

Overview of Illegal Harms

What is this chapter about?

This chapter summarises the main duties the Act creates. The Act gives online service providers a range of duties. The main ones relating to illegal content are for providers to assess the risk of harm arising from illegal content or (for a user-to-user (U2U) service) illegal activity on their service, and take proportionate steps to manage and mitigate those risks.

The Act lists over 130 ‘priority offences’. U2U service providers will need to take steps to prevent users encountering content amounting to one of these offences. Search service providers will need to minimise the risks of users encountering content that amounts to one of these offences. U2U and search service providers only need to take actions that are proportionate. Where appropriate, we have grouped these priority offences into broad groups such as terrorism, hate offences, child sexual exploitation and abuse, and fraud and financial offences.

Providers also have duties in relation to non-priority illegal content of which they are aware.

Summary of chapter

- 1.1 The Online Safety Act (the Act) gives service providers a range of new duties in relation to illegal content. These duties set out requirements for providers to assess and manage the risks arising from the offences set out in the Act. This chapter outlines:
- a) what ‘illegal content’ is for the purposes of these duties;
 - b) the relevant offences in the Act, consisting of priority offences (including inchoate offences) and ‘relevant non-priority’ (or ‘other’) offences;
 - c) how these offences are relevant to service providers’ duties in relation to the: risk assessment duties and illegal content safety duties;¹ and
 - d) service providers’ duties relating to terms of service (user-to-user or U2U services) and publicly available statements (search services).

The definition of ‘illegal content’

- 1.2 ‘Illegal content’ is a new concept created by the Act, defined as ‘content that amounts to a relevant offence’.² In this chapter we set out what the Act defines to be a ‘relevant offence’.
- 1.3 Section 192 of the Act sets out how, (where they are required to do so), providers of services should make judgements as to whether content is illegal content. The approach set out in the Act is such that ‘illegal content judgements’ are to be made if the service provider has ‘reasonable grounds to infer’ that the content in question amounts to a

¹ In relation to illegal content judgments, the Act creates additional duties for Category 1 services including duties protecting news publisher content and duties about fraudulent advertising. We will be consulting on the requirements of the Act for Category 1 services at a later date. If we need to amend this guidance and/or chapter we will consult on proposed amendments (if required) at the time.

² Content may consist of ‘certain words, images, speech or sounds’. A full definition of illegal content may be found in section 59 of the Act.

relevant offence. The service must make this judgement using all 'relevant information that is reasonably available' to it. These two principles are more fully explained in our Illegal Content Judgements Guidance ('the ICJG'). This guidance is designed to help providers better understand what illegal content is and how they should make judgements about that content.

- 1.4 'Reasonable grounds to infer' is not a criminal threshold, and there are no criminal implications for the user if their content is judged to be illegal content against this threshold. The provider is not obliged to report illegal content to law enforcement except where the content in question is subject to requirements to report Child Sexual Exploitation and Abuse (CSEA) material to the National Crime Agency (NCA) in the UK, as set out in section 66 of the Act. More information on 'reasonable grounds to infer' and its relationship to 'illegal content' is provided in the Illegal Content Judgements Guidance.
- 1.5 Providers of services need to understand what 'illegal content' is to carry out both the risk assessment duties and the safety duties.

Relevant offences in the Act

- 1.6 The Act sets out the 'relevant offences' in scope of the criminal law in the UK for the purposes of identifying 'illegal content'. Under the Act, the relevant offences comprise:
 - a) A list of priority offences; and
 - b) 'Non-priority' (or 'other') offences.
- 1.7 The specific offences included in the Act, and whether they are defined as priority or 'other' offences has been decided by Parliament. This is not a matter over which Ofcom has any discretion.
- 1.8 The offences exist as a matter of UK criminal law. It is important to note that most of the offences are not framed in terms of online content or the online world. Many offences were first drafted with reference to offline acts only, and their relationship to online content and behaviour is an area in which Ofcom continues to build a body of evidence.
- 1.9 Some of the relevant offences are relatively straightforward. In these cases, it is easy to see how they can be committed by a user posting a single item of content. Others, however, are more complex. They may be more about a series of interactions between users, or may involve behaviour that takes place partly offline, or may involve thinking about the nature, identity or age of one or more of the users concerned.
- 1.10 The way in which the UK legal system works means that the relevant offences are defined in an Act of Parliament (legislation) and may be further elaborated or defined in the courts as 'case law'. Where case law has an important impact upon the framing of an offence, Ofcom's ICJG aims to set this out. UK criminal legislation and case law are both of importance when understanding the offences in question.
- 1.11 However, although providers should be aware of the impacts of UK criminal legislation and case law as appropriate when complying with their illegal content duties under the Act, they are not required to make findings to a criminal standard or to make decisions that the law has been broken in any given case. Nor will Ofcom, as regulator, make any such legal judgement as to whether an offence has taken place.

- 1.12 The full definitions of the offences are far more detailed, nuanced and complex than any summary can convey. In the final part of this chapter, we explain how the regulatory documents we are publishing with this statement will help explain to providers what the offences below actually are, which will help providers better understand how they can make judgements that content is illegal for the purposes of the Act.
- 1.13 At the time of our consultation on illegal harms, some of the priority offences were not yet in force. All priority offences are now in force and the final regulatory products published alongside our Statement therefore include all relevant priority offences.

Priority offences

- 1.14 The priority offences are set out in Schedules 5 (Terrorism offences), 6 (CSEA offences) and 7 (Priority offences) of the Act.
- 1.15 These are the most serious offences covered by the Act, as defined by Parliament, and all providers will need to act to prevent users encountering content amounting to one of these offences. In total there are over 130 priority offences in scope of the Act. We have grouped these into 17 broad categories which we set out in Table 1.1 below.
- 1.16 Within these broad categories lie a large number of priority offences across three different jurisdictions: England and Wales, Scotland, and Northern Ireland. Many offences also overlap with one another, and one piece of content or one user's activity may have the potential to amount to multiple offences.

Table 1.1: Priority offences by category

Offence category	Individual offence groups
Terrorism	• A series of offences relating to 'proscribed organisations' • Offences related to information likely to be of use to a terrorist • Offences relating to training for terrorism • Other offences involving encouraging terrorism or disseminating terrorist materials • Miscellaneous, more specific terrorism offences • Offences relating to financing terrorism
Harassment, stalking, threats and abuse offences	• Offences relating to threats • Offences relating to abuse and insults • Other content likely to amount to harassment offences (including stalking)
Coercive and controlling behaviour	• Coercive and controlling behaviour offence
Hate offences	• Stirring up of racial hatred offence • Offence of stirring up of hatred on the basis of religion or sexual orientation

Intimate image abuse	• Offences relating to non-consensual disclosure of intimate images (intimate image abuse)
Extreme pornography	• Possession of extreme pornography offence
Child sexual exploitation and abuse (CSEA)	• Offences relating to the making, showing, distributing or possessing of an indecent image or film of a child • An offence of possession of a prohibited image of a child • Linking to or directing a user to child sexual abuse material (CSAM) • An offence of possession of a paedophile manual • An offence of publishing an obscene article • Sexual activity offences (potential victim under 16) • Adult to child offences (potential victim under 16) • 'Arranging' together with 'assisting', 'encouraging' and 'conspiring' offences which could take place between adults and/or children (potential victim(s) under 16) • Offences concerning the sexual exploitation of children and young people aged 17 or younger
Sexual exploitation of adults	• Causing or inciting prostitution for gain offence • Controlling a prostitute for gain offence
Unlawful immigration	• Offences relating to illegal entry into the UK • Facilitating unlawful immigration to a member state or to the UK
Human trafficking	• Human trafficking offences
Fraud and financial offences	• Offences relating to false claims to be authorised or exempt for the purposes of carrying on regulated activity • Fraud by false representation • Fraud by abuse of position and participating in fraudulent business carried on by sole trader etc. • Other financial services offences • Fraud related to misleading statements or impressions about investments • Offences related to articles for use in fraud
Proceeds of crime	• Offences related to proceeds of crime
Assisting or encouraging suicide	• Assisting or encouraging suicide offence

Drugs and psychoactive substances	• The unlawful supply, offer to supply, of controlled drugs • The unlawful supply, or offer to supply, of articles for administering or preparing controlled drugs • The supply, or offer to supply, of psychoactive substances • Inciting any offence under the Misuse of Drugs Act 1971
Weapons offences (knives, firearms, and other weapons)	• Offences relating to firearms, their parts, ammunition, including air guns and shotguns • Offences relating to 3D printing instructions for guns and gun parts • Knives offences • ‘Offensive’ weapons offences • Imitation firearms offences
Foreign interference	• Foreign interference offence
Animal welfare	• Offence of causing unnecessary suffering to an animal

1.17 The ‘Priority offences by category’ table illustrates how we have chosen to categorise the priority offences for the purpose of conducting risk assessments and relates to the offences as categorised in the Register of Risks ³. The priority offence categories in Table 1.1 vary slightly from how we have grouped the priority offences in other chapters, such as the Register of Risks or the Risk Assessment Guidance chapters. In the Register of Risks and the Risk Assessment Guidance we have instead separated some of the individual offence groups from the wider offence categories outlined in the table and we instead refer to 17 ‘**kinds of illegal harms.**’⁴ We have done this due to the different ways that these 17 ‘kinds of illegal harms’ manifest online.

Priority inchoate offences

1.18 Included in the list of priority offences are inchoate versions of all priority offences listed in Schedules 5, 6 and 7. Inchoate offences happen when someone is involved in another offence in a way which makes them guilty, without actually committing the offence themselves. For example, a person may ‘assist’ in a robbery if they drive the getaway car. They did not carry out the offence, but they were involved in it.

1.19 There is considerable overlap between the inchoate offences. The inchoate offences are:

³ The grouping of offences in the Register of Risk differs slightly from the groupings in the ICJG, due to the differing purpose of these regulatory products.

⁴ See the Register of Risks and the Risk Assessment Guidance for an overview of how we have grouped the priority offences.

- a) Conspiring (with one or more others) to commit an offence. A conspiracy is an agreement between two or more people to commit an intended offence (or one or more intended offences);⁵
- b) Encouraging (someone) to commit an offence. This overlaps with inciting, counselling or procuring and aiding and abetting the commission of a priority offence;
- c) Assisting (someone) to commit a priority offence. This overlaps with aiding and abetting the commission of a priority offence and, in the case of Scottish law, being involved art and part⁶; and finally
- d) Attempting to commit an offence. We are not aware of any circumstances in which this could take place online, and so we do not talk about it further in this guidance.

Relevant non-priority offences ('other' offences)

- 1.20 In addition to the priority offences set out above, service providers also have duties to swiftly take down content where this amounts to a relevant non-priority offence which meets certain criteria. In section 59(5) to 59(6) of the Act these offences are referred to as 'other offences'. However, to avoid confusion between statutory 'other offences', which can give rise to illegal content, and offences, outside the scope of section 59(5)-(6), in this section we use the term 'relevant non-priority offences'.
- 1.21 The relevant non-priority offences are offences under UK law which are not priority offences under Schedules 5, 6 or 7 of the Act, where:
 - a) The victim or intended victim of the offence is an individual (or individuals);
 - b) The offence is created because of the Online Safety Act, another Act, an order of Council or other relevant instruments. The effect of this is that the offences created by the UK courts are not relevant offences, and offences created in the devolved Parliaments or Assemblies are only 'other' offences if certain procedures are followed in their making⁷;
 - c) The offence does *not* concern the infringement of intellectual property rights, the safety or quality of goods, or the performance of a service by a person not qualified to perform it; and
 - d) The offence is *not* an offence under the Consumer Protection from Unfair Trading Regulations 2008.

⁵ It should be noted that there is no offence of 'attempting to conspire', so a person trying and failing to engage in a conspiracy will not thereby generate any illegal content.

⁶ In Scottish law, the term 'art and part' is used to denote the equivalent of aiding and abetting an offence.

⁷ See section 59(5)(iii) of the Act.

How the offences are relevant to service providers' duties

- 1.22 Service providers have a number of duties in relation to these offences, which differ depending on whether the service is a U2U⁸ or search service⁹, and whether the offence is a priority or relevant non-priority offence. These duties can broadly be broken down into two categories:
- a) Duties to assess risks of harm arising on the service, otherwise referred to as the 'risk assessment duties'; and
 - b) Duties to manage and mitigate those harms, otherwise referred to as the 'illegal content safety duties'.

Offences and the risk assessment duties

- 1.23 The Act requires providers of services to assess risks of harm under their risk assessment duties. The risk assessment duties vary depending on whether a service is a U2U service or a search service. Identifying and managing risks requires providers to think about more than just content in isolation. For more information on providers' risk assessment duties, see Annex 5 of this consultation. However, for the purposes of understanding how the different offences are relevant to the different duties, we also summarise it briefly below.

U2U services

- 1.24 Providers of U2U services must consider the following factors in their assessment of risk:
- a) The risk of illegal content being present or disseminated on a service;
 - b) The risk of the service being used to for the commission a priority offence; and
 - c) The risk of the service being used for the facilitation of a priority offence. This refers to content or behaviour that is not necessarily illegal, but which facilitates a priority offence.
- 1.25 Service providers conducting risk assessments should note that such an assessment will not always result in being able to point with certainty to specific cases of illegal content, or actual instances of the service being used for the commission or facilitation of priority offences. Assessments of risk should be based on a reasonable assessment of how offences may manifest and therefore the likelihood of such content or activities being present on a service, rather than aimed at giving accurate indications of how much content exists in reality.¹⁰ As part of this assessment, providers should also consider the impact of illegal harm on users.
- 1.26 For example, romance fraud occurs when a person pretends to be romantically interested in another person for the purposes of obtaining money from them. The content they may generate would be a part of the deception carried out for the purposes of the fraud. A

⁸ A user-to-user or U2U service is an internet service by means of which content that is generated directly on the service by a user of the service, or uploaded to or shared on the service by a user of the service, may be encountered by another user, or other users, of the service.

⁹ A search service refers to services that are, or include, a search engine, which allows users to search more than one website or database.

¹⁰ There will be some likelihood of most illegal harms occurring on every service. The judgement that services need to make for the purpose of the risk assessment is how likely it is that any users might encounter illegal content, and how likely it is that the service might be used to commit or facilitate an offence. This should be based on the characteristics of the service and the evidence the service has collated.

service designed to enable users to contact one another, and chat romantically need not necessarily be focused on identifying specific examples of content amounting to romance fraud to identify a risk that such content or behaviour might exist on the service and present a risk to users given the nature, characteristics and functions of that service.

1.27 Another example of how a U2U service might be used to facilitate an offence might include a messaging service which enables adults to identify and contact children they do not know. It is of course not unlawful for an adult to contact a child they do not know, but where such contacts are enabled, this may facilitate the adult going on to abuse the child. Such use of a service to facilitate a crime may not in and of itself generate any illegal content (as defined by the Act), though it may lead to a risk of harm.

1.28 For more information, see the Risk Assessment Guidance.

Search services

1.29 Search *content* is defined in the Act as content that may be encountered in or via search *results* of a search service. Search *results* means content presented to a user of a search service by operation of the search engine in response to a search request made by the user.¹¹ Content is encountered ‘via’ search results if it is encountered because of interacting with search results, for example, by clicking on them. But it does not include subsequent interactions with a website located using a search engine, such as extra clicks.

1.30 Providers of search services have an obligation to conduct a risk assessment considering, among other things, the risk of individuals encountering illegal content in their search content, taking into account the way in which the search engine functions.

1.31 Unlike U2U services, providers of search services do not, however, have to consider the risk of the search service, or the search content that may be encountered on it, being used for the commission or facilitation of a priority offence.

Duties relating to relevant non-priority offences (U2U and search services)

1.32 As the above shows, service providers’ duties in relation to illegal content are not limited to the priority offences. However, in their risk assessments, providers must assess the risk of the 17 kinds of illegal harm separately. They are not required to assess each possible kind of ‘other’ illegal content separately. Nor do providers of U2U services have to assess the risk that their service will be used for the commission or facilitation of relevant non-priority offences. The risk assessment duties relating to relevant non-priority offences are therefore more high level.

1.33 Providers do, however, need to assess the risk of harm from relevant non-priority offences *appearing* on the service. As mentioned in the paragraph 1.32, this does not mean assessing the risk of every possible offence that is not a priority offence occurring on a service. However, if providers have evidence or reason to believe that other types of illegal harm that are not listed as priority offences in the Act are likely to occur on a service, then they will need to consider those in the risk assessment.

Safety duties about illegal content

¹¹ It should be noted that the following types of content are excluded from the Act’s definition of search content: paid-for advertisements; content on the website of a recognised news publisher; and content that records, reproduces or links to articles, written items or recordings produced by a recognised news publisher. For a full definition of ‘search content’ see section 57 of the Act.

- 1.34 The Act imposes a number of safety duties requiring service providers to manage and mitigate risks of harm from illegal content. We refer to these (as does the Act) as the ‘illegal content safety duties’.
- 1.35 A provider’s illegal content safety duties will vary depending on whether they are providing a U2U service or a search service, as set out in the tables in paragraph 1.44.

U2U services

- 1.36 Table 1.2 summarises the safety duties for providers of U2U services in relation to different types of illegal content. The duties are different for priority illegal content and relevant non-priority illegal content. Broadly they include:
- Duties to take or use proportionate measures relating to the design or operation of the service to prevent individuals from encountering priority illegal content and minimising the length of time that such content is present on the service;
 - Duties to take or use proportionate measures relating to the design or operation of the service to design and operate systems in a way which mitigates and manages the risks identified in the service provider’s risk assessment;
 - A duty to operate the service using proportionate systems and processes designed to swiftly take down (priority or non-priority) illegal content when they become aware of it (the ‘**takedown duty**’); and
 - A duty to take or use proportionate measures relating to the design and operation of the service to mitigate and manage the risk of the service being used for the commission or facilitation of a priority offence.
- 1.37 The safety duty also requires providers to include provisions in their terms of service specifying how individuals are to be protected from illegal content, and to apply these provisions consistently.¹² We explain these duties in more detail further in the chapter.

Table 1.2: The applicability of the illegal content safety duties depending on each type of offence for U2U services

	Priority offences	Relevant non-priority offences	Facilitation of a priority offence	Facilitation of a relevant non-priority offence
1: Take or use proportionate measures relating to the design or operation of the service to effectively mitigate/manage risk of service being used for commission/facilitation of an offence ¹³			✓	
2: Take or use proportionate measures relating to the design or operation of the service to prevent	✓			

¹² This duty requires U2U services to address terrorist content, CSEA content and other priority illegal content separately.

¹³ Section 10(2)(b) of the Act.

individuals from encountering [content which amounts to such offences] by means of a service¹⁴				
3: Take or use proportionate measures relating to the design or operation of the service to effectively mitigate/manage the risks of harm to individuals, as identified in risk assessment ¹⁵	✓	✓	✓	If relevant risk identified in risk assessment
4: Operate a service using proportionate systems and processes designed to swiftly take down [content which amounts to such offences] when service becomes aware of it ¹⁶	✓	✓		
5: Operate a service using proportionate systems and processes to minimise the length of time [content which amounts to such offences] is present on a service ¹⁷	✓			

Search services

- 1.38 Table 1.3 summarises the safety duties for search services in relation to different types of illegal content.
- 1.39 In addition to these duties, providers of search services must also “include provisions in a publicly available statement specifying how individuals are to be protected from search content that is illegal content” and must “apply the provisions of the statement consistently.”¹⁸

¹⁴ Section 10(2)(a) of the Act.

¹⁵ Section 10(2)(c) of the Act.

¹⁶ Section 10(3)(b) of the Act.

¹⁷ Section 10(3)(a) of the Act.

¹⁸ Section 27(5) and (6) of the Act.

Table 1.3: The applicability of safety duties depending on each type of offences, for search services

	Priority offences	Relevant non-priority offences	Facilitation of a priority offence	Facilitation of a relevant non-priority offence
1: Take or use proportionate systems and processes to effectively mitigate/manage the risks of harm to individuals [from such content] ¹⁹	✓	✓		
2: Operate a service using proportionate systems and processes to minimise the risk of individuals encountering [content which amounts to such offences] ²⁰	✓	✓*		
* Where the service has been alerted to the content by another person or become aware of it in any other way.				

Duties related to terms of service (U2U) and publicly available statements (search)

- 1.40 The relationship between a user and a service provider is governed by its contract with them. For a U2U service, this is set out in its terms of service or community guidelines. For a search service, this will consist of publicly available statements or its community guidelines. For combined services (where a U2U and search service are effectively combined) the contract may be set out in one or both formats.
- 1.41 Service providers are entitled to use their contract with their users to prohibit content on their service which is not illegal content under the Act. For example:
- A niche topic-based service would be entitled to moderate in a way to ensure that all posts were about the topic of the service;
 - A service would be entitled to meet its users' preferences by saying that, for example, sexual content or racially charged epithets are not permitted; and
 - A service would be entitled to manage the risk of spam by screening out references to investments.
- 1.42 More broadly, many service providers operate internationally and may wish to write terms of service or publicly available statements which (where possible) work for every country in which they operate.
- 1.43 The Act does not prevent this. If terms of service or publicly available statements prohibit broader categories of content than just 'illegal content' as defined in the Act, a service provider may conclude that there is no need for it to make illegal content judgements in relation to any specific items of content. Nonetheless, it will still need to comply with the duties in the Act which relate to illegal content.

¹⁹ Section 27(2) of the Act.

²⁰ Section 27(3)(a) and 27(3)(b) of the Act.

- 1.44 Conversely, if a service provider publishes a single globally applicable terms of service, and those terms of service do not prohibit all content which is illegal content in the UK, that provider will still need to apply UK definitions of 'illegal content' for its UK users, and protect its UK users from 'illegal content' no matter where in the world that content was uploaded or indexed.