



From Rt Hon Harriet Harman MP, Chair

**Rt Hon Nadine Dorries MP**  
**Secretary of State for Digital, Culture, Media and Sport**  
4<sup>th</sup> Floor  
100 Parliament St  
London SW1A 2BQ

By email

19 May 2022

Dear Secretary of State,

As you will be aware, part of the role of the Joint Committee on Human Rights is to carry out legislative scrutiny in respect of Bills that may raise human rights concerns. The Online Safety Bill is of interest to the Committee because attempts to regulate content online have the potential to protect the rights of internet users to be safe from harm – but they also have the potential to infringe users' rights to free expression (as guaranteed by Article 10 of the European Convention on Human Rights). Our main focus, therefore, is on Part 3 of the Bill, which imposes a variety of duties on providers of user-to-user and search services both in respect of illegal content and content that is legal but still considered harmful.

### **Illegal content**

Overall, the Government's attempt to introduce protections for users against illegal content, whilst also respecting freedom of expression, is welcome, but we do have some questions regarding the detail of the provisions of the Bill.

There is a risk that even with careful guidance providers may err on the side of caution, or introduce systems that result in overly cautious responses, when it comes to content that is not easy to identify as illegal or not. For example, the category of "priority illegal content", in respect of which the most onerous duties fall on providers, includes content that amounts to an offence under section 5 Public Order Act 1986 (POA), which covers "threatening or abusive words or behaviour, or disorderly behaviour" that is likely to cause "harassment, alarm or distress". It is hard to see how providers, and particularly automated responses, will be able to determine whether content on their services fall on the legal or illegal side of this definition. We would therefore like answers to the following questions about how this part of the Bill will work in practice:

- Given the inclusion of section 5 Public Order Act 1986 within the category of priority illegal content, how will a provider of user-to-user services judge whether particular words or behaviour shared online are "abusive" rather than merely offensive and whether or not they are likely to cause someone "distress" sufficient to amount to a criminal offence? Are there particular concerns about such judgements being made as a result of the use of algorithms and use of AI?



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- Will the inclusion of section 5 Public Order Act 1986 within the category of priority illegal content, in practice, result in service providers removing content that does not meet the criminal threshold, potentially resulting in an interference with the Article 10 rights of users? Given the uncertain threshold of s5 POA 1986, should this offence be removed from the list of offences that amount to “priority illegal content” (in Schedule 7 of the Bill)?
- Can you explain how you will prevent providers taking an overly cautious approach to other offences that fall within “illegal content” for the purposes of the Bill but which may be hard for providers or automated responses to identify?

The Committee recognises that a lot of detail on how providers will be expected to comply with the duties imposed by the Bill is intended to be set out in guidance to be published by OFCOM.

- Why have you chosen to provide the detail of how to comply with the overarching duties, which will have a direct impact on users’ freedom of expression, in OFCOM guidance rather than in on the face of the Bill or in material that accompanies the Bill and can be scrutinised by Parliament?
- Will the JCHR be sent a copy of any OFCOM code of practice for providers of Part 3 services in draft for scrutiny before it is laid before Parliament?

### **Legal but harmful content**

Particularly in light of the rights guaranteed by the UN Convention on the Rights of the Child, the Committee welcomes the principle behind measures designed to protect children from harmful content on services they are likely to use, even if that content is not illegal. Nevertheless, we are concerned that what will come within “legal but harmful” content will largely be left to regulations. There is very little detail on the face of the Bill.

The same concern arises regarding defining content that is legal but harmful to adults, in respect of which duties would be imposed on ‘Category 1’ services under the Bill.

The extent of the content that falls within the ‘legal but harmful’ categorisation will be crucial in determining the proportionality of any interference with Article 10 ECHR, and therefore ought to be open to effective scrutiny by Parliament.

- Why have you chosen to provide detail on what will come within the categories of content that is legal but harmful to children (i.e. “primary priority content”; “priority content” and “non-designated content”) and adults (particularly “priority content”) in regulations rather than on the face of the Bill where it can be scrutinised as the Bill passes through Parliament?
- Will the JCHR be sent a copy of these regulations in draft for scrutiny before



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they are laid before Parliament?

In respect of priority content that is legal but harmful to adults, the Bill currently requires providers to state whether that material will be taken down; made subject to restricted access; made subject to limited recommendation or promotion; or recommended or promoted. This appears to require providers to either promote or recommend content identified as harmful or restrict it, which could result in providers who do not want to be seen to be promoting harmful content imposing more restrictions than are necessary.

- Why does the Bill not contain a more neutral option for providers, whereby material is neither promoted or recommended nor subject to limitations?

### **Protection for freedom of expression**

The Bill's main method for protecting free expression is the obligation to have regard to "freedom of expression within the law" in clause 19. Consistently with the heightened protection that Article 10 ECHR provides for political and public interest speech, the Bill provides additional protection for freedom of speech in respect of content that is of "democratic importance" and also "journalistic content". However, the definitions of these two categories of content are extremely vague. It again appears that significant and important detail will be left for guidance or even, ultimately, judicial interpretation.

- Given the number of interrelated legal duties that affect free expression, from the criminal law on hate speech, to the law on defamation, to the Equality Act, is the term "freedom of expression within the law" sufficiently clear to ensure providers recognise the extent of this obligation?
- Why is there no greater detail on the face of the Bill as to what content falls within the heightened protections provided in relation to "content of democratic importance" and "journalistic content"?

The Committee would be grateful for a response to this letter by 9<sup>th</sup> June. We will continue to monitor the progress of the Bill and keep under review its implications for human rights.

Yours sincerely,

**Rt Hon Harriet Harman MP**  
Chair of the Joint Committee on Human Rights