



HOUSE OF LORDS

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Secretary of State for Digital, Culture, Media and Sport
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30 January 2023

Dear Secretary of State,

I write with suggested changes to the Online Safety Bill.

Background

On 25 January we took evidence from the Parliamentary Under-Secretary of State for Tech and the Digital Economy, Paul Scully MP, Lord Parkinson of Whitley Bay and the Deputy Director of Online Harms Regulation, Orla MacRae. We are grateful for their evidence.

We remain concerned about the Government introducing powers that undermine Ofcom's independence. We recommend that you change course. We also recommend addressing unnecessary amendments which have removed important transparency requirements for social media platforms.

Clause 39: Power to direct for reasons of public policy

The Secretary of State will have extensive powers under the Bill. Many of these will ensure the regime functions as intended and that there is sufficient flexibility to respond to developments in a complex environment. But these powers must respect the regulator's operational independence, which is fundamental.

Our evidence session on 25 January was illuminating but did not leave us convinced that all the ministerial powers are necessary or justified. Some of the explanations we have received on this matter remain vague, speculative and unconvincing.¹

Clause 39 will empower the Secretary of State to direct Ofcom on the development of its codes of practice.² This goes beyond simply setting strategic direction. Many stakeholders have argued such powers would depart from the cornerstone of media regulation in western Europe that there is an independent regulator and that the executive does not interfere in its day to day decision-making.³ We accept that it is appropriate for the Secretary of State to set strategic direction where needed; the Communications Act 2003 is

¹ Oral evidence, [Online Safety Bill](#), 25 January 2023

² [Online Safety Bill](#), clause 39(1). References are to the bill as introduced to the Lords (HL Bill 87).

³ See Digital, Culture, Media and Sport Committee, [Amending the Online Safety Bill](#), 4 July 2022, p 3



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a good example. But empowering the Secretary of State to direct Ofcom on the development of codes of practice relating to the regulation of social media platforms amounts to significant interference in Ofcom's independence.⁴

We are not alone in our concern. Ofcom's CEO Dame Melanie Dawes has previously said that the Secretary of State's powers "seem to be beyond what we would normally expect to see in regimes setting up an independent regulatory system."⁵ The Joint Committee on the Draft Online Safety Bill found that "the powers for the Secretary of State to a) modify Codes of Practice to reflect Government policy and b) give guidance to Ofcom give too much power to interfere in Ofcom's independence and should be removed".⁶ Others such as Dr Edina Harbinja argued that the Secretary of State's powers in the Bill are "too broad and overarching".⁷

The Government has committed to tabling amendments to clause 39 to clarify that the general power to direct Ofcom "for reasons of public policy" will be replaced by a clearly defined list of grounds for issuing a direction, comprising of "national security, public safety, public health, the UK's international relations and obligations, economic policy and burden to business".⁸

This proposal is inadequate. The explanations we have received for needing this power were unconvincing. The inclusion of powers to direct Ofcom for reasons of "economic policy and burden to business" was particularly poorly evidenced. Nor does the proposed amendment address the fact that the Government should respect Ofcom's independence in developing the codes of practice in the first place. The proposed amendment remains so broad that it could still capture an extensive range of issues. It goes substantially beyond what is provided in comparable legislation, such as the Communications Act 2003.

The Government has also committed to tabling an amendment to clause 39 to provide that the power will be used only in exceptional circumstances. The Minister did not clarify in detail what this might involve. If it is an emergency power this should be made explicit.

We recommend that clause 39(1)(a) be removed from the bill. The Government's proposed amendment to clarify the Secretary of State's powers is cosmetic and inadequate. It would provide needlessly expansive powers to undermine Ofcom's independence by interfering with the actual implementation of the online safety regime.

Clause 39: power to issue further directions

In developing its codes Ofcom must consult an extensive range of stakeholders and submit draft codes to the Secretary of State. But the Secretary of State "may give OFCOM one or more further directions requiring OFCOM to modify the draft of the code of practice ...

⁴ Oral evidence, [Online Safety Bill](#) (Q9). See also supplementary [note](#) from Professor Lorna Woods, 13 December 2022

⁵ Dame Melanie Dawes, [Consideration of government's draft Online Safety Bill oral evidence](#) (Q266)

⁶ Joint Committee on the Draft Online Safety Bill, [Draft Online Safety Bill](#) (First Report of Session 2021–22)

⁷ Oral evidence, [Online Safety Bill](#) (Q9)

⁸ Paul Scully MP, [Letter to the Chair](#), 17 January 2023



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When the Secretary of State is satisfied that no further modifications to the draft are required, the Secretary of State must, as soon as reasonably practicable, lay before Parliament ... the modified draft”.

Carnegie UK stated that the provision creates a power to direct OFCOM in an indefinite back and forth version of “ping pong” before laying a code, which is only then subject to parliamentary oversight.⁹ This lack of transparency and potential for lengthy or infinite delay is troubling. The Minister admitted this was a possibility, but believed it was unlikely to happen.¹⁰

We do not think there are adequate safeguards in place to prevent such an outcome. Some have suggested it enables the Government to wear Ofcom down over contentious provisions.¹¹

We accept that the Government may need to raise issues with Ofcom in relation to national security, terrorism, public safety or child sexual exploitation. But the Government can simply write to Ofcom about the issues of concern, as it does in most other areas of media regulation. The Government’s letter to Ofcom about the Ukraine crisis and reporting from Russia Today is a recent example of the Government raising security concerns with the regulator.¹² For particularly sensitive matters, a brief public letter could be supplemented with private correspondence where required.

Clause 39 empowers the Secretary of State to engage in a private form of ping-pong with Ofcom, potentially indefinitely, before any parliamentary oversight comes into play. This is troubling. It is also unnecessary.

We recommend that the rest of clause 39 is amended to enable the Secretary of State to write to Ofcom about national security, terrorism, public safety or child sexual exploitation. Ofcom should be required to have regard to such letters but not be bound by them, and it can set out its reasons in the usual manner. In the event of emergencies we would expect Ofcom to follow the course set out by the Secretary of State, recognising the Government’s responsibility for public safety and national security.

Ofcom’s draft codes which are amended following a Secretary of State letter should require parliamentary approval via the affirmative procedure.

Clause 157 and guidance

Clause 157 enables the Secretary of State to issue guidance to Ofcom about (a) the “exercise of their functions under this Act”; (b) carrying out research; and (c) the exercise of their powers in relation to media literacy.

⁹ See [note](#) from Professor Lorna Woods to Communications and Digital Committee, 13 December 2022

¹⁰ Oral evidence, [Online Safety Bill](#), 25 January 2023

¹¹ See [note](#) from Professor Lorna Woods to Communications and Digital Committee, 13 December 2022

¹² See Ofcom, [Letter to the Secretary of State for Digital, Culture, Media and Sport](#) (23 February 2022)



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Part (a) of this power is both broad and unnecessary. The Secretary of State will already have powers to issue strategic guidance. This additional unlimited power to provide guidance to which Ofcom must have regard is not justified and could amount to an unnecessary intrusion into Ofcom's day-to-day work.

Clause 157(1)(a) grants the Secretary of State unnecessary and unconstrained powers to give “guidance” to Ofcom, to which it must have regard. This provision should be deleted.

Parliamentary oversight

The Government has recognised the unprecedented nature of the online safety regime; former Secretary of State Nadine Dorries MP described the Secretary of State's new powers as “novel”.¹³ We were pleased to hear the Minister emphasise the importance of Parliament having ultimate oversight of proposals to change digital regulation. This was a key finding of this Committee's 2021 report *Digital Regulation: joined-up and accountable*, which recommended establishing a joint committee of both Houses to oversee digital regulation.¹⁴ This was endorsed by the Joint Committee on the Draft Online Safety Bill.¹⁵ Such a committee would be a good way to alleviate concerns about executive overreach and ensure effective oversight.

We reiterate our recommendation to establish a joint committee of both Houses to oversee digital regulation.

We also encourage you to bring forward the Digital Markets, Competition and Consumer Bill at the earliest opportunity to ensure there is a comprehensive legislative framework in place.

Risk assessments, transparency and freedom of speech

The requirement for platforms to carry out risk assessments for adult services should be reinstated to address concerns about freedom of expression, platform transparency and online safety.

Provisions regulating content which is ‘legal but harmful for adults’ have been removed from the bill. But this does not mean the requirement for platforms to undertake risk assessments for adults should also be removed. Indeed, the amended bill has expanded the user empowerment tools to include functions to limit user interaction with content such as:

- unverified users;
- suicide content;

¹³ Nadine Dorries MP, oral evidence ([Q279](#))

¹⁴ Communications and Digital Committee, [Digital Regulation: joined-up and accountable](#) (3rd Report of Session 2021–22) para 80

¹⁵ Joint Committee on the Draft Online Safety Bill, [Draft Online Safety Bill](#) (First Report of Session 2021–22) para 434



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- eating disorder content;
- abuse targeting race, religion, sex or sexual orientation, disability or gender reassignment;
- inciting hatred against people with the above characteristics.

We did not receive a satisfactory answer as to why the amended bill offers an expanded array of user empowerment tools to address content that is harmful to adults, but no longer requires a risk assessment relating to the platform's functions and features designed to tackle such content.

Reinstating the risk assessment for adults would not require reinstating the now-removed clauses relating to 'legal but harmful to adults'. As was made clear in our evidence session, both supporters and critics of 'legal but harmful' see value in the risk assessment. It would provide crucial insight into how platforms are managing the tension between providing user empowerment tools and protecting freedom of expression. The Equality and Human Rights Commission recently emphasised that platforms should ensure freedom of expression is not infringed by measures taken to comply with the other duties in the bill. It said platforms should be required to assess and report on the risk in the design and function of services for negative impacts on freedom of expression.¹⁶

The bill also requires the new user empowerment tools to be "effective". But it is not clear how users or Ofcom could judge the effectiveness of the tools without access to some form of risk assessment indicating the prevailing conditions on the platform and what action has been taken to mitigate key risks.

We heard that Ofcom has broad information gathering powers, which might involve requiring risk assessments, and that platforms will be undertaking risk assessments for child protection and illegal content duties anyway.¹⁷ It therefore makes little sense to excuse platforms from having to publish risk assessments for adults as a matter of course.

We recommend reinstating the requirement for Category 1 platforms to undertake risk assessments for adults. This should assess the risk in the design and function of services for (a) content set out in clause 12 which is subject to user verification tools; and (b) effects on freedom of expression. Platforms should be required to report on these assessments in the same way as required for child protection and illegal content duties.

We acknowledge the Government's objectives in removing 'legal but harmful to adults' provisions. Maintaining adult risk assessments would support those objectives by requiring platforms to be transparent about how they are managing the tension between protecting free speech and limiting access to content through user empowerment tools.

¹⁶ Equality and Human Rights Commission, Briefing: House of Lords – Second Reading, January 2023

¹⁷ Oral evidence, [Online Safety Bill](#), 25 January 2023. See also [note](#) from Professor Lorna Woods to Communications and Digital Committee, 13 December 2022



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Child protection

We welcome the clarification in our evidence that Ofcom will have powers to define minimum standards for age assurance in its codes of practice.¹⁸ This will be key to ensuring that child protection duties work as intended.

The Government remains unwilling to require app stores to introduce age check requirements. We understand the argument that the bill focuses on user content. But requiring app stores to undertake age checks could be an efficient way of achieving the bill's aims of preventing children from accessing inappropriate content. It would not be difficult for an app developer to inform an app store of their age verification requirements. We appreciate this would likely require work on defining what is in scope of the bill.

We would be grateful for further clarification on why the Government does not agree that requiring age verification by app stores would be an effective way of achieving its child protection objectives.

I hope you will take these proposed amendments and requests for clarification into account as the bill progresses through the House of Lords.

Yours sincerely,

BARONESS STOWELL OF BEESTON

¹⁸ Oral evidence, [Online Safety Bill](#), 25 January 2023