



Department for
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Lord Gilbert of Panteg
Chair, Communications and Digital Committee
House of Lords
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MC2021/12120/DC
16 June 2021

Dear Lord Gilbert,

Thank you for your letter of 25 May to the Secretary of State for Digital, Culture, Media and Sport. I am responding as the Minister responsible for the Online Safety Bill.

I was pleased to speak with your Committee recently, for your inquiry into freedom of expression online, and look forward to seeing your report when it is published. Thank you for setting out where you think further detail would be of benefit to the inquiry.

You have noted four areas in particular and I have responded to each of your points in turn below. My officials would be happy to attend a meeting, and will be in touch separately in the coming days.

Protection of children

Your letter raises concerns regarding the level of protection for children in comparison with the Digital Economy Act 2017. The online safety regime will ensure a comprehensive approach to protecting children. It will deliver the objectives of Part 3 of the Digital Economy Act to protect children from accessing online pornography, and go further to protect children from a broader range of harmful content on all services in scope.

Where pornography sites host user generated content or facilitate online user interaction (including video and image sharing, commenting and live streaming) and meet the test of being 'likely to be accessed by children', they will be subject to the safety duties set out in clause 10. Similar duties will apply in relation to search services under clause 22. The online safety regime will capture both the most visited pornography sites and pornography on social media, therefore covering the vast majority of sites where children are most likely to be exposed to pornography.

I am confident that the legislation will provide much greater protection to children than the Digital Economy Act would have done, by bringing into scope social media companies where a considerable quantity of pornographic material is available to children.

Research by the British Board of Film Classification, published in 2020, found that only 7% of children accessed pornography through dedicated pornography sites alone. Most children intentionally accessing pornography were doing so across a number of sources, including social media, as well as video sharing platforms, forums, and via image or video search engines. The majority of these sources would not fall within scope of the Digital Economy Act, but will fall within the scope of online safety legislation. Our proposals will therefore achieve a more comprehensive approach and allow us to address children's access to pornography in the round.

I have heard the concerns about commercial pornography sites which do not host user generated content or facilitate online user interaction and will keep an open mind on further measures to protect children. Pre-legislative scrutiny will be a good opportunity to hear a range of views on this topic, and I hope that this will begin shortly.

Definition of harm

With regards to your comments on clause 46, I have addressed each point in turn below.

Firstly, the use of the term "ordinary sensibilities" is intended to make clear that the test of whether legal content is harmful does not include content that only people with an unusual sensitivity (such as a phobia) would be harmed by. This concept is already well-established in law, for example in case law concerning the tort of misuse of private information. The inclusion of such a constraint is considered necessary to ensure that, when making the assessment of whether there are reasonable grounds to believe that the nature of the content or the fact of its dissemination gives rise to a material risk of a significant adverse physical or psychological impact on an adult or child, service providers are not required to consider the possible effect of that content on people whose responses may be unpredictable.

The requirement to assume that the person in question has the relevant characteristic or is a member of a group particularly affected by content is to ensure that content does not fall outside the scope of the relevant provisions simply because a typical member of the public in the UK does not have that characteristic or is not a member of the group in question. These characteristics are not restricted to those protected under the Equality Act 2010, ensuring that harmful content concerning other qualities (such as personal appearance) is also covered. Employing a narrower term than "characteristic" (which should be understood as simply having its ordinary English meaning of 'a distinguishing trait or quality') would have the unwanted effect of excluding some content which gives rise to a material risk of a significant adverse physical or psychological impact on an adult or child from the protections afforded by the Bill.

You have asked whether being a survivor of sexual abuse would count as a relevant characteristic. As you have correctly recognised, these are complex issues and we would expect Ofcom's codes of practice and any supplementary guidance to assist service providers to fulfil their obligations in relation to such points. However, in cases relating to experiences that can have a profound effect on victims, I think it is right to require service providers to take that effect into account when assessing the risk of harm posed by online content to individuals. The proposition that a survivor of such an experience cannot as a result be considered as having "ordinary sensibilities" would not be consistent with the approach taken in the Bill. Where content could potentially give rise to a material risk of a significant adverse physical or psychological impact on survivors of an experience (such as sexual abuse), service providers should assess whether the test for harmful content is met by reference to the likely impact of that content on a person of ordinary sensibilities who has had that experience.

Regarding protections for vulnerable adults, companies will be required to consider various relevant user characteristics, including age and learning disabilities. Provisions relating to user reporting and redress have also been designed to enable a carer (or other adults providing assistance to a vulnerable adult) to make complaints on behalf of an adult who may need this. Ofcom's existing duty to consider the vulnerability of users whose circumstances appear to put them in need of special protection (under section 3(4)(f) of the Communications Act 2003) will also apply to its exercise of its online safety functions.

Your letter also asks for clarifications on the draft Bill's definition of psychological impact. As noted above, the service provider will have to have reasonable grounds to believe that content gives rise to a material risk of a significant adverse psychological impact on a person of ordinary sensibilities. There is no requirement that that psychological impact should have a clinical basis. It could include causing feelings such as serious anxiety and fear; longer-term conditions such as depression and stress; and medically recognised mental illnesses, both short-term and permanent. Your letter also references the definition of indirect impact in clause 46(7). When read with subsection (3), this provides that a service provider will have reasonable grounds to believe that there is a material risk of the content indirectly having a significant adverse impact on a person of ordinary sensitivities where that content could cause an individual to do or say harmful things to a targeted person. The service provider would not have the necessary reasonable grounds to believe that there was such a risk if the content could only have such an effect by triggering an unexpected response in an unreasonable person (for example innocuous content leading to risky or violent behaviour).

Finally, your letter asks about the definition of harm in clause 137. To confirm, the shorter definition of "harm" as "physical or psychological harm" in clause 137 is there to make clear what "harm" refers to wherever it is used throughout the Bill. The provisions in clauses 45 and 46 regarding what will constitute "a material risk of a significant adverse physical or psychological impact" do not provide a different definition of harm; instead they establish the test to be applied by service providers when determining what is to be treated as legal but harmful content for the purposes of this legislation.

Content of democratic importance

With regards to your concerns about clause 13, I would like to reassure you that the democratic content provisions apply to the content and not the actor. Content of democratic importance is any content which seeks to contribute to democratic political debate in the UK at a national and local level. As such it does not seek to privilege communications from certain actors over others.

The definition is intended to cover a wide range of policy and political issues in the UK. The protections set out in the draft Bill ensure that the largest and riskiest platforms set a higher bar for removing content of democratic importance. These protections will apply equally to different political viewpoints and are specifically provided for in subsection (3) of this clause. This subsection imposes a duty to ensure that the systems and processes designed to ensure that the importance of the free expression of content of democratic importance is taken into account apply in the same way to a diversity of political opinion. A platform therefore should not decide to have a higher level of protection for left wing over right wing views, or vice versa. The importance of protecting democratic debate was similarly reflected in the Data Protection Act 2018 in its provisions on democratic engagement being in the public interest.

Journalistic content

Finally, your letter sets out your concerns for protections for journalistic content. To reassure you, news publishers' content is not in scope of this legislation, so Ofcom cannot penalise a platform for keeping news publishers' content on their site, even when the platform might normally be required to remove similar content under its new duties for mitigating harm. This removes any incentive for in-scope companies to remove news publishers' content and, alongside the new safeguards for journalistic content, is a significant improvement on the status quo, where social media companies can remove journalistic content with no accountability and little recourse for journalists to appeal.

There may be instances when journalistic content shared on a Category 1 service poses such a great risk to that platform's users, or is in such clear breach of the service provider's terms and conditions, that the provider will wish to remove it. In such instances the provider will need to justify the removals against a clear and properly enforced policy and make sure those who have posted journalistic content have a swift avenue of appeal. If platforms do not do this, Ofcom will be able to take appropriate enforcement action against them.

Journalistic content, for the purposes of this legislation, includes the full range of content created for the purpose of journalism and which is UK-linked. As you note, our intention is that any content that an individual shares for journalistic purposes should be given the same protections as that shared by a full-time journalist. To implement this and ensure it is enforceable, Ofcom will recommend steps for complying with this duty in codes of practice and platforms themselves will need to clearly set out how they intend to identify journalistic content, including citizen journalism, so that only those who have posted or created journalistic content have access to the expedited appeals process and other protections.

I hope the above responses provide the further detail needed for your inquiry, and I look forward to discussing these issues with you and members of your Committee during pre-legislative scrutiny on this Bill in due course.

I'm also copying this letter to my colleague Baroness Barran, the Minister for Civil Society.

With best wishes,

Caroline Dinenage MP
Minister of State for Digital and Culture