

Online Harms Government consultation response

General points

- The online harms legislation will introduce a new duty of care for online companies to their users. Companies within scope of the duty of care will be legally obliged to identify, remove, and limit the spread of illegal content.
- A number of topics classed as “priority harmful content” will be set out in secondary legislation and the Law Commission is also currently carrying out a review which might create new offences in the area of abusive and offensive communication.
- A broad range of services that host user generated content and/or facilitate interaction between users, as well as search engines, will be in scope of the duty of care. DCMS Minister Oliver Dowden has stated that services which use end-to-end encryption will still have to comply with the duty of care.
- “Infrastructure service providers” which are services that only have a functional role in enabling online activity (such as ISPs, email, App stores and browsers) will not be in scope but are expected to take voluntary measures (to be set out in separate guidance) and support the regulator with enforcing the new regime.
- Ofcom will publish Codes of Practice to set out how a company must comply with the duty of care and will also have a two tier system of powers:
 - Level One-Ofcom will have the power to make it less commercially viable for a non-compliant company to provide services to UK users e.g. enforcing restrictions through a court order.
 - Level Two (serious failures of the duty of care)-Ofcom can block a non-compliant company’s services (with the help of ISPs) from being accessible in the UK.
- The Online Safety Bill, which will set out the regulatory framework for online harms, will be ready in 2021. It will then need to pass through Parliament to become law at a later stage.

Definition of harm

- The legislation will set out a general definition of harmful content and activity.
- A limited number of priority categories of harmful content which the Government believe pose the greatest risk to users will be set out in secondary legislation. This includes priority criminal offences such child sexual exploitation and abuse, priority categories that affect children such as pornography and, priority categories that are deemed harmful to adults. This might include types of misinformation and disinformation, but the list will be determined by Government and the regulator.
- The Government has also requested the Law Commission to look into how criminal law can address the encouragement or assistance of self-harm and a range of other communications defences.
- A number of harms will be excluded from scope where there are existing Governmental initiatives in place. The following will be excluded from scope:
 - Harms resulting from breaches of intellectual property rights
 - Harms resulting from breaches of data protection legislation
 - Harms resulting from fraud
 - Harms resulting from breaches of consumer protection law
 - Harms resulting from cyber security breaches or hacking

- The online harms regulatory framework will not aim to tackle harm occurring through the dark web.

The duty of care

- The duty of care consists of two parts. The first relates to the duties on companies and the second relates to the regulator's duties and functions.
- The legislation places a number of businesses (see below) within scope of the duty of care. All businesses subject to the duty of care must tackle illegal content on their services and protect children from harmful and inappropriate content. In addition, the largest or most significant companies (classified as Category 1) will also need to take action against content that is regarded as harmful to adults.
- The Government say this two-tier approach aims to prevent disproportionate burdens on small businesses whilst ensuring those with the largest online presence are held to account.
- Unlike the initial Government response, the Government is excluding many low-risk businesses from the duty of care. These include:
 - reviews and comments on products and services directly delivered by a company.
 - 'below the line comments' on articles, news publishers' sites and blogs.
- As well as the duty of care, those in scope will also have additional duties such as providing mechanisms to allow users to report harmful content or activity and to appeal the takedown of their content. Businesses in Category 1 will be required to publish transparency reports containing information about the steps they are taking to tackle online harms on those services.

Which companies will be in scope of the duty of care?

- At its most basic level the duty of care will fall on companies which host the following services:
 - user-generated content which can be accessed by users in the UK. Not just based in the UK but accessed by the UK.
 - Facilitate public or private online interaction between service users (messaging), one or more of whom is in the UK. Excluding emails or Telephony (see below).
- The new regulatory framework will take a tiered approach with the majority of services in 'Category 2 services'.
 - Category 2 Services "will need to take proportionate steps to address relevant illegal content and activity, and to protect children".
 - Category 1 Services are classed as high risk high-reach services and will be required to take action in respect of content or activity on their services which is legal but harmful to adults. These companies will also be required to publish reports on their efforts to combat harms included in the new framework.

Which companies will be exempt from the duty of care?

- Infrastructure Service Providers: Services which play a functional role in enabling online activity, such as ISPs will be exempt. The Government is using the term "Infrastructure service providers" (see below) to identify services such as these.

- Business Services: Online services which are used internally by organisations - such as intranets, customer relationship management systems, enterprise cloud storage, productivity tools and enterprise conferencing software - will also be excluded from scope.
- Email and Telephony: Email communication, voice-only calls and SMS/MMS remain outside the scope of legislation.
- Education Institutions: Online services managed by educational institutions, e.g. platforms used by teachers also remain out of scope.
- Journalism: Content and articles produced and published by news websites on their own sites, and below-the-line comments published on these sites, will not be in scope of legislation.
- It is worth noting that there are a number of inconsistencies with the terminology used to describe those who are exempt from the duty of care (e.g. "Infrastructure Service Providers" and "Internet Infrastructure Providers"). However, the general rule is that the exemption relates to business services.

Infrastructure service providers continued

- Although ISPs are not within scope of the duty of care, the new legislation groups ISPs within the term "Infrastructure service providers". This includes:
 - ISPs
 - Virtual private networks
 - Browsers
 - Web-hosting companies
 - Content delivery service providers
 - Device manufacturers
 - App stores
 - Enterprise private networks and;
 - Security software
- The Government say ISPs still have an important role to play in combatting serious harms such as child sexual exploitation.
- The Government will publish voluntary best practice guidance for infrastructure service providers to set out where their actions can help identify and prevent child sexual exploitation and abuse. This guidance will be separate from the online harms regime.

Age Verification and the new online harms regime

- The Government maintains that most adult content websites that are accessible to children will be in scope of the new regime which also brings in adult content that is shared on social media websites.
- Unlike as in the cancelled age verification proposals under the Digital Economy Act, companies in scope will not be required to use specific technology, but it is expected that that regulator will require relevant companies to have age verification or assurance measures in place.

Safety by design

- Alongside the bill, the government will develop a safety by design framework that will provide guidance on how to build safer online products and services from the outset. It will encourage

companies to actively consider the safety implications of their design decisions and will be tailored to support companies with a range of digital skills and subject knowledge.

- The safety by design framework will contain:
 - High level design principles to guide product design and development work;
 - Practical guidance for implementing safer design choices and effective safety features;
 - Examples of best practice and case studies on service design.
- It is currently not clear to what degree companies that are not in scope will be expected to follow the safety by design guidance.

Who will enforce the framework?

- Ofcom has been officially named as the new online harms regulator.
- They will publish codes of practice which will set out the steps a company should take to comply with the law. This could include steps to make services safer by design.
- Codes of practice will also set out expectations for reporting and redress mechanisms which companies must implement. These will cover harmful content and activity, infringement of rights (such as over-takedown), or broader concerns about a company's compliance with its regulatory duties.
- Ofcom will have a duty to consult interested parties on the development of the codes of practice.
- If companies don't meet their responsibilities, Ofcom will be able to give fines of up to £18m or 10% of global annual turnover, whichever is the higher, or stop services from operating.
- The legislation will also impose criminal sanctions on senior managers that fail to comply with information requests from the regulator.
- As well as these measures, Ofcom will have the two level system of powers:
 - Level One-Ofcom will have the power to make it less commercially viable for a non-compliant company to provide services to UK users. If needed, Ofcom can enforce restrictions through a court order.
 - Level Two (serious failures of the duty of care)-Ofcom can block a non-compliant company's services from being accessible in the UK. Key internet infrastructure providers such as ISPs, browsers and app stores will be asked to withdraw the company's services.
- Ofcom will cover the costs of running the regime from industry fees. However, only companies above a threshold based on global annual revenue will be required to notify and pay the fees. Although the threshold is yet to be announced, this will mean that the majority of in-scope companies will be exempt from paying a fee.
- It is worth noting that the Government response does not specify whether the industry fees will come from companies within scope of the duty of care. Although we assume this to be the case, we will continue to monitor this point.

The Secretary of State for DCMS will undertake a review of the effectiveness of the regime 2-5 years after entry into force. They will produce a report which will then be laid in Parliament and Parliament will have an opportunity to debate its findings.

Appeals

- Companies and individuals will be able to appeal decisions through judicial review via the High Court. The Government will also create an additional statutory mechanism of review by designating an existing statutory body to review appeals.

Next steps

- The Online Safety Bill, which will set out the regulatory framework for online harms, will be ready in 2021. It will then need to pass through Parliament to become law at a later stage.
- Codes of Practice to be published by Ofcom.
- Government to publish separate voluntary best practice guidance for infrastructure service providers (including ISPs).
- The Government will publish a 'One Stop Shop' with practical guidance for companies (particularly smaller ones) on how to protect children online. It will be designed as an interim tool to support businesses ahead of the regulatory framework.
- As previously announced by Minister for Digital Infrastructure Matt Warman MP, work is underway on legislation concerning the harms that can arise from 'smart', Internet of Things (IoT) or 'internet-connected' devices. This will be introduced "as soon as parliamentary time becomes available".

Useful links

- [Online Harms White Paper: Full Government response to the consultation](#)
- [Online harms: interim codes of practice](#)
- [Fact sheet — Online Harms Full Government Response](#)
- [Ofcom response to announcement](#)
- [DCMS Press release](#)