



RESPONSE TO DSIT “ONLINE SAFETY ACT: SUPER COMPLAINTS ELIGIBILITY AND PROCEDURAL REQUIREMENTS” CONSULTATION

1. We welcome the opportunity to respond to the consultation on the Online Safety Act super complaints eligibility criteria and procedural requirements.
2. This response is from the Online Safety Act Network, in conjunction with the Molly Rose Foundation, and reflects inputs from other civil society partners with an interest in this area which may be also reflected in their individual organisational responses.
3. We are concerned that the effect of the eligibility criteria will significantly limit the number of expert organisations who might otherwise enter the super-complaints mechanism and that the impact of the procedural requirements on the number of super complaints that Ofcom can consider at any one time will further weaken the regime’s effectiveness.
4. Before going through these points in detail below, we remind DSIT that during the passage of the Online Safety Bill through Parliament the Government came under significant pressure to address what was seen to be a deficit in the regime regarding routes for user complaints, redress and alternative dispute resolution. Opposition amendments to introduce an ombudsman function were rejected by the Government in the House of Lords and much emphasis was placed on the importance of the super complaints mechanism as a substitute. For example, [DCMS Minister Lord Parkinson during Report stage](#) on 19 July 2023:

*Rather than creating a single advocacy body to research harms to children and advocate on their behalf, as the noble Lord’s amendment suggests, the Bill achieves the same effect through a combination of Ofcom’s research functions, the consultation requirements and the super-complaints provisions. **Ofcom will be fully resourced with the capacity and technological ability to assess and understand emerging harms and will be required to research children’s experiences online on an ongoing basis. [...]***

Alongside its own research functions, super-complaints will ensure that eligible bodies can make complaints on systemic issues, keeping the regulator up to date with issues as they emerge. This means that if Ofcom does not identify a systemic issue affecting children for any reason, it can be raised and then dealt with appropriately. Ofcom will be required to respond to the super-complaint, ensuring that its subsequent decisions are understood and can be scrutinised. Complaints by users will also play a vital role in Ofcom's horizon scanning and information gathering, providing a key means by which new issues can be raised.

5. It is our view, shared with others we have consulted with, that - as currently designed - the super complaint mechanism envisaged by the Government and agreed by Parliament will not be delivered. We urge DSIT to reconsider whose interests they are primarily serving - users, industry or the regulator - and redraft the proposals as we set out below before laying regulations.

Eligible entity criteria

Lack of “designation” and the consequent resource burdens on civil society and Ofcom

6. The proposals put forward for consultation do not follow the model in other super-complaint regimes of having a designation process for eligible bodies set out in regulations. (See annex for Police Service, Enterprise Act and Financial Services comparisons.) Instead, the eligibility criteria of an entity wishing to submit a super complaint will be assessed by Ofcom as a precursor to the admissibility of that entity's super complaint being assessed. This process will be repeated every time Ofcom receives a super complaint.
7. We are surprised that DSIT is not consulting on its decision not to follow the established procedure in other regimes. There are undoubtedly merits - in an area that is fast-moving and where harms and risks can often emerge rapidly - of fostering a flexible and fluid ecosystem of bodies who can trigger the super complaint mechanism should the need arise. But this is at odds with the potentially high thresholds being set by many of the criteria, especially in combination, which we discuss below. Additionally, this approach will require a significant investment in resources from civil society organisations to prove their eligibility *each and every time* a potential super complaint is to be made. This is particularly problematic as there is no guarantee (as per the three-stage process set out in section 8) that the super complaint itself will be assessed

as admissible when the second stage is reached. Far from encouraging a flexible and diverse range of eligible entities to engage in the process, it is likely in fact to have the opposite effect: excluding many bodies that would otherwise play a valuable part in a well-functioning super complaint system.

8. No evidence is given as to the merits of this approach as opposed to the more established designation model. **Was consideration given to a “provisional designation” system, whereby organisations with an interest in one or more of the variety of harms covered by the OSA (eg, fraud, Violence Against Women and Girls (VAWG), children’s rights, harassment and abuse, etc) could have their eligibility criteria determined once at the outset, to enable them to then submit super complaints as required when a systemic issue with relevance to their particular area of expertise is identified?** This would not just reduce duplicatory burdens for the civil society organisations that are likely to fit those criteria but also reduce the resources required from Ofcom, who - under the current proposals - will also, *each and every time*, have to assess eligibility criteria when a super complaint is in the pipeline before they are able to start to assess the admissibility of the super complaint itself.

Lack of specification in the eligibility criteria

9. As drafted, many of the eligibility criteria - individually and/or collectively - could exclude many organisations with expertise in the harms covered by the OSA regime from meeting the threshold to be approved as a super complaint body. These criteria often, in many cases, diverge significantly from the criteria set out in other comparable super complaint regimes, with no justification made in the consultation documents as to why this is the case.
10. While we have had assurances that the deliberate exclusion of expert NGOs from taking forward a super complaint is not the intention, we would strongly urge DSIT to redraft the criteria in a much clearer way so that the risk - and *the perception of the risk* - of exclusion is removed before regulations are laid and Ofcom takes on the running of the regime. These include:
 - a. Criterion 1: “demonstrate integrity and impartiality and must not represent the interests of regulated services”. While “integrity”, “impartiality” and “independence” are established criteria in the other comparable regimes, the reference to regulated services’ interest is much broader than the comparable references to the police or policing unions in the police super complaint regulations, or to businesses in the financial services legislation. Further clarity is

needed here. As DSIT will know well, many NGOs that are active in the online safety/online harms space take - of necessity - funding in the form of grants from tech companies, whether to deliver educational programmes or resources for parents or children, to carry out research or to run events. **Does this type of industry funding preclude them from applying to be a super-complaint body? What is the level at which tech-industry funding would become problematic? Does DSIT already have a list of organisations in mind that they deem are “representing the interest of regulated services”?** This feels like a very grey area and one which could automatically disbar too many organisations - particularly when all the criteria set out in the consultation document have to be met to meet the eligible entity test.

- b. Criterion 3: “expertise in and experience of issues relating to online safety covered by and in scope of the regulations” **How is “expertise” in online safety to be judged?** The commentary mentions “a website demonstrating expertise in issues relating to online safety, relevant publications and research or examples of operational programmes relating to online safety”. We are concerned that this in effect precludes organisations whose primary purpose is not “online safety” but the protection of particular categories of users who may be harmed by activity online and/or where online activity leads to offline harms, on which the organisations’ expertise has been built. For example, organisations representing minority groups, charities in the VAWG sector and campaign groups seeking to reduce the risk of suicide and self-harm.

We would prefer to see this criterion redrafted to seek expertise and experience in understanding the offences and harms covered by the Act rather than the more narrow focus on online safety. (Indeed other regimes have a broader scope that includes representing the public interest more generally.) In addition, limiting the expertise criterion to that “in scope of the regulations” appears to close down opportunities for organisations to bring super-complaints that may be related to design or functionality decisions by regulated companies that are a factor in emerging harms (for example, the metaverse, or genAI), which runs counter to Lord Parkinson’s view in the extract from the House of Lords debate quoted above.

- c. Criterion 5: “a strong track record” of publishing high quality research and evidence **What is the bar for judging “a strong track record”? Or judging whether - as the consultation commentary says - that the quality of writing,**

evidence and analysis is “high”? This criterion does not exist in any of the super complaint mechanisms in the annex: what is the justification for it here?

Evidential requirements that bear no comparison to other regimes

11. We would query the thresholds that DSIT apply to the following requirement in section 3 that “super-complaints must be supported by substantial high quality evidence, including documented facts and evidence”. Again, this appears to be a higher bar than in other regimes. For example, [the guidance on police super complaints](#) says these must “be supported, wherever possible, by documented facts and evidence, including details of any relevant legislation, guidance, policies or practices that the relevant police force(s) may be failing to comply with”. It goes on “The quality of the evidence you give us is critical, as are the specification and focus of your complaint. ***The amount and type of evidence you submit will depend on the nature of the complaint and the evidence that is available, among other factors. There is no right or wrong amount or type of evidence; it depends on the complaint you’re making.*** Annex A sets out the kind of evidence designated bodies should consider giving us when deciding whether to make a super-complaint.
12. In the case of the online safety regime, there is going to be a significant information and evidence asymmetry between the information held by Ofcom, via its information gathering and supervisory powers, and the information held by civil society or other organisations that are likely to bring super complaints. There will be an even greater asymmetry between the information held by the regulated services themselves that may be relevant to the super complaint and both the regulator and eligible entities. Organisations that support users who are victims of online harms - particularly those in scope of the Act - are very likely to be able to demonstrate the impact and outcome of those harms but may be less well placed to provide evidence on where Ofcom has potentially failed to discharge its duties with regard to its oversight and enforcement of regulated services. We would urge DSIT to make clear - well in advance of regulations being laid - what “substantial high quality evidence, including documented facts and evidence” means in this context.
13. The requirement to consult widely before a supercomplaint is submitted is another arguably unnecessary resource burden. There are circumstances where this potentially may impede the supercomplainant e.g. where commercial confidentiality or legal or other sensitivities may come into play. In cases where information is provided by a

whistleblower, for example, this process step may introduce additional challenge and complexity.

14. It is worth noting here that in the courts, claims for strike-out can be successfully defended where the case is better than merely arguable but - unlike the super complaints regime proposed here - claimants do not have to show upfront that they are likely to win and indeed cases can go forward even when it is improbable that they can win.

Procedural requirements

Sections 4 and 5: Requirements to avoid duplication of Ofcom's work and to limit super complaints by bodies which meet the eligible entity criteria - whose interests does this serve?

15. We have significant concerns here that the proposals (for example, requirements 1 & 2 in question 10, and requirements 1-3 in question 12) are drafted from the perspective of managing Ofcom's workload and resource requirements rather than from the perspective of protecting users and addressing systemic - and potentially harmful - issues. Again, we would refer back to Lord Parkinson's assurances that **"if Ofcom does not identify a systemic issue affecting children for any reason, it can be raised and then dealt with appropriately"** via the super complaint process. The proposals here put up significant barriers to achieving that aim.
16. In terms of specifics, requirement 1 (section 4) says a complaint will not be eligible for consideration if it repeats the substance of a super complaint already being assessed. This does not take account of the fact that there may be more than one issue relating to one particular harm that needs to be taken into account, and that a super complaint from an organisation representing one particular group of users about one particular type of harm may be substantively different to that from an organisation representing a different group of users but about the same harm. This in effect puts an arbitrary cap on the super complaint mechanism that does not exist in comparable regimes.
17. Additionally, we are concerned that requirement 2 - which says that a complaint that repeats the substance of one already assessed will not be considered unless there has been a "material change of circumstances" since the previous complaint was made - could lead to the system being gamed. DSIT will be well aware of the heated political debates during the passage of the Bill through Parliament with regard to balancing rights to freedom of speech and the rights of users to be protected online. It is entirely

possible that these divisions will continue to play out during the implementation of the regulatory regime and that the super complaint mechanism could be used as a means to advance one side or the other; for example, with one organisation lodging a complaint in order to prevent another organisation on the opposite side of the debate addressing this from a different perspective. We would ask that this requirement is redrafted to refer to “substantial new evidence” rather than a “material change of circumstance”.

18. Finally, requirements 1-3 in question 12 explicitly - and with no justification - put an arbitrary cap on eligible entities putting in multiple super complaints within narrow time frames. If the system is to be trusted and to work effectively in the interests of users, then it needs to be designed in a way that focuses on evidence and outcomes: if there are multiple super complaints that can be evidenced by the same eligible entity within a six-month or two-year time frame, and that meet the admissibility criteria, then it is incumbent on Ofcom to address them and to work urgently to resolve the systemic issues that those complaints may well relate to.
19. We suggest that if the process set out in section 8 (requirements related to the timing of the super complaint process) was simplified and shortened - ideally by having a list of organisations already assessed for eligibility who can submit super complaints and thus eliminating the need for that assessment to happen each time a super complaint is submitted - Ofcom’s resources could be more usefully deployed on dealing with the substance of super complaints, the need for the arbitrary capping of super complaints in section 5 could be removed and the interests of users better served.
20. We would also query the necessity of the “stop the clock” provisions in this regard: in practice, it is highly likely that virtually all supercomplaints will be subject to extensive dialogue with Ofcom before being submitted, so this function seems unnecessary and could also be used in ways which significantly extend the process.
21. We are happy to elaborate further on any of these points prior to the final drafting of the regulations.

Online Safety Act Network

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Annex: comparisons with other super complaints regimes

Police Service

Police Service Super Complaints Eligibility criteria and Statutory Instrument

Criterion 1: That the body is competent in, and has considerable experience of, representing the interests of the public.

Criterion 2: That the body would represent the interests of the public effectively in its role as a designated body and, in particular, would work to improve policing.

Criterion 3: That the composition of the body and the arrangements for its governance and accountability are such that it can be relied upon to act independently and with integrity in its role as a designated body.

Criterion 4: That the body has the capability necessary to carry out its role as a designated body effectively.

Criterion 5: That the body has made arrangements for the appropriate storage and handling of data that it may obtain in its role as a designated body.

Criterion 6: That the body can be relied upon to have regard to any guidance about the making of super-complaints which is given to designated bodies by Her Majesty's Chief Inspector of Constabulary.

Criterion 7: That the body's activities include activities in, or in relation to, more than one police area.

Criterion 8: That the body is not a trade union or an association which represents the interests of members of police forces.

Criterion 9: That the body would collaborate effectively with bodies which are not designated bodies but which are, or may be, aware of matters which could form the basis of a super-complaint and, where appropriate, make a super-complaint on the basis of matters raised with it by such bodies.

Police Service Super Complaints: designated bodies and regulations designating them

- Action on Elder Abuse
- Advocacy After Fatal Domestic Abuse
- Centre for Women's Justice
- Children's Commissioner for England
- Criminal Justice Alliance
- Faith Matters

- Galop
- Hestia
- Liberty
- Missing People
- Pathway Project
- Southall Black Sisters
- Suzy Lamplugh Trust
- Tees Valley Inclusion Project
- Welsh Women's Aid
- Women's Aid Federation of England

Enterprise Act/Consumer Protection

This comes from s 11(1) Enterprise Act and is a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'.

Criteria for designation:

3. The criteria that an applicant must satisfy in order that the Secretary of State may designate it as a designated enforcer under section 213(2) of the Act are as follows:

(a) the applicant is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity and has established procedures to ensure that any potential conflicts of interest are properly dealt with;

(b) the applicant has demonstrated experience, competence and expertise in promoting or protecting the collective interests of consumers in respect of domestic infringements or [Schedule 13 infringements], including, where the applicant is a successor to any person or body which had such expertise, by reference to that person or body;

(c) the applicant has demonstrated the ability to protect the collective interests of consumers by promoting high standards of integrity and fair dealing in the conduct of business in relation to such consumers;

(d) the applicant has the capability to investigate infringements and carry out the enforcement procedures set out in Part 8 of the Act in respect of the types of infringement for which it seeks designation;

(e) the applicant is ready and willing to follow best practice in enforcement;

(f) the applicant is ready and willing to co-operate with the [CMA] and other general enforcers, designated enforcers ... and any other person responsible for the regulation of matters in respect of which acts or omissions may constitute domestic or [Schedule 13 infringements] including by:

(i) sharing information with such other enforcers and persons in so far as legally permitted; and

(ii) by participating in arrangements to co-ordinate action under Part 8 with other enforcers and persons acting or proposing to act in respect of the same person.

Enterprise Act: Designated Bodies

The Campaign for Real Ale Limited.

The Consumers' Association.

The Gas and Electricity Consumer Council.

The General Consumer Council for Northern Ireland.

The National Association of Citizens Advice Bureaux.

The National Consumer Council.

The Consumer Council for Postal Services.

The WaterVoice Council.

The Financial Services and Markets Act 2000

The Financial Services and Markets Act 2000 ("the Act") gives designated consumer bodies the right to make a "super-complaint" to the Financial Conduct Authority (FCA) separate from the cross-sectoral super-complaints regime provided for in the Enterprise Act 2002. Section 234C(3) (inserted by s 40 Financial Services Act 2012) sets out requirements, giving Treasury power to

make regs. S 234C(3(a)) required the body to “represent the interests of consumers of any description”. Additionally, the body:

- must be constituted, managed and controlled so as to be expected to act independently, impartiality and with complete integrity
- can demonstrate considerable experience and competence in representing the interests of consumers of any description
- has the capability to put together reasoned super-complaints on a range of issues
- is ready and willing to co-operate with the FCA. In particular, the body agrees to take account of any guidance issued by the FCA on the making of super-complaints
- Where it appears to the Treasury that a body primarily represents the interests of businesses in their capacity as consumers of financial services, the body must be able to demonstrate that it primarily represents the interests of small or medium- sized businesses
- The fact that a body has a trading arm will not disqualify it from being designated provided that the trading arm does not control the body; any profits of the trading arm are only used to further the stated objectives of the body; and the body has established procedures to ensure that any potential conflicts of interest are properly dealt with.

Financial Services (Banking Reform)

The supercomplaints mechanism under s 68 of the Financial Services (Banking Reform) Act 2013 is also modelled on the Enterprise Act version. The Treasury designates the bodies – and the criteria seem similar to those in re FCA.