



LEGAL, REGULATORY & COMPLIANCE CONSULTANTS

**RESPONSE SUBMITTED BY HANDLEY GILL LIMITED TO
THE DEPARTMENT FOR SCIENCE, INNOVATION &
TECHNOLOGY'S CONSULTATION ON 'SUPER-
COMPLAINTS: ELIGIBLE ENTITY CRITERIA & PROCEDURAL
REQUIREMENTS' UNDER PART 8 CHAPTER 2 ONLINE
SAFETY ACT 2023**

09 JANUARY 2024

Part 2. Eligible entity criteria

Section 1 – Proposed Criteria

Question 1: To what extent do you agree or disagree that the following criteria should be used to assess which organisations can submit super-complaints?

Criterion 1: That they must demonstrate integrity and impartiality, and must not represent the interests of regulated services.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
			X		

Criterion 2: That they have considerable experience and competence in representing the interests of people of any description in, or within, the UK.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
			X		

Criterion 3: That they have expertise in, and experience of, issues relating to online safety covered by and in scope of the regulations.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
	X				

Criterion 4: That they are willing to cooperate, and work with OFCOM throughout the supercomplaints process. This includes that OFCOM will have no reason to believe that the relevant guidance it produces in relation to the handling of super-complaints will not be followed accordingly.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
		X			

Criterion 5: That they have a strong track record of publishing high quality research and analysis.

Strongly agree	Agree	Neither	Disagree	Disagree strongly	Don't know



		agree nor disagree			
				X	

Criterion 6: That they have a strong track record of working effectively and collaborating with other civil society groups.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
				X	

SECTION 2 - Wider questions

Question 2: To what extent do you consider that the current draft criteria are fair?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
				X	

We do not object to a requirement that organisations must not be representing the interests of regulated services, in so far as that means that they must not be acting on behalf of any one or more regulated services in making a specific complaint. We do not consider that this requirement should be interpreted so as to restrict the relevant super-complainant from being in receipt of funding from any one or more regulated entities, and consider that - provided appropriate governance mechanisms are in place - this should not diminish its impartiality or integrity.

Individuals and organisations involved in lobbying and campaigning in relation to online safety and online harms issues have included charities, for example, but it is not clear that they would satisfy the proposed requirement of impartiality where they have lobbied strongly for specific outcomes. We note that an obligation of impartiality is not a requirement of the designated body criteria underpinning the police super-complaints system.

We are concerned that the threshold for Ofcom to pre-emptively determine that a proposed super-complainant would not comply with its guidance, thereby entitling it to reject a complaint that is otherwise legitimate, is too low and that there is a risk that Ofcom would be found to have failed to act proportionately.

Given that it was not considered necessary for Ofcom itself to have published high quality research and analysis in the area of online safety prior to being identified as the appropriate regulator of online safety, to impose such a requirement on super-complainants would appear to be excessive.

Since the proposed procedure does not create a concept of a 'lead super-complainant' where more than one eligible entity submits the same or a substantially similar complaint, or a pre-registration process whereby entities could be authorised as super-complainants and advertise that fact thus enabling them to channel potential complaints acting as an 'umbrella organisation' (unlike the police super-complaints system), it is not apparent to us why it is considered appropriate to require a demonstration of having worked effectively and collaborated with other civil society groups.

We would propose consideration of an additional criterion, requiring the relevant body to have a geographic nexus with the UK.

Question 3: To what extent do you consider that the requirement to meet all criteria (1-6 included in previous questions) could exclude bodies that would otherwise bring legitimate super-complaints?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
X					

We consider that the individual proposed criteria are highly restrictive and that their cumulative application would in practice, render fewer than a handful of existing organisations eligible, while excluding relevant existing organisations and precluding the establishment of new entities. This would appear to be by design. Organisations with strong knowledge of online safety issues may not have experience of representing individuals and vice versa, not least as a consequence of the emerging and novel nature of these issues.

Furthermore, we consider that there is scope for the establishment of dedicated vehicles (whether charities, community interest companies or other entities) specifically for the purpose of acting as super-complainants. Such organisations could receive funding, commission academic and other research, engage with relevant third-party organisations, gather information from individuals regarding their experiences and represent the interests of individuals, instructing legal and other advisors as necessary. Such organisations could prove to be extremely effective, as has been the case in relation to the EU organisation NOYB in the context of the enforcement of the EU General Data Protection Regulation. In so far as the criteria require evidence of an established track record as opposed to the ability to demonstrate capacity in the relevant areas, and there is no 'saving provision' which would enable other relevant organisations which do not meet all of the specified criteria but can nevertheless demonstrate relevant capacity and (more importantly) a legitimate complaint, we consider that the criteria are too restrictive. We would strongly argue for at the least a saving provision which would enable appropriate organisations to be given super-complainant status regardless of their ability to meet each and every criterion. We do not consider that such organisations would be less well placed than existing organisations which have a public profile for bringing challenges against the government and public bodies, with varying levels of success.



Part 3. Procedural requirements

SECTION 1 - Pre-notification requirements

Requirement 1: Complainants must pre-notify OFCOM of their intention to make a supercomplaint at least 30 days before making a complaint, except in exceptional circumstances.

Question 4: Do you agree pre-notification should be included in the procedural regulations?

Yes	No	Don't Know
	X	

Question 5: If you have answered 'no' to question 4 please explain your reasons below.

If the purpose of the pre-notification requirement was to enable analysis of eligibility to make a complaint to be undertaken we would have no objection to it, and indeed would consider it could be valuable, however the stated purpose of the pre-notification requirement is to enable Ofcom to prioritise and re-deploy resources, which merely appears to be an attempt to further extend the period for dealing with super-complaints beyond the already lengthy proposed 120 day period, to which we object.

Question 6: If you agree with a pre-notification requirement, do you agree that 30 days is an appropriate length of time? If not, what do you think the appropriate amount of time would be?

Yes	No	Don't Know

N/A

SECTION 2 - Requirements related to the form and manner of complaints

Question 7: To what extent do you agree with the following procedural requirements?

Requirement 1: Super-complaints must be in writing.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
X					

Requirement 2: A complaint must set out the feature or conduct (or combination) to which the complaint relates.



Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
X					

Requirement 3: A complaint must set out the regulated service(s) and provider(s) of such service(s) to which the complaint relates.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
	X				

Requirement 4: A complaint must outline why the eligible entity considers that either s.169 (1)(a),(b) or (c) has been met.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
X					

Requirement 5: If a complaint is in relation to a particular provider, a complaint must outline why the eligible entity considers that either s.169 (2)(a) or (b) has been met.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
X					

Requirement 6: A complaint must provide an explanation of how the super-complainant has assessed the current or potential harm caused to users or members of the public.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
	X				

Requirement 7: A complaint must give the name of an individual representing the eligible entity who may be contacted about the complaint.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
			X		



Wider questions:

Question 8: To what extent do you consider that these requirements would provide clarity on what should be included in a super-complaint, and would ensure that supercomplaints include the necessary information for OFCOM to assess what the supercomplaint relates to?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
	X				

In relation to proposed Requirement 3, i.e. that a complaint must set out the regulated service(s) and provider(s) of such service(s) to which the complaint relates, we consider that while the super-complainant should identify the relevant regulated service(s) of which it is aware, that should not preclude Ofcom from considering whether one or more regulated service(s) which are not identified in the super-complaint are affected by the same or similar issues.

In relation to proposed Requirement 7, i.e. that a complainant must give the name of an individual representing the eligible entity who may be contacted about the complaint, provide that contact details are provided for the relevant entity, we do not consider it necessary for a specific individual to be identified. We would not object to a failure by the relevant entity to engage promptly with communications from Ofcom leading to a complaint being 'frozen' or rejected.

We consider that it would also be necessary for the proposed super-complainant to establish that it meets the eligible entity criteria.

SECTION 3 - Evidential requirements

We are proposing the following procedural requirements related to evidence:

Requirement 1: Super-complaints must demonstrate that the super-complainant has consulted with a range of bodies, industry experts or academics on the matters concerned in the complaint.

Requirement 2: Super-complaints must be supported by substantial high quality evidence, including documented facts and evidence.

Question 9: To what extent do you assess that these requirements would effectively ensure that super-complaints are well-evidenced? If not, how do you think they could be improved?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
				X	

We do not consider it either necessary or proportionate to impose an additional obligation on a super-complainant to consult with a range of bodies, industry experts or academics on the matters raised by the complaint, particularly having regard to the proposed eligibility criteria already pertaining to super-complainants and the statutory threshold.

We accept and would advocate that super-complainants must provide documented prima facie evidence in support of their complaint. However, Ofcom – with its powers of compulsion under Part 7 Chapter 4 Online Safety Act 2023 – and regulated entities themselves have the best access to evidence, notwithstanding the transparency obligations under the Act, and we would therefore advocate avoiding imposing an overly burdensome threshold, such as that proposed.

SECTION 4 - Requirements to avoid duplication of OFCOM's work

Question 10: To what extent do you agree with the following procedural requirements?

Requirement 1: A complaint that repeats the substance of a super-complaint that is already being assessed may not be eligible for consideration, if the regulator deems that it is merely duplicative of the existing complaint.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
	X				

Requirement 2: A complaint that merely repeats the substance of a complaint that has already been assessed by OFCOM is not eligible for consideration unless there has been a material change of circumstances since the previous complaint was made.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
	X				

Requirement 3: Super-complaints must not be under consideration by another UK regulator (statutory or self-regulatory) or by the courts.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
			X		

Question 11: To what extent do you consider that these requirements are necessary to prevent OFCOM undertaking duplicative work when responding to super-complaints?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
		X			

We consider that, if and to the extent that a complaint is duplicative of an existing complaint, Ofcom could consult with the pre-existing super-complainant to ascertain whether it would be willing to engage with the new complainant and to adopt either its arguments and/or evidence, or any part thereof, or alternatively Ofcom could formally recognise the further complaint as supporting the pre-existing complaint (provided that it met the relevant eligibility criteria).

We have no objection to proposed Requirements 1 and 2. If and to the extent that a complaint is already under consideration by another regulator, given that the purview of that regulator will be different to Ofcom's we do not consider that this should preclude Ofcom's consideration of a complaint. We would accept that it may be appropriate to postpone the determination of any penalty to have regard to that imposed by another regulator to avoid a disproportionate outcome. We consider that the Digital Regulation Co-operation Forum could provide an appropriate mechanism for sharing information in relation to complaints and identifying complaints that raise issues in other regulatory contexts and that this should be encouraged rather than stymied.

SECTION 5 - Requirements to limit super-complaints by bodies which meet the eligible entity criteria

Question 12: To what extent do you agree with the following procedural requirement?

Requirement 1: The super-complainant should not have another active super-complaint under consideration by OFCOM (except under exceptional circumstances).

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
				X	

Requirement 2: The super-complainant should not have submitted a super-complaint within the past six months (except under exceptional circumstances).

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
				X	



Requirement 3: The super-complaint should not raise substantially similar concerns to supercomplaints or other investigations which OFCOM has considered in the previous 2 years (except under exceptional circumstances).

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
		X			

Question 13: To what extent do you consider that these requirements are necessary to ensure that OFCOM's super-complaints caseload remains manageable?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
				X	

If a super-complainant is able to meet the relevant criteria for bringing a complaint, necessarily establishing that the features of a regulated service or conduct of a regulated entity is either causing or presents a material risk of harm or otherwise adversely impact the rights of individuals, then we do not consider that Ofcom should seek to artificially stymie that complaint by seeking to restrict the number of complaints that may be brought at any time. We anticipate that the super-complaint mechanism will, if properly implemented, provide a powerful tool to effect action on the part of Ofcom as regulator and change on the part of regulated entities; we are concerned that imposing a 2 year moratorium on complaints would in practice prevent issues which have caused or risk causing harm or other adverse impacts and which have not been adequately addressed from being revisited.

The government has promised to make the UK the safest place in the world to be online and Ofcom needs to be appropriately resourced to deliver on that promise.

SECTION 6 - Requirements on OFCOM on receipt of a super-complaint

We propose the following requirements should be placed on the regulator in this regard:

Requirement 1: Where a super-complaint is submitted in line with requirements set out in OFCOM's guidance, OFCOM must acknowledge receipt of the super-complaint.

Requirement 2: If OFCOM decides that a complaint is eligible for consideration, they must inform the body in writing that the complaint will be investigated.

Requirement 3: If OFCOM decides that the complaint is not eligible for consideration, they must inform the body in writing of that decision and the reasons for it.



Question 14: To what extent do you consider that these requirements would support the effective functioning of a super-complaints system? If not, please explain how you would revise these requirements.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
X					

We consider that these requirements are the minimum necessary to enable the process to function effectively and for Ofcom to meet its public law obligations.

SECTION 7 - Requirements related to OFCOM's response

We propose the following requirements:

Requirement 1: OFCOM must publish its response to all super-complaints, and send a copy to the complainant body.

Requirement 2: OFCOM may exclude information from the report if its inclusion would be contrary to the interests of national security, might jeopardise the safety of any person, may be commercially sensitive, or would be in conflict with any other legislation or rights (including, but not limited to, GDPR etc).

Question 15: To what extent do you consider that these requirements would ensure that super-complaints are dealt with transparently? If not, please explain how you would revise these requirements.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
			X		

The GDPR is no longer applicable in the UK, which is now subject to the UK GDPR and related national legislation.

We consider that any proposal to withhold information must as a minimum be based on the thresholds set out in the Freedom of Information Act 2000, and involve a balancing exercise between the public interest disclosure versus the public interest in withholding the relevant information. However, having regard to Ofcom's wide-ranging powers in relation to publication as set out at s.207 Online Safety Act 2023, we consider that a significantly higher threshold would be appropriate and therefore material should only be withheld where there is evidence that its disclosure would or might seriously and prejudicially affect the relevant interests.



We strongly welcome the requirement that Ofcom must publish its response to all super-complaints.

SECTION 8 - Requirements related to the timing of super-complaints process

Question 16: To what extent do you consider that 120 days would enable OFCOM to make a full assessment and provide a response to super-complaints while maintaining public confidence? Please provide details.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
			X		

Given that Ofcom must first determine the eligibility of the super-complainant (eligibility assessment), then confirm that the super-complaint meets the relevant threshold criteria (admissibility assessment), then conduct its own investigations, which may include issuing information notices to multiple regulated entities, consider the representations of the relevant regulated entity and potentially further submissions by the super-complainant in response, then reach its own conclusions, while we would hope to see super-complaints dealt with with the urgency they warrant, we are nevertheless concerned that in practice to seek to conclude all super-complaints within 4 months is unrealistic. We anticipate that it may in practice be necessary to provide for super-complaints to be dealt with in up to 180 days, while we would advocate imposing an obligation for Ofcom to deal with complaints as soon as possible and with due urgency.

Splitting up different parts of the process

Question 17: To what extent do you consider that the eligibility assessment should be split from the rest of the super-complaints process?

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
		X			

We would not object to the eligibility assessment, i.e. the assessment of the eligibility of the super-complainant to make the complaint, being separated from the remainder of the super-complaints process; indeed, we can see value in enabling potential super-complainants to undergo eligibility assessments independent of any complaint. However, if and in so far as an eligibility assessment is to be tied to a super-complaint, but considered separate to the remainder of the process, we consider that a period of no more than 30 days should be allocated to the eligibility assessment. In such circumstances, we would withdraw our support for the remainder of the process being extended to up to 180 days



and consider that a 30 day plus 120 day process ought to be the norm, potentially with a longer backstop period and in any event an obligation on Ofcom to act expeditiously.

Questions related to ‘stop-the-clock’ provisions

Question 18: To what extent do you agree with the following procedural requirement?

Requirement 1: Where OFCOM is waiting for a response from a super-complainant, OFCOM may ‘stop-the-clock’ such that each day until they receive a response does not count towards the time-limit prescribed in regulations.

Strongly agree	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don’t know
			X		

This would appear to be a further attempt to artificially extend the period for Ofcom to deal with super-complaints; as stated above, we would prefer to see a longer backstop for Ofcom to resolve super-complaints coupled with an obligation to act expeditiously. While we would have no objection to a ‘stop-the-clock’ process where there has been an extended period of non-communication by a super-complainant (albeit that this could potentially be a reason to de-designate them thus vitiating the complaint, or alternatively to inhibit their future designation), to ‘stop-the-clock’ after every time Ofcom sends a communication would in practice extend the period by many months and would serve to diminish public confidence in both Ofcom and super-complainants.

Question 19: Do you think that the stop-the-clock mechanism should be limited in any way (i.e. how long it can be used for and/or how many times in the same supercomplaints process it can be used)?

Any such mechanism, if it were to be introduced, should only be used where a super-complainant has failed to respond within, for example, 2 weeks of a substantive communication. In such circumstances we would not limit its use.

Are you responding on behalf of an organisation or in a personal capacity?

On behalf of an organisation	X
In a personal capacity	

If you are responding on behalf of an organisation, please state the name of the organisation below, alongside any relevant information on your organisation’s expertise and/or interest in matters covered in this consultation:



Handley Gill Limited

Handley Gill Limited ('Handley Gill') is a legal, regulatory and compliance consultancy based in London. We offer a full range of expert data protection, online safety, content moderation, artificial intelligence (AI), human rights and related ESG (environmental, social and governance) advice, compliance and assurance services to clients from individuals, small businesses and start-ups to multi-national corporations across a range of industries, as well as to government, public and third sector entities.

Our specialist consultants are immersed in the legislation, guidance and judgments relevant to compliance with the General Data Protection Regulation 2016/679 (GDPR), the UK GDPR, the Data Protection Act 2018, The Privacy and Electronic Communications Regulations (PECR), the Online Safety Act 2023 and other legislation including the Human Rights Act 1998 and the Equality Act 2010.

Our consultants have contributed to the development of the Online Safety Act 2023, and have expertise advising and representing both individuals and regulated entities in complaints to regulated entities, before regulators and the courts in the context of relevant issues and balancing rights to privacy and data protection and freedom of expression.

We publish resources relating to the passage and implementation of the Online Safety Act 2023 on our website: <https://www.handleygill.co.uk/onlinesafety-onlineharms>. We operate the X (formerly Twitter) account 'OnlineSafetyActUK': <https://twitter.com/OnlineSafetyAct>.

If you are responding in a personal capacity, which of the following applies to you:

An employee of a regulated service	
A professional who has contact with regulated services in the course of their work	
A campaigner on issues related to online safety or an employee of a campaigning organisation working on issues related to online safety	
A member of the public	
None of the above	

If you are responding in a personal capacity, please provide your name and contact details, alongside any relevant information on your interest in matters covered in this consultation:

Would you like the information you have provided to this consultation to be treated as confidential?

Yes	No
	X



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