



HOUSE OF LORDS

Communications and Digital Committee

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Rt Hon Oliver Dowden CBE MP
Secretary of State for Digital, Culture, Media and Sport
Department for Digital, Culture, Media and Sport
100 Parliament Street
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25 May 2021

Dear Oliver,

Thank you for your letter of 12 May. I am writing on behalf of the Communications and Digital Select Committee. We welcome the publication of the draft Online Safety Bill and share the Government's aim of making the internet safer for UK citizens.

Our recent reports on *Growing up with the Internet* and *Regulating in a Digital World* considered a range of issues relating to internet regulation. We have recently finished taking evidence in our inquiry, on freedom of expression online. We are grateful to Ministers and officials in your department for their engagement on this. Our report will make detailed recommendations relating to the draft Bill, as well as on other areas, including competition policy and digital citizenship.

The Committee discussed our initial conclusions last week, and although we still have some work to do to flesh out our thinking, I was asked to flag up to you that the evidence we have received on four issues which are in the draft Bill would seem to us to point to different legislative solutions than the ones currently selected by the Government. It would, I think, be helpful if you could provide more information on the following specific points to inform our report. A letter would be sufficient, but if it were possible for us to discuss these issues with the Bill Team, that might also be helpful in understanding better the policy decisions you have reached.

Protection of children

We maintain the strong conviction expressed in our report on *Growing up with the Internet* that keeping children safe online is an essential and urgent task. We are therefore pleased that the draft Bill contains protections for children against content which may be harmful to them.

However, we are concerned that pornographic websites which do not offer user-to-user services are not in scope of the draft Bill. In this respect, the draft Bill offers a lower

standard of protection for children than the unimplemented provisions in the Digital Economy Act 2017 which it repeals. Ensuring that these websites take appropriate steps to prevent children from accessing them – and ensuring that they do not host illegal content – is crucial.

Definition of harm

We agree with the principle that Ofcom should have a role in protecting adults from content which, though legal, would harm them.

Clause 46 of the draft Bill states that its provisions on ‘legal but harmful’ content on category 1 platforms apply where “the provider of the service has reasonable grounds to believe that the nature of the content is such that there is a material risk of the content having, or indirectly having, a significant adverse physical or psychological impact on an adult of ordinary sensibilities.”

It is unclear what the draft Bill means by “ordinary sensibilities”. It is even less clear when read in conjunction with subsection (4), which specifies that “in the case of content which may reasonably be assumed to particularly affect people with a certain characteristic (or combination of characteristics), or to particularly affect a certain group of people, the provider is to assume that [the adult] possesses that characteristic (or combination of characteristics), or is a member of that group (as the case may be)”.

For example, would being a survivor of sexual abuse count as a relevant characteristic? If so, would such a survivor being more sensitive to particular types of content due to their experiences mean that they could not be considered “of ordinary sensibilities”? Please could you also tell us how the Government envisages these provisions applying to vulnerable adults, as defined in existing law?

These are complex issues, which we know you and your department will have considered at length. It would be of great help to us to understand better the thinking behind the definitions in the Bill. In particular, please could you clarify whether the draft Bill’s definition of psychological impact has any clinical basis? If not, who would be qualified to make judgements about such impacts?

The definition of ‘indirect’ impact in subsection (7) appears vague and overly broad. We are concerned that this will lead to content which is legitimate and well-intentioned being censored due to speculation about the influence it might have on an unreasonable person’s actions towards a third party. No platform could reasonably be expected to enforce this provision without significant interference in their users’ freedom of expression.

In addition to the definition in clause 46, the draft Bill contains a shorter definition of harm as “physical or psychological harm” in section 137. This is the standard for the designation of priority content. We would find it helpful to understand why the Government decided to use these two different standards.

Content of democratic importance

Clause 13 of the draft Bill introduces previously unannounced protections for ‘content of democratic importance’. In principle, we welcome the proposal that powerful social media companies should not be able to suppress opinions they disagree with. However, we believe that the clause as currently drafted has two flaws.

The first is definitional. This category is defined as content which “is or appears to be specifically intended to contribute to democratic political debate in the United Kingdom or a part or area of the United Kingdom.” The explanatory notes to the draft Bill add: “Examples of such content would be content promoting or opposing government policy and content promoting or opposing a political party.”

The narrow focus on “democratic political debate” – and the explanation that this refers to government policies and political parties – privileges debates initiated by elected representatives and political parties over those initiated by members of the public. Citizens campaigning on issues which are not – as described in the Government’s press release – “live” do not appear to be protected. Nor do those campaigning for social rather than policy change.

Furthermore, we question whether the proposed duty would be effective as it only focuses on “systems and processes”. The provision requires platforms to apply their terms and conditions consistently and in a manner which does not discriminate against particular political opinions. For example, a platform would not be allowed to state in its terms and conditions that hateful content was not allowed but then only remove hateful content from one side of the political spectrum and not the other. However, the draft Bill does not appear to prevent platforms from having terms and conditions which prohibit particular views providing they then apply those terms and conditions consistently. We worry that social media companies – perhaps under pressure from their staff or activist advertisers – would be free to write terms and conditions which ban viewpoints they dislike on controversial issues.

Journalistic content

We welcome the principle in clause 14 of the draft Bill that journalistic content should receive special protection, although we remain to be convinced that the draft Bill would not lead to access to such content being restricted.

Nor are we convinced that the Government’s proposals to apply these protections to ‘citizen journalism’ are workable in their current form. We question whether there is any prospect of Ofcom or platforms being able consistently to distinguish citizen journalism from other forms of expression by individuals without citizen journalism being clearly defined. This raises the prospect of expedited appeals processes intended for news organisations being overwhelmed by members of the public and therefore not offering the intended protection.

We welcome the Government's decision to subject the draft Bill to pre-legislative scrutiny and hope to contribute to that committee's work. In our forthcoming report we will set out in detail how we believe the Government can protect freedom of expression while also protecting users from harm. The UK has an opportunity to lead the world in human-rights based internet regulation. We must get this right. We look forward to a continuing dialogue on these important issues.

Yours sincerely,

Lord Gilbert of Panteg
Chair of the House of Lords Communications and Digital Committee