause 55).
185. A notification under subsection (1) must be provided to OFCOM by the time specified by OFCOM in a statement of charging principles (see clause 55).
186. However, these duties are extensive and may prove to be excessive in specific cases. Under subsection (5), where OFCOM considers that an exemption from the requirements to notify and pay a fee for such providers is appropriate, and the Secretary of State approves the exemption, OFCOM may provide that particular descriptions of providers of regulated services are exempt for the purposes of this section and clause 52.
187. Clause 51 further allows OFCOM to revoke such an exemption where they consider that it is no longer appropriate and the Secretary of State approves the revocation.

188. OFCOM must publish details of any exemption for the time being approved under subsection (5).

Justification for the power

189. Providing OFCOM with the power to make exemptions from the notification and fee requirement will allow OFCOM to remain responsive to the services which it regulates and avoid imposing an undue regulatory burden.
190. Delegating this power will allow exemptions to be provided when the framework is operational, and OFCOM can use its full resources and expertise to assess what expectations are proportionate for particular services to comply with.
191. The power to provide exemptions from the notification and fee requirements is a limited and specific power which can only be exercised with the approval of the Secretary of State.

Justification for the procedure

192. Since these provisions are concerned with operational matters in the context of how the regulator intends to use its powers, the provision to be made is administrative rather than legislative in character. Therefore no Parliamentary procedure is considered necessary.
193. However, OFCOM must receive the approval of the Secretary of State to exercise this power. This will ensure that the Secretary of State has oversight of any exemptions.
194. OFCOM must also publish details of any exemption for the time being approved under subsection (5).



## **Clause 51(8): Duty to notify OFCOM**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

### Context and purpose

195. As above, OFCOM will have a power to charge an annual fee to the providers of regulated services which are not exempt (see clause 52), where the providers meet the relevant financial threshold (which is to be set by OFCOM and approved by the Secretary of State (clause 53).
196. There will be a requirement for all providers of regulated services who meet the financial threshold to notify OFCOM of details of the regulated services they provide, the provider's qualifying worldwide revenue and any supporting evidence, documents or other information specified by OFCOM in its Statement of Charging Principles (clause 55). The notification must be provided to OFCOM within the timeframe specified by OFCOM in its Statement of Charging Principles.
197. Providers will also be required to notify OFCOM if, due to a change in their qualifying worldwide revenue, they are no longer liable to pay a fee. OFCOM will require providers to share information as necessary to evidence this.
198. OFCOM has the discretion to determine the amount of the annual fee with reference to various relevant factors (clause 52), but must do so in accordance with its published Statement of Charging Principles. Among other things, the Statement will include the principles that the fees payable to OFCOM will meet but not exceed the annual costs of OFCOM in exercising their regulatory functions under the Bill, and that the fee will be justifiable and proportionate, having regard to the provider's revenue and the functions in respect of which the fee is imposed. Where providers do not notify or pay a fee, then they may be subject to enforcement action as per clause 89.
199. Clause 51(8) states that "qualifying worldwide revenue" and "qualifying period" will be defined by regulations made by the Secretary of State. Before making any such regulations, the Secretary of State must consult with OFCOM.

### Justification for the power

200. "Qualifying worldwide revenue" and "qualifying period" underpin the funding regime of the regulator. "Qualifying worldwide revenue" is also a key factor in determining the applicable penalties. It is vital therefore that both definitions are fit for purpose and easily understood by industry and stakeholders. By defining the terms in regulations, the government will be able to draw on OFCOM's financial expertise and resources. OFCOM will also be able to relay views from industry following a period of consultation.
201. Defining the terms in regulations will also allow for the definitions to be amended in the future. Flexibility is required to ensure "qualifying worldwide revenue" and "qualifying period" remain usable by OFCOM and enable easy reporting by industry.

Justification for the procedure

202. This power will be subject to the affirmative procedure.

203. There is likely to be substantial parliamentary interest in the regulations as the subject matter will underpin OFCOM's funding and penalty regimes. The affirmative resolution is therefore considered appropriate in order to provide both Houses the opportunity to debate and actively approve the content of the instrument.

## **Clause 53: Threshold figure**

**Power conferred on:** OFCOM and Secretary of State

**Power exercised by:** Decision

**Parliamentary procedure:** None

### Context and purpose

204. The regulator will be funded through contributions from providers of regulated services whose qualifying worldwide revenue is at or above a specified threshold as determined by clause 53. Providers with qualifying worldwide revenue at or above the threshold will have an obligation to notify OFCOM, and pay an annual fee (see clause 52).
205. OFCOM will set the threshold figure and notify the Secretary of State of the proposed threshold. The figure should be kept under review and OFCOM will have the power to amend this figure.

### Justification for the power

206. OFCOM is required to set fees and thresholds for existing regimes in line with the principles outlined in the Statement of Charging Principles and after consulting with industry. The Secretary of State is not required to approve those figures and they are not subject to Parliamentary oversight.
207. For the online safety regime, OFCOM as the regulator will be best placed to recommend an appropriate threshold after the regulations under clause 51 have been made and consultations with industry have taken place. As per clause 54, Secretary of State guidance, which will have been laid before Parliament, will stipulate the principles which OFCOM should consider when determining the threshold figure. OFCOM will be required to provide the Secretary of State with the necessary evidence collated through the consultations, in order to support its decision as to the level of the threshold.
208. The reason for introducing the Secretary of State sign off under this regime is to confirm that the threshold has been set at a level which leads to affordable and proportionate fees whilst ensuring OFCOM's annual operating costs are recouped.
209. The Secretary of State must decide whether or not to approve the proposed threshold figure put forward by OFCOM. If the Secretary of State does not approve the threshold figure for fees, then the Secretary of State must inform OFCOM of this decision. The Secretary of State must then determine, and subsequently publish, a threshold figure that the Secretary of State considers appropriate. The process to be followed in order for the Secretary of State to determine the figure has been agreed with OFCOM.

### Justification for the procedure

210. OFCOM will ultimately publish the threshold for providers of regulated services. The provision to be made is administrative rather than legislative in character, and no parliamentary procedure is considered necessary in line with the existing procedures for OFCOM's other regimes.

## **Clause 54(1): Secretary of State's guidance**

**Power conferred on:** Secretary of State

**Power exercised by:** Guidance

**Parliamentary procedure:** Lay the guidance in Parliament and publish.

### Context and purpose

211. The regulator will be funded through contributions from providers with in-scope services whose qualifying worldwide revenue is at or above a threshold figure determined either by OFCOM and approved by the Secretary of State, or by the Secretary of State if they do not agree OFCOM's proposed figure (see clause 53).
212. The Secretary of State must issue guidance to OFCOM about the principles OFCOM will follow when determining the fees payable by a provider of a regulated service (see clause 52). The guidance must also set out the principles to be considered by OFCOM when determining the threshold figure under clause 53.
213. The Secretary of State must consult OFCOM before issuing, revising or replacing the guidance. The guidance must also have due regard to HM Treasury's Managing Public Money guidance.
214. The Secretary of State guidance may not be revised or replaced more frequently than once every three years, unless by agreement between the Secretary of State and OFCOM or it needs to be corrected as a result of an amendment, repeal or modification to a provision of the Bill dealing with fees. OFCOM must have regard to the guidance when exercising its functions relating to fees under this Chapter of the Bill.

### Justification for the power

215. By stipulating the principles which OFCOM should consider when determining the threshold figure, the guidance will help assure that OFCOM set the threshold at a level where burdens are minimised for small businesses. This will ensure that fees charged by OFCOM will be justifiable and proportionate. Furthermore, the guidance will ensure that OFCOM sets the fees at a level which allows them to recoup the annual operating costs of the regulatory regime.

### Justification for the procedure

216. The Secretary of State must lay the initial guidance (and any revised guidance) before Parliament and publish the guidance issued under this section. As the guidance does not include any legislative requirements, there is no need for further Parliamentary scrutiny.

## **Clause 55(1): Fees statements by OFCOM**

**Power conferred on:** OFCOM

**Power exercised by:** Statement of Principles

**Parliamentary procedure:** None

### Context and purpose

217. The regulator will be funded through contributions from providers with in-scope services whose qualifying worldwide revenue is at or above a specified threshold (as determined by clause 53). Unless a provider is categorised as exempt, they will be required to notify OFCOM should their qualifying worldwide revenue for a qualifying period be at or above the specified threshold.
218. OFCOM will be required to publish a Statement of Charging Principles (“the Statement”) which will set out the principles and processes which OFCOM will adhere to when setting out the fees payable by a regulated service provider. The Statement will also detail the information required from providers at the point of notification. The Secretary of State will publish guidance on the principles to be considered by OFCOM when drafting the Statement.
219. Without publication of this document, OFCOM will not be able to require providers to pay a fee.

### Justification for the power

220. Under the Communications Act 2003, OFCOM is required to set licence fees in the broadcasting sector and administrative charges in the electronic communications sector in accordance with charging principles that it has published. There are similar provisions in the Postal Services Act 2011 in relation to the setting of charges for the postal services sector. In line with its legislative duties, OFCOM currently publishes a Statement of Charging Principles which outlines that charges and fees must be set so as to meet, but not to exceed, OFCOM’s annual costs of regulating the relevant sector.
221. The duty to publish the Statement is crucial to ensure consistency with OFCOM’s other regimes. It is also required to allow for transparency in the online safety funding regime and clarity for providers and stakeholders. It is expected that OFCOM will consult with providers of regulated services in preparation of the Statement.
222. The Statement will be published ahead of each charging year. It will outline how the fees charged by OFCOM will meet, but not exceed, the costs of carrying out online safety functions for that charging year. It will also set out how the fees to be charged to providers are proportionate and justifiable and that there is a transparency in relation to the costs incurred and fees charged.
223. The Statement will further set out the information required from a provider at the point of notification (see clause 51). This information could include details regarding the relevant qualifying worldwide revenue; details of the regulated service; and any supporting evidence, documentation or other information specified by OFCOM.

Justification for the procedure

224. OFCOM will publish the Statement. The provision to be made is administrative rather than legislative in character, and no parliamentary procedure is considered necessary in line with the existing procedures for OFCOM's other regimes.

## **PART 4: OFCOM'S POWERS AND DUTIES IN RELATION TO REGULATED SERVICES**

### **CHAPTER 3: RISK ASSESSMENTS**

#### **Clause 62(1): OFCOM's guidance about risk assessments**

**Power conferred on:** OFCOM

**Power exercised by:** Guidance

**Parliamentary procedure:** None

#### Context and purpose

225. Under clause 61 OFCOM must carry out a risk assessment to identify, assess and understand the risks of harm to individuals presented by regulated services. The risk assessment must, amongst other things, assess the levels of risk of harm presented by regulated services of different kinds, and identify characteristics of different kinds of regulated services that are relevant to such risks of harm, and assess the impact of those kinds of characteristics on such risks. OFCOM must develop risk profiles for different kinds of regulated services.
226. As soon as reasonably practicable after OFCOM have completed their first risk assessment under clause 61, OFCOM must prepare and publish guidance for providers of regulated services to assist them in complying with their duties to carry out risk assessments under clauses 7 and 19 (in respect of user-to-user services and search services respectively). The guidance must include the risk profiles developed by OFCOM under clause 61(3). OFCOM is also under a duty to publish the guidance and to keep it up to date (subsections (4) and (5) of clause 61).

#### Justification for the power

227. OFCOM's guidance is intended to assist providers of regulated services comply with their duties to carry out risk assessments under clauses 7 and 19.
228. Such guidance is too detailed to be set out on the face of the legislation. Further, the power to revise the guidance provides OFCOM with the flexibility to modify its details in the light of emerging technologies and changes in user behaviour. This will be essential given the fast-paced and innovative nature of the regulated sector.

#### Justification for the procedure

229. Since these provisions are concerned with operational and administrative matters in the context of how regulated service providers can comply with their duties to perform risk assessments under the Bill, the provision to be made is administrative rather than legislative in character. Therefore, no Parliamentary procedure is considered necessary.

## CHAPTER 4: USE OF TECHNOLOGY IN RELATION TO TERRORISM CONTENT AND CHILD SEXUAL EXPLOITATION AND ABUSE CONTENT

### Clause 66(5): Use of technology notices: supplementary

**Power conferred on:** Secretary of State

**Power exercised by:** Decision

**Parliamentary procedure:** None

#### Context and purpose

230. As part of the regulator's enforcement regime, OFCOM will be able to give a provider of a regulated service a Use of Technology Notice.

231. A Use of Technology Notice is a notice issued to a regulated user-to-user or search service requiring the provider of the service to do either or both of the following:

- Use accredited technology to identify public terrorism content present on the service or in the search results of the service and to swiftly take down that content (either by means of the technology alone or by means of the technology together with the use of human moderators to review terrorism content identified by the technology);
- Use accredited technology to identify child sexual exploitation and abuse content present on any part of the service (public or private) or in the search results of the service, and to swiftly take down that content (either by means of the technology alone or by means of the technology together with the use of human moderators to review CSEA content identified by the technology).

232. If a provider is already using accredited technology in relation to the service in question, a Use of Technology Notice may require the provider to use it more effectively (specifying the ways in which that must be done). This will allow the regulator to mandate effective use of technology to tackle and prevent terrorism and CSEA content online.

233. For the purposes of clauses 64 and 65, technology is "accredited" if it is accredited by OFCOM or another person appointed by OFCOM as meeting minimum standards of accuracy in the detection of terrorism content or CSEA content, as the case may be.

234. Clause 66(5) provides the Secretary of State with the power to set those minimum standards of accuracy, following advice from OFCOM.

#### Justification for the power

235. Protecting children and preventing terrorism is central to the online safety framework. As such, the framework will ensure that terrorism content and CSEA content is identified, minimised and removed. Effective use of technology will be an important part of this process for some services.

236. Delegating this power will enable the Secretary of State to benefit from OFCOM's expertise, or the expertise of a third-party (as appointed by OFCOM) when deciding on the minimum standards of accuracy.



237. Delegating this power also enables the updating or introduction of future minimum standards, ensuring that the framework can adapt to the emergence of new technologies, changing online behaviour and evolving harms.
238. This power is a limited one and the wider power to provide a Use of Technology Notice is set out extensively in primary legislation. This power relates only to the minimum standards of accuracy which a technology must reach to be accredited. This will ensure that the Secretary of State is able to set a basic standard, without interfering with the activities of the regulator or playing any role in deciding which technologies can be accredited.

Justification for the procedure

239. Since this provision is concerned with operational matters and is limited to setting a minimum standard, the provision to be made is administrative rather than legislative in character. Therefore, no further Parliamentary procedure is considered necessary.
240. The Secretary of State will also have to consult OFCOM.

## **Clause 68(1): Guidance about requiring use of technology**

**Power conferred on:** OFCOM

**Power exercised by:** Guidance

**Parliamentary procedure:** None

### Context and purpose

241. If a company takes the steps set out in OFCOM's codes of practice to minimise the presence of illegal harms on their services identified by their risk assessments, they will have fulfilled their safety duties (see clause 9). However, an exception to that approach has been created because of the seriousness of child sexual exploitation and abuse and terrorism. United Kingdom related referrals of child abuse images from industry are now 10 times greater than in 2013 and all of the 2017 terrorist attacks in the United Kingdom involved the internet to some extent.
242. If OFCOM has reasonable grounds for believing that the provider is failing to comply with the duty in clause 9 so far as the duty relates to terrorism and CSEA content, OFCOM may issue a Use of Technology Warning Notice. This is based on evidence demonstrating the prevalence and persistent presence of terrorism content on public channels or CSEA content on public and private channels (as the case may be) on the service.
243. Once the period for representations from the service provider has passed, OFCOM may issue the provider with a formal Use of Technology Notice. The safeguards set out in clause 64 or 65 must be met before OFCOM is able to issue a Use of Technology Notice. If a service provider does not comply with a Use of Technology Notice, OFCOM can issue a Penalty Notice under clause 90 after allowing the provider the opportunity to make representations on the alleged breach. OFCOM could also consider pursuing business disruption measures (under clauses 91 to 94) or issuing a further Use of Technology Notice (under clause 67).
244. Clause 68 requires OFCOM to produce and publish guidance to providers of user-to-user services and search services on how OFCOM would exercise its powers under this Chapter. This is to ensure that service providers are clear in advance on the circumstances under which the regulator may issue a Use of Technology Notice.

### Justification for the power

245. Collaboration between government, industry, charities and civil society organisations has led to some progress in tackling CSEA and terrorism content online. But existing efforts by service providers have not delivered the necessary improvements to tackle the scale and seriousness of terrorism and CSEA content on their platforms. Problems persist and cooperation from service providers is inconsistent.
246. Companies may choose to voluntarily use technology to identify harms on their platforms. However, it is important that OFCOM can also require a service provider to use technology to identify terrorism or CSEA where the company has persistent and prevalent levels of CSEA and/or terrorism on its service and where it is not using technology to effectively address them.

247. The scale and severity of the harms and the strict safeguards regulating the use of technology justify this power. Their use is subject to clear safeguards to ensure protections for users' rights to freedom of expression and privacy.
248. One such safeguard is that OFCOM should set out in guidance how it proposes to exercise its powers under this clause. This is to provide clarity around the use of the power. We intend for OFCOM to have the discretion to decide on the exact content of the guidance.

Justification for the procedure

249. The provision to be made is administrative rather than legislative in character. Therefore, no Parliamentary procedure is considered necessary.

## CHAPTER 6: ENFORCEMENT POWERS

### Clause 85(14): Amount of penalties

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

#### Context and purpose

250. OFCOM will have a suite of enforcement powers available to use against providers of regulated services who fail to comply with 'enforceable requirements' (see clause 82) such as duties to carry out risk assessments or safety duties about illegal content, and protecting children or adults from harmful content. One of those powers will be for OFCOM to impose financial penalties on providers who have failed, or are continuing to fail, to comply with their statutory obligations.
251. Where a penalty is imposed on a person in respect of a regulated service provided by that person, the maximum amount of the penalty that can be imposed is whichever is the greater of £18 million or 10% of the person's 'qualifying worldwide revenue'. (The same maximum penalty applies if two entities are jointly and severally liable for a penalty: see clause 86(1). "Qualifying worldwide revenue" has the same meaning as regulations made under clause 85(14) in its application to a group of entities: see clause 86(7)).
252. This power allows the Secretary of State to make regulations defining 'qualifying worldwide revenue'.

#### Justification for the power

253. 'Qualifying worldwide revenue' is central to the regulatory framework's enforcement processes because it will be used to determine applicable penalties against services (including groups of entities under clause 86 as applicable - which provides that regulations defining the term can include the application of that term to a group of entities). It is vital therefore that the definition is fit for purpose and easily understood by industry and stakeholders. Through defining the terms in regulations, the government will be able to draw on OFCOM's financial expertise and resources, and consider the approach taken in OFCOM's other regulated sectors. OFCOM will also be able to relay views from industry following a period of consultation.
254. Defining the terms in regulations will also allow for the definitions to be amended in the future. Flexibility is required to ensure "qualifying worldwide revenue" remains usable by OFCOM and to enable easy reporting by industry.
255. This is a limited, technical power to set the meaning of the term. OFCOM's powers to use the term 'qualifying worldwide revenue' in practice will be clearly set out in the legislation (in terms of calculating fees and setting penalties).
256. In determining the amount of a penalty to be imposed on a person, OFCOM must, in particular, take into account—
- any representations made, and evidence provided, by the person;

- any steps taken by the person towards—
  - complying with any duty or requirement specified in the provisional notice of enforcement action given to the person under clause 80, or the confirmation decision given to the person under clause 83,
  - or remedying the failure to comply with any such duty or requirement;and
- the effects of the failure (or failures) in respect of which the penalty is imposed.

257. The penalty must also be of an amount that OFCOM considers to be appropriate, and proportionate to the failure (or failures) in respect of which it is imposed.

#### Justification for the procedure

258. The Secretary of State must consult OFCOM before making regulations under subsection (14).

259. The affirmative procedure ensures that Parliament has full scrutiny and oversight of the parameters of ‘qualifying worldwide revenue’, which will have a crucial role in determining the value of the penalties which OFCOM will be able to impose under the new regime.

## **Clause 97(1): Guidance about enforcement action**

**Power conferred on:** OFCOM

**Power exercised by:** Guidance

**Parliamentary procedure:** None

### Context and purpose

260. A range of enforcement powers will be conferred on OFCOM in order to enable it to tackle infringements in a proportionate and effective manner. Early engagement between the regulator and individual service providers is a key emphasis of these powers.
261. The enforcement provisions enable OFCOM to issue a provisional notice of enforcement action in respect of a failure to comply with a number of listed duties or requirements (see clause 82). In order to issue such a notice, OFCOM must consider that there are reasonable grounds for believing that the provider has failed or is failing to comply with a relevant duty or requirement. This notice can then be followed by a confirmation decision requiring the provider to take remedial action as well as imposing a penalty for continued failure to comply with the duties or requirements. Maximum penalties of £18 million or 10% of qualifying worldwide revenue, whichever is greater, alongside business disruption measures, are available to provide a suitable deterrent or sanction.
262. OFCOM will be required to produce and publish guidance about how it proposes to exercise its enforcement powers. The guidance must, in particular, give information about the factors that OFCOM would consider it appropriate to take into account when taking, or considering taking, enforcement action against regulated providers' failure to comply with enforceable requirements. These enforceable requirements are listed in clause 82 and include, for example, the safety duties to carry out and report risk assessments, safety duties about illegal content or protecting adults and children, user reporting and redress duties, recording-keeping and review duties.
263. In relation to any enforcement action by OFCOM which relates to a failure by a provider of a regulated service to comply with the safety duties on illegal content and protecting children, the guidance must explain how OFCOM will take into account the impact (or possible impact) of such a failure on children.
264. Before producing such guidance, OFCOM must consult with the Secretary of State and any other person OFCOM considers appropriate. OFCOM will have the power to amend or revise the guidance.

### Justification for the power

265. Since this guidance will be informing regulated service providers how OFCOM proposes to exercise its enforcement powers under the Bill, it is appropriate for the regulator to be responsible for such guidance after consulting the Secretary of State and other persons who OFCOM consider appropriate.
266. Such guidance is too detailed to be set out on the face of the legislation. Further, the power to revise the guidance provides OFCOM with the flexibility to modify the details

if they are required in light of emerging technologies and changes in the activities of regulated services.

Justification for the procedure

267. Since these provisions are concerned with operational and administrative matters in the context of how the regulator intends to use its enforcement powers, the provision to be made is administrative rather than legislative in character. Therefore, no Parliamentary procedure is considered necessary.

## CHAPTER 7: COMMITTEES, RESEARCH AND REPORTS

### Clause 101(8): OFCOM's report about researchers' access to information

**Power conferred on:** OFCOM

**Power exercised by:** Guidance

**Parliamentary procedure:** None

#### Context and purpose

268. Under this clause, OFCOM must prepare a report on the manner and extent to which independent researchers are currently able to obtain information from providers of regulated services to inform their research into online safety matters; the legal and other issues which currently constrain the sharing of information for such purposes; and the extent to which greater access to information for such purposes might be achieved.
269. In this clause, a person carries out "independent research" if the person carries out research on behalf of a person other than a provider of a regulated service.
270. In preparing the report, OFCOM must consult the Information Commissioner, the Centre for Data Ethics and Innovation, United Kingdom Research and Innovation, persons who appear to OFCOM to have relevant expertise, persons representing providers of regulated services as well as other persons OFCOM considers appropriate. OFCOM must then publish the report within the period of two years beginning with the day on which this clause comes into force, and send a copy of the report to the Secretary of State, who must lay it before Parliament.
271. Ongoing research and analysis into online safety matters is essential in preventing future harm to users. Following the publication of that report, this clause then provides OFCOM with a delegated power to produce guidance about matters dealt with in the report for providers of regulated services and persons carrying out independent research into online safety matters.
272. This guidance will support providers of regulated services and persons carrying out independent research in interpreting OFCOM's report and applying its findings. This power is a limited power with the steps that OFCOM must take to produce a report and any subsequent guidance both clearly established in primary legislation.
273. Following the publication of the report, if OFCOM decides to prepare such guidance, it must consult the same list of persons suggested for consultation when preparing the report.
274. OFCOM must also publish the guidance (and any revised guidance) and include in each transparency report under clause 100 an assessment of the effectiveness of the guidance. The requirement that OFCOM includes an assessment of the effectiveness of its guidance in its transparency report will ensure that the efficacy of this power is under public review.



Justification for the power

275. It is appropriate for these matters to be set out in guidance as opposed to in primary or secondary legislation because they are not legislative in character. The guidance that OFCOM may produce would be non-binding on companies.

Justification for the procedure

276. This is a discretionary power to produce guidance. The guidance that OFCOM may produce would be non-binding on companies. This guidance will deal with operational and administrative matters and so we do not consider it necessary or appropriate for Parliament to consider. Its publication will ensure that the guidance is available to the public and no further procedural requirements are needed.

## CHAPTER 8: MEDIA LITERACY

### Clause 103(4): Media literacy

**Power conferred on:** OFCOM

**Power exercised by:** Guidance

**Parliamentary procedure:** None

#### Context and purpose

277. OFCOM's existing media literacy duties in Section 11 of the Communications Act 2003 will be replaced with the broader provisions set out in clause 103. This will extend these duties into the online sphere and expand upon them. The new provision will require OFCOM to take steps to improve the media literacy of members of the public and, in relation to material published by means of the electronic media such as online, TV and radio, to encourage the development and use of technologies and systems that help to improve the media literacy of members of the public.
278. The Bill will contain a new, detailed definition of 'media literacy' which includes an understanding of the nature and characteristics of material published by means of the electronic media, and an awareness of the impact that such material may have (for example the impact on the behaviour of those who receive it). It also covers an awareness of the available systems by which the nature of such material, and its reliability and accuracy, may be established, and personal information may be protected.
279. Under clause 11(4), OFCOM will be required to prepare guidance about the evaluation of educational initiatives, action taken by service providers, and emerging technologies and processes designed to improve the media literacy of the public. Under clauses 11(5) and (6) OFCOM must publish this guidance and keep it under review.

#### Justification for the power

280. Currently there is limited robust evaluation of the effectiveness of media literacy provisions at improving media literacy capabilities in individuals across organisations undertaking media literacy activity. As such there is an evidence gap about what types of media literacy activity are effective in building long-term media literacy capabilities in individuals. The guidance OFCOM is required to issue on evaluations is intended to help organisations delivering media literacy activity to better evaluate the effectiveness of their measures.
281. It is not possible to set out details about this guidance on the face of this legislation as further research is required to understand what the exact content or nature of the guidance should look like. Researching and exploring this further will be a role for OFCOM to undertake as it produces the guidance.

#### Justification for the procedure

282. OFCOM will publish the guidance. The provision is administrative rather than legislative in character, and no parliamentary procedure is considered necessary.

## **PART 5: APPEALS AND SUPER-COMPLAINTS**

### **CHAPTER 2: SUPER-COMPLAINTS**

#### **Clause 106(3): Power to make super-complaints**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Affirmative

#### Context and purpose

283. This clause will establish a super-complaints procedure whereby an “eligible entity” can make a complaint to OFCOM about any feature of one or more regulated services or the conduct of one or more providers of such services.

284. Subsection (3) will provide that to be eligible to bring a complaint, an entity must meet criteria which will be specified in regulations made by the Secretary of State. One of the criteria which must be specified in the regulations is that the entity is a body representing the interests of users of regulated services, or members of the public or a particular group of such users or members of the public: see subsection (4). Before making these regulations, the Secretary of State must consult OFCOM and such other persons as they consider appropriate: see subsection (5).

#### Justification for the power

285. This power allows the Secretary of State to determine the criteria for entities who are able to make a super-complaint. OFCOM will then determine whether an entity that has made a complaint is eligible by assessing it against the criteria set out by the Secretary of State in the regulations. This protects the independence of the regulator while providing proportionate oversight of the parameters of the super-complaints process.

286. The Bill sets out clear parameters for the super-complaints procedure, and setting further details on the criteria for entities who are able to make a super-complaint in regulations will not only ensure that they can adapt over time, but also enables the Secretary of State to consult where appropriate.

287. There are clear limitations on the Secretary of State’s powers to make regulations under this power, and the Secretary of State must consult OFCOM, and such other persons as the Secretary of State considers appropriate.

#### Justification for the procedure

288. We consider it appropriate that regulations under this section are subject to the affirmative procedure because they will determine who can make a super-complaint and could therefore have a significant effect on the scope of the super-complaints scheme as well as the burdens placed on OFCOM.

## **Clause 107(1): Super-complaints: procedure**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Negative

### Context and purpose

289. The super-complaints process is a central part of the regulatory framework. It is essential that it is effective and proportionate, and that it can operate without imposing an undue burden on the regulator.
290. This section allows the Secretary of State to make regulations containing provision about procedural matters relating to super-complaints under clause 106. Such regulations may, in particular, include provisions about how an eligible entity can notify OFCOM of its intention to make a complaint, the form and manner of such a complaint, how OFCOM must respond to such a complaint and the time limits for such a response.

### Justification for the power

291. Setting out the procedure for super-complaints in secondary legislation will ensure that the process can be revised and updated when the regulatory framework is in force, so that the process can be improved upon and updated as needed. As the procedure for making a super-complaint is an administrative procedure, it is considered an appropriate matter for secondary legislation.

### Justification for the procedure

292. The regulations under clause 107 will be subject to the negative procedure. We consider this procedure gives Parliament appropriate oversight given that this power concerns the making of provisions relating to procedural matters. Furthermore, before making regulations under subsection (1), the Secretary of State must consult OFCOM, and such other persons as the Secretary of State considers appropriate. This will ensure the procedural matters being proposed are fit for purpose.

## **Clause 108(1): Super-complaints: guidance**

**Power conferred on:** OFCOM

**Power exercised by:** Statutory Guidance

**Parliamentary procedure:** None

### Context and purpose

293. This clause confers a duty on OFCOM to issue guidance about complaints under clause 106.

294. This must include guidance about the criteria specified in regulations under clause 106(3), and guidance about procedural matters relating to super-complaints under clause 107.

### Justification for the power

295. As OFCOM will be required to implement the regulations set out by the Secretary of State under clause 106(3) and clause 107(1), OFCOM will be best placed to issue guidance on these matters. We could expect this guidance to include further details on the quality or type of evidence of harm required from a super-complaint, or further detail on how a super-complaint should be structured.

296. Delegating this power to OFCOM will ensure that the guidance is responsive to procedural changes and that it remains an instructive resource for entities that wish to make super-complaints. It is important to ensure that guidance can be updated and adapted if the criteria for entities who are able to make a super-complaint or the provisions relating to procedural matters set out by the Secretary of State change.

### Justification for the procedure

297. OFCOM must publish the guidance (and any revised or replacement guidance). Given that this guidance will relate to operational and administrative matters, we do not consider that a Parliamentary procedure is appropriate.

## **PART 6: SECRETARY OF STATE'S FUNCTIONS IN RELATION TO REGULATED SERVICES**

### **Clause 109(1): Statement of strategic priorities**

**Power conferred on:** Secretary of State

**Power exercised by:** Statement of strategic priorities

**Parliamentary procedure:** Specific procedure set out in clause 110

#### Context and purpose

298. This power will allow the Secretary of State to make a statement that sets out the government's strategic priorities relating to online safety matters. The statement may, among other things, set out particular outcomes identified with a view to achieving the strategic priorities. A statement of strategic priorities for online harms will allow the government to be clear on the overall strategic direction for tackling online harms and respond at a high level to future changes.
299. Clause 110 requires that the Secretary of State must consult OFCOM, and such other persons as considered appropriate on a draft of the statement. The final statement must be published and laid in Parliament. The Secretary of State may not designate the statement if either House of Parliament resolves not to approve it within 40 days of being laid. OFCOM's duties in relation to the statement of strategic priorities are set out in clause 57. OFCOM must have regard to the statement when carrying out its functions under the Bill and in relation to its general duties relating to online safety matters and its duty to promote media literacy under the Communications Act 2003. Within 40 days of the statement being designated, OFCOM must publish an explanation of what it proposes to do in consequence of the statement and after 12 months (and every subsequent 12 months) must also publish a review of what it has done during the period in question as a result of the statement.

#### Justification for the power

300. Delegating this power is necessary because of the potential for future changes in technology impacting the experience of individuals and society online, including the nature of online harms; this power therefore allows the government to respond to developments and set its strategic priorities for addressing online harms. It is not appropriate to set out such strategic priorities in primary legislation; by their nature they will change over time.
301. The statement will be limited to high level strategic priorities. For example, it will not be able to direct the regulator to take action against specific companies.

#### Justification for the procedure

302. Legislation will require that the statement is developed through engagement with OFCOM and other persons that the Secretary of State considers appropriate. There are also limits to how often this power can be used. Under subsections (6) and (7), no amendment to the statement can be made within the period of 5 years of that statement being made unless:
- A Parliamentary general election has taken place;

- There has been a significant change in the policy of Her Majesty's Government affecting online safety matters;
  - The Secretary of State considers that the statement, or any part of it, conflicts with any of OFCOM's general duties (Section 3 of the Communications Act 2003).
303. This provision ensures that the government can respond to changes in technology and policy, while ensuring Parliamentary oversight of such changes. This is not the first time this approach has been taken. A similar procedure (negative resolution procedure) is used under the Digital Economy Act 2017, which amended the Communications Act 2003 to provide the Secretary of State with a power to make statements setting strategic priorities relating to telecommunications, the management of the radio spectrum, and postal services. Part 5 of the Energy Act 2013 also makes provision for the Secretary of State to designate a strategy and policy statement.
304. As such, it is considered appropriate to maintain the same arrangements, with the Secretary of State required to lay a draft of the statement before Parliament and unable to designate the statement if either House resolves, within the 40-day period, not to approve it.

## **Clause 111(1): Secretary of State directions about advisory committees**

**Power conferred on:** Secretary of State

**Power exercised by:** Directions

**Parliamentary procedure:** None

### Context and purpose

305. Following consultation with OFCOM, the Secretary of State may give a direction requiring OFCOM to establish an advisory committee to provide advice to OFCOM about online safety matters of a kind specified in the direction. If a new online harm emerged and became prevalent, including but not limited to online harms which are not in scope of the duty of care, it may be appropriate to establish an advisory committee to advise OFCOM about the issue. It is expected that OFCOM would share advice with the government to inform policy development, including through the requirement that advisory committees must publish a report within the period of 18 months after being established, and after that must publish periodic reports.
306. For example, this could be used in a scenario where there is growing concern around the understanding of members of the public on the impact of social media on societal polarisation. It is unlikely the duty of care alone, which is limited to harm to individuals, would address this issue. In consultation with OFCOM, the government could direct OFCOM to establish an advisory committee to facilitate multi-stakeholder dialogue and build a greater understanding of the issue.
307. An advisory committee established by OFCOM would be a multi-stakeholder group of individuals and representatives from relevant organisations who are brought together to discuss a particular topic or issue, in this context, in relation to online harms. OFCOM would determine the terms and the membership of the advisory committee, and examples of its functions could include developing understanding of the issue, providing non-binding recommendations about how service providers could address the issue and building multi-stakeholder consensus. An advisory committee must, unless the direction specifies otherwise, publish a report within the period of 18 months after being established, and after that must publish periodic reports. The Secretary of State may vary or revoke a direction given under this section.

### Justification for the power

308. It is expected that OFCOM would establish advisory committees as it sees fit and would engage with the Secretary of State regularly. It is therefore envisaged that this power would be used infrequently. OFCOM and the Secretary of State could agree that an emerging issue merits the establishment of an advisory committee. This power would not prevent OFCOM from establishing other advisory committees should OFCOM wish to do so. However, this power will provide the Secretary of State with the ability to direct OFCOM to establish an advisory committee, where necessary and following consultation with OFCOM, to ensure that OFCOM is addressing emerging threats to online safety.
309. This power will help to future-proof the regime and ensure that the Secretary of State is empowered to deal with future challenges by creating an avenue to understand and help tackle emerging issues which may not be in scope of the duty of care, without



creating additional requirements on companies. It could be used to demonstrate that the government and OFCOM recognise the importance of the issue and could help build evidence and understanding to inform policy development.

310. There are clear limitations on this power. The Secretary of State is required to consult with OFCOM before using the direction making power. While it allows the Secretary of State to direct OFCOM to undertake a specific and limited task, it does not infringe on OFCOM's decision making powers or interfere with its regulatory responsibilities. The recommendations provided by the advisory committee would not be binding, and it would be at OFCOM's discretion to act on advice. This power would not prevent OFCOM from establishing other advisory committees should it wish to do so.

Justification for the procedure

311. There is no procedure for this power on the basis that the scope of the power is limited and the Secretary of State will need to consult OFCOM on use of this direction making power. An advisory committee established under this direction would have no power to set requirements on businesses, and OFCOM would be under no obligation to act on its advice.
312. The power is operational and non-legislative.

## **Clause 112(2) and (3): Secretary of State directions in special circumstances**

**Power conferred on:** Secretary of State

**Power exercised by:** Directions

**Parliamentary procedure:** None

### Context and purpose

313. If the Secretary of State has reasonable grounds for believing that circumstances exist that present a threat to the health or safety of the public, or to national security, the Secretary of State will be able to give specific directions to OFCOM to deal with that threat by directing OFCOM's media literacy activity and requiring OFCOM to give a public notice statement to service providers. The power in this clause ensures that the regulatory framework can respond to future threats.
314. Under subsection (2), the Secretary of State may give OFCOM a direction to give priority for a specified period to specified objectives designed to address the threat presented to the health or safety of the public, or to national security, in exercising their media literacy functions (under section 11 of the Communications Act 2003). It is expected that in such a scenario, OFCOM would direct media literacy priorities as it sees fit. This power will provide the Secretary of State with the ability to ensure that OFCOM is addressing threats to online safety. The Secretary of State must consult with OFCOM before giving the direction.
315. Under subsection (3), the Secretary of State may give OFCOM a direction requiring OFCOM to give a public statement notice to a specified provider of a regulated service, or providers of regulated services generally. This is a notice requiring a provider of a regulated service to make a publicly available statement, by a date specified in the notice, about steps the provider is taking in response to the threat presented to the health or safety of the public, or to national security. For example, in the event that there is concern about the impact of social media on societal polarisation and a growing risk of public disorder as a result, a provider of a regulated service would be required by OFCOM to make a publicly available statement about the steps they are taking in response to this threat.
316. The Secretary of State may vary or revoke a direction given under both subsections. If the Secretary of State varies or revokes a direction given under subsection (4), OFCOM may, in consequence, vary or revoke a public statement notice that it has given by virtue of the direction.

### Justification for the power

317. This power ensures that the framework is equipped to respond to future threats in circumstances where there is a threat to the health or safety of the public, or to national security, for example where there may be an increased risk of certain types of disinformation and misinformation proliferating online.
318. For example, a coordinated disinformation campaign attempting to undermine the efficacy of vaccines would constitute a threat to the health or safety of the public. This would be addressed, primarily, through the duty of care. This power will support the duty of care by ensuring the Secretary of State has the option to ensure that OFCOM

is taking steps to reduce the negative impacts of particular types of disinformation and misinformation.

319. In both subsections, “specified” means specified in the direction. Providing the Secretary of State with discretion as to how to define those terms when directions are made ensures that any directions are proportionate, targeted and effective.
320. There are clear limits to the use of this power. Both directions provided under this section are limited powers which do not affect the fundamental principles of the regulatory framework. The Secretary of State must consult with OFCOM before giving the direction. The Secretary of State can direct OFCOM to give priority only for a specified period to specified objectives regarding OFCOM’s duty to promote media literacy.
321. Further, the Secretary of State must publish the reasons for giving a direction in circumstances where there is a threat to the health or safety of the public under subsection (2) or (3), providing oversight and transparency. There is an exception to the requirement of publishing the reasons for giving a direction where it relates to a threat to national security.

#### Justification for the procedure

322. There is precedent in section 132 of the Communications Act 2003 for the conditions specified for the use of this power, where the Secretary of State has reasonable grounds for believing that circumstances exist that present a threat to the health or safety of the public, or to national security. This procedure is proportionate because the power does not alter the regulatory framework and does not place significant duties or expectations on either companies or the regulator.
323. All directions created under this section must be published. This power requires close engagement with OFCOM.

## **Clause 113(1): Secretary of State guidance**

**Power conferred on:** Secretary of State

**Power exercised by:** Guidance

**Parliamentary procedure:** Must be laid before Parliament

### Context and purpose

324. This clause will enable the Secretary of State to give guidance to OFCOM about OFCOM's exercise of its functions under the Bill, and its functions and general powers under the Communications Act 2003 including its functions relating to media literacy under section 11 of the Communications Act. Before issuing, revising or replacing the guidance, the Secretary of State must consult OFCOM. The guidance must be issued as one document and will not contain guidance on fees made under clause 54. The Secretary of State will be able to revise or replace the guidance but no more than once every three years, unless agreed between the Secretary of State and OFCOM or if the guidance needs to be corrected because of an amendment to a provision of this Bill or section 11 of the Communications Act 2003 (media literacy).

### Justification for the power

325. This power allows the Secretary of State to provide guidance to OFCOM on carrying out its statutory functions in order to comply with the Online Safety legislation. This guidance must be aligned with the Online Safety legislation and any other existing legislative requirements on OFCOM.

326. Delegation is necessary because, as this is a new regulatory regime, this will allow the Secretary of State to provide clarity to the regulator and others by setting out how they expect OFCOM to carry out its statutory functions in order to comply with the legislation. The legislation will set a clear regulatory framework and this guidance will not create any additional requirements. However, should it be needed, it will allow for further information to be provided on specific areas to guide OFCOM in exercising its functions. A similar power exists under section 4(5)(a) and section 4(5B) of the Railways Act 1993.

### Justification for the procedure

327. This power is restricted in its frequency and impact, and requires close engagement with OFCOM.

328. The Secretary of State must lay the guidance (including revised or replacement guidance) before Parliament and must publish the guidance (and any revised or replacement guidance). In general, it is not considered appropriate for any type of Parliamentary scrutiny to apply to this guidance because it concerns administrative and operational matters and is not legislative in character.

329. The primary legislation will state only that OFCOM must have regard to the guidance when exercising any functions to which the guidance relates.

## **PART 7: GENERAL AND FINAL PROVISIONS**

### **Clause 140(2) and (5): Commencement**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** None

#### Context and purpose

330. This clause deals with the commencement of the provisions of the Bill. It provides that a number of provisions, listed in subsection (1), will come into force when this Act is passed. The remaining provisions will come into force on a day set out by the Secretary of State through regulations. These can be different days for different provisions.
331. Subsection (4) provides further specification for the commencement of two clauses. It sets out that the clauses relating to the requirement to name a senior manager (clause 71) and senior manager liability (clause 73) may not be commenced before the publication of the report on the outcome of the review required by clause 115.
332. Subsection (5) further provides that the Secretary of State may by regulations make transitional or saving provision in connection with the coming into force of any provision of the Bill.

#### *Senior Manager Liability and the Secretary of State's Review*

333. This legislation includes a deferred power for the Secretary of State to introduce criminal offences for named senior managers of in scope service providers who fail to comply with information requests from OFCOM. Prompt and accurate provision of information from service providers will be crucial in order for OFCOM to assess the efficacy of the regulatory framework, and how best to apply it to ensure the safety of users. These deferred offences will help further deter providers from failing to comply with OFCOM's information requests (alongside OFCOM's other enforcement powers). Clause 71 sets out how senior managers are named and clause 73 sets out the offences which they will be made liable for.
334. These clauses cannot be commenced until the Secretary of State's review has been undertaken and the report published. This will ensure that they can only be commenced on the basis of sufficient evidence and that in scope service providers have adequate clarity about when the offences may come into force.
335. Clause 115 provides that the Secretary of State must review the operation of (a) the regulatory framework and (b) section 11 of the Communications Act 2003 (OFCEM's media literacy functions insofar as they relate to online safety matters). The review must consider the effectiveness of the Online Safety regime, including among other things OFCEM's information gathering and enforcement powers and whether it would be appropriate to commence clause 71. The review must be carried out within two - five years of Part 2 of the Act coming into force, and cannot be carried out earlier or later than that. Following the review, the Secretary of State must prepare and publish a report on its outcome.

336. In carrying out the review, the Secretary of State will be required to consult with OFCOM and any other persons they consider appropriate. Once that review is complete, clauses 71 and 73 may be commenced.

#### Justification for the power

337. A power is needed to commence those provisions which do not come into force on the day on which the Act is passed.

338. Having the power to make senior managers responsible for failures relating to these requests will help drive a culture of engagement and collaboration with OFCOM in respect of information requests and also with the broader framework.

339. An important area of responsibility will be making sure the regulator has access to accurate and timely information. This will be crucial to allow the regulator to understand how the duty of care is being met and where there is risk of harm online. The government is, therefore, targeting the senior manager sanction at this key element of the regime. This approach will also help to ensure senior managers are clear about what is expected from them and help drive a compliance culture.

340. Recognising industry concerns about potential negative impacts on the attractiveness of the United Kingdom tech sector, the power to commence the senior manager liability offences will be deferred for at least two years after the regulatory framework comes into effect. The decision to commence the offences will be subject to a review of the impact of the framework, which includes an assessment of the suitability of commencing the offences. The offences will be a last resort, only to be used if providers have failed to meet their information sharing responsibilities. This approach balances industry concerns with many stakeholders' support for the proposal as a way to drive culture change.

#### Justification for the procedure

341. Commencement regulations will be made by statutory instrument. No Parliamentary procedure is considered necessary, given that the detail of the provisions to be commenced would already have been considered by Parliament during the passage of the Bill.

342. The power to commence clauses 71 and 73 is also exercisable by statutory instrument, and the commencement of these particular offences will, on the face of the Bill, be deferred for at least 2 years from the commencement of the Bill. As above, no Parliamentary procedure is considered necessary given that the detail of the provision will be considered during the passage of the Bill. The report on the outcome of the Secretary of State's review has to be laid before Parliament before clauses 71 and 73 can be commenced.

343. Accordingly, the Secretary of State will be able to consider the merits of bringing the senior manager liability offences into force. The procedure is limited in scope to commencing the offences. It is considered that no further Parliamentary procedure is necessary, given that the details of the provisions to be commenced would already have been considered by Parliament during the passage of the Bill.

## **SCHEDULE 4: CATEGORIES OF REGULATED SERVICES: REGULATIONS**

**Power conferred on:** Secretary of State

**Power exercised by:** Regulations

**Parliamentary procedure:** Negative

### Context and purpose

344. The Bill creates different categories of regulated services which will have additional duties imposed upon them. OFCOM will be under a duty to establish and maintain a register of these particular categories of regulated services with one part for each of the following (see clauses 59 and 60):
- user-to-user services meeting the Category 1 threshold conditions;
  - search services meeting the Category 2A threshold conditions;
  - user-to-user services meeting the Category 2B threshold conditions.
345. Schedule 4 requires the Secretary of State to make regulations to specify the threshold conditions that a regulated service must meet to be included in the relevant part of the register.
346. Paragraph 1(1) of Schedule 4 requires the Secretary of State to specify, through regulations, the precise conditions relating to a service's number of users and functionalities that must be met in order for a regulated service to be designated as a "Category 1 service". In making these regulations, the Secretary of State must take into account the likely impact of the number of users of a service, and its functionalities, on the level of risk of harm to adults from content that is harmful to adults disseminated by means of the service.
347. In practice this means that those regulated user-to-user services with the largest audiences and high-risk features will be designated as "Category 1 services" and therefore providers of such a service will be subject to additional duties in respect of content that is harmful to adults on their service. These include, for example, the duty to assess and identify content that is harmful to adults on their service, a duty to specify, in a clear and accessible way, in their terms of service how such content is to be dealt with by the service provider and to produce for OFCOM annual transparency reports. Category 1 service providers will also have duties to protect journalistic content and content of democratic importance.
348. Paragraph 1(2) requires the Secretary of State to specify, through regulations, the precise conditions relating to a search service's number of users and any other factors the Secretary of State considers relevant that must be met in order for a regulated search service to be designated as a "Category 2A service". Similarly, paragraph 1(3) requires the Secretary of State to make regulations specifying the conditions (in relation to the service's number of users, functionalities and any other factors the Secretary of State considers relevant) that must be met for a regulated user-to-user service to be designated as a "Category 2B service". Category 2A and 2B services will be under the additional duty to prepare annual transparency reports for OFCOM. Such reports will include, for example, information about the steps the service provider is taking in relation to illegal content on their services.

349. The regulations will also specify how a service may count as meeting the relevant threshold conditions, such as by meeting the conditions in any specified combination. However, this is subject to the rule that at least one specified condition about a number of users and at least one condition about functionality must be met for Category 1 and 2B services, and that at least one specified condition about number of users must be met for Category 2A services: see paragraph 1(4).
350. Prior to making regulations in respect of Category 1 services, OFCOM must carry out research into how the number of United Kingdom users of user-to-user services, and the functionalities offered by user-to-user services, affect the dissemination of content that is harmful to adults on those services (paragraph 2(2) of Schedule 4). Before making regulations in respect of Category 2A services, OFCOM must carry out research into the prevalence of illegal content and content that is harmful to children presented via the search service, the numbers of users of such services and such other factors as it considers relevant to the Category 2A threshold conditions. Before specifying Category 2B threshold conditions via regulations, OFCOM must carry out research into the dissemination of illegal content and content that is harmful to children and adults via regulated user-to-user services, the number of users and functionalities of user-to-user services and any other factors that OFCOM considers relevant to the specifying of Category 2B threshold conditions.
351. OFCOM must then provide advice to the Secretary of State, based on its research. This advice must make a recommendation on the provisions to be made through the regulations (paragraph 2(5) to Schedule 4), and must be published. In respect of Category 2A and 2B threshold conditions, such advice may include advice that the regulations should include another factor in addition to number of users (and functionalities for Category 2A), and what that other factor should be. Although the Secretary of State does not have to follow this advice, this research period will ensure that the Secretary of State has evidence and justification to inform the making of regulations.
352. The Secretary of State must then make regulations. If the regulations include provision which differs in any material respect from the provisions advised by OFCOM, the Secretary of State must publish a statement explaining why they have departed from that advice (paragraph 2(8) to Schedule 4).
353. After the regulations are made, OFCOM will be required to assess services which it considers are likely to meet the Category 1, 2A or 2B threshold conditions set out in the regulations against those threshold conditions, and to establish a register of Category 1, 2A and 2B services (see clause 59). Services become subject to Category 1, 2A or 2B duties by virtue of being added to the relevant part of the register established under clause 59.
354. The regulations may be amended or replaced by further regulations but no amendment or replacement regulations can be made until OFCOM has carried out further research and provided advice to the Secretary of State based on its research. Such research may be initiated by OFCOM, or by the Secretary of State (paragraph 3(4) to Schedule 4). After regulations are amended or replaced, OFCOM will have to assess services which it considers are likely to meet the new Category 1, 2A or 2B



threshold conditions against the new threshold conditions, and to make any necessary changes to the register (subsections (1), (2) and (3) of clause 60).

#### Justification for the power

355. This power is central to establishing the regulatory regime. The differentiated approach - which places additional duties on the highest-risk services - is essential to making the regime effective and proportionate. Only providers of services which meet the Category 1 threshold conditions will be subject to additional duties around legal content which is harmful to adults, transparency reporting, and journalistic protections. Likewise, only those services which meet the Category 2A and 2B threshold conditions will be so designated and their providers subject to the additional duty on transparency reporting.
356. Setting thresholds in primary legislation could quickly become outdated. This could, for example, result in high-reach, high-risk services remaining free of Category 1 regulatory duties - which would negatively impact the effectiveness of the new regime. Conversely, it could result in low-reach and/or low-risk services remaining subject to Category 1 regulatory duties unduly - which would create disproportionate regulatory burdens.
357. Setting the threshold conditions through secondary legislation will deliver increased flexibility and ensure the process is responsive to technological change, changes in people's use of regulated services, and trends related to online harms as well as responsive to the service it regulates. As technologies and user-patterns change, it is essential that the thresholds for the categories of services can be modified and added to.
358. Furthermore, the government considers it essential for the setting of threshold conditions to be informed by independent evidence and advice. That is why regulations can only be made after OFCOM has provided the Secretary of State with research and advice.
359. Numerous safeguards have been built in to ensure this power is used fairly, transparently and proportionately. Specifically:
- the power can only be exercised - both for the first making of regulations and future amendments or replacements - after OFCOM has provided research and advice to the Secretary of State (paragraph 2(11) and sub-paragraphs (1), (2) and (3) or paragraph 3 of Schedule 4).
  - This research and advice will be published, subject to confidentiality requirements (paragraphs 2(7), 3(7) and 4 of Schedule 4).
  - The Secretary of State will be required to publish a statement if they make, amend or replace regulations which differ materially from OFCOM's advice, or if they decide not to amend or replace regulations in spite of advice from OFCOM to do so (paragraph 2(8), 3(8) and (9) of Schedule 4). Such a statement must be published no later than the time at which the regulations to which the statement relates are made, and in such manner as the Secretary of State considers appropriate for bringing it to the attention of persons who may be affected by it (paragraph 2(9), and sub-paragraphs (10)

and (11) of paragraph 3 of Schedule 4).

360. Given the fast-moving technological landscape in which the threshold conditions will be set, it appears sensible to specify such conditions in secondary legislation. The Bill also includes various safeguards pertaining to the use of regulations to set threshold conditions, in order to provide transparency regarding the decision-making process, in particular where there is any departure from OFCOM's advice.

Justification for the procedure

361. By virtue of clause 132(5)(f), regulations made under paragraph 1 of Schedule 4 are subject to the negative procedure.
362. The negative procedure is considered appropriate because, as described above, there are significant safeguards built into the regulation-making process in Schedule 4 of the Bill. Furthermore, use of the negative procedure will ensure that the register of Category 1, 2A and 2B services can be established swiftly following provision of research and advice by OFCOM, whilst also allowing for appropriate Parliamentary scrutiny of the regulations. This is important to balance giving service providers certainty and clarity, and enabling rapid changes if new, high-risk functionalities emerge, with the need for effective Parliamentary oversight.

**Department for Digital, Culture, Media and Sport**  
**12.05.2021**